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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 TEL WEST COMMUNICATIONS, LLC,) Docket No. UT-013097
4))
5) Petitioner,) Volume V
6)) Pages 387 to 445
7) vs.)
8))
9 QWEST CORPORATION,)
10))
11) Respondent.)
12 _____)
13

14 A hearing in the above matter was held on
15 March 12, 2002, at 10:00 a.m., at 1300 South Evergreen
16 Park Drive Southwest, Room 206, Olympia, Washington,
17 before Administrative Law Judge LAWRENCE BERG.

18 The parties were present as follows:

19 QWEST CORPORATION, by LISA ANDERL and ADAM
20 SHERR, Attorneys at Law, 1600 Seventh Avenue, Suite
21 3206, Seattle, Washington 98191, Telephone (206)
22 345-1574, Fax (206) 343-4040, E-mail landerl@qwest.com.

23 TEL WEST COMMUNICATIONS, LLC, by BROOKS E.
24 HARLOW and DAVID RICE, Attorneys at Law, Miller Nash
25 LLP, 601 Union Street, Suite 4400, Seattle, Washington
26 98101, Telephone (206) 777-7406, Fax (206) 622-7485,
27 E-mail harlow@millernash.com.

28 Joan E. Kinn, CCR, RPR
29 Court Reporter

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1 Anderl appearing on behalf of Qwest.

2 MR. SHERR: And Adam Sherr on behalf of Qwest
3 as well.

4 JUDGE BERG: Thank you, counsel. There has
5 been an agreement between the parties as to how to
6 proceed with arguments. Tel West and Qwest will each
7 have approximately 30 minutes. Tel West seeks to divide
8 its time in the form of an initial presentation and
9 rebuttal. Qwest's 30 minutes would be presented in the
10 form of a response. The order would be Tel West would
11 begin, present arguments for approximately 20 minutes,
12 Qwest would then present arguments for approximately 30
13 minutes, followed by arguments by Tel West for 10
14 minutes.

15 I have indicated to the parties that there
16 was one specific issue that I had in mind that would be
17 helpful if the parties were able to address. I have
18 also acknowledged to the parties that this is a
19 difficult case and that there are excellent arguments
20 advanced on both sides, and there is likewise evidence
21 that would support either side's position and that
22 ultimately there will certainly need to be some
23 balancing that is done in order to render a final
24 decision or at least on my part recommendations to the
25 Commission.

1 The concern that I had certainly stems from
2 the interpretation of 6.2.9, but also to some extent the
3 definition of basic exchange telecommunications service
4 at Section 4.7 of the agreement and the possibility that
5 there are other statutory or rules, or excuse me, other
6 statutes or rules that require Qwest to provide access
7 to operator services and directory assistance as part of
8 its basic exchange telecommunications service.

9 As I read the first clause of Section 6.2.9
10 of the agreement, my understanding is that Tel West's
11 argument is that the CLEC, in this case Tel West, has
12 discretion whether to accept Qwest's directory
13 assistance service or operator services for its resold
14 local exchange service lines. My reading of this clause
15 would then also lead me to conclude that Tel West's
16 position is that Qwest has discretion whether to provide
17 directory assistance service or operator services for
18 Tel West's resold local exchange service lines.

19 There has been discussion regarding the
20 significance of Section 6.1.1 and the extent to which
21 this agreement controls conflicts arising between the
22 terms and conditions of tariffs, catalog, price lists,
23 or other retail telecommunications service offerings in
24 this agreement. Also in the agreement is a definition
25 of basic exchange telecommunications services that as

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1 stated includes access to directory assistance and
2 operator services.

3 My concern is that there may also be other
4 statutes or rules of this Commission that require that
5 operator services and directory assistance be included
6 as part of basic exchange service, and it would be
7 helpful certainly if parties are aware of other
8 requirements that they could make that known. I just
9 have a general belief that that has been a requirement
10 in the past, but I'm not as certain in the context of
11 the classification of operator services and directory
12 assistance as a competitive service. So to the extent
13 parties can clarify that for me, it would be helpful.
14 Also to the extent that if, in fact, parties believe
15 that there are other requirements in statutes or rules
16 that require the provisioning of OS/DA as part of basic
17 telephone exchange service, I would appreciate some
18 perspective of how that should be regarded in the
19 context of 6.1.1. And also lingering in the back of my
20 mind is some concern whether the parties are capable of
21 contracting in such a way that other requirements,
22 existing law would be conflicted. And so to the best of
23 my ability, that's the one concern or one point of
24 argument that I did not feel sufficiently addressed in
25 the parties' briefs, and it would be helpful to have

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1 some additional perspective on that.

2 Now I don't mean to say that this is a
3 threshold or determinative point. I understand that
4 there are other arguments, valid arguments that are
5 being made that also need to be considered.

6 Any questions, counsel?

7 MR. HARLOW: No, thank you, Your Honor.

8 JUDGE BERG: Ms. Anderl, Mr. Sherr?

9 MS. ANDERL: No.

10 JUDGE BERG: All right. It's 10:30. I will
11 just note that each party is represented by two counsel
12 here. I would just ask that counsel assist me by
13 keeping track of time among yourselves and not imposing
14 that chore on me. I would prefer just to be able to sit
15 back and listen to the parties. And certainly if there
16 is some need to run over, I will make sure that both
17 sides have an equal opportunity to address issues here.

18 MR. HARLOW: Thank you, Your Honor.

19 JUDGE BERG: All right, let's proceed.

20 MR. HARLOW: Thank you. I'm going to start
21 with the billing disputes issue, and the billing
22 disputes is largely behind us. It's unfortunate it
23 wasn't behind us at the time Tel West filed its initial
24 petition. It's pretty clear, indeed Mr. Brotherson
25 admitted that, I don't remember his exact language, but

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1 essentially he admitted the existence of a problem as of
2 October of last year. Billing disputes have been piling
3 up since April, and indeed those April disputes were not
4 resolved until mid February on the eve of this hearing.

5 Tel West certainly appreciates that Qwest
6 seems to have largely caught up with the billing
7 disputes, and because of that, we discussed this prior
8 to going on the record yesterday but I think it's -- I
9 don't recall if we put it on the record, so we will do
10 so now, because of that mid February resolution that
11 Qwest provided of the April through October billing
12 disputes, Tel West is withdrawing its request for relief
13 set forth on page 20 of its pre-hearing brief numbered 1
14 and 5. And so the relief that Tel West is seeking now
15 goes forward only.

16 And we're not, as Qwest asserts, seeking to
17 rewrite the interconnection agreement. Quite the
18 contrary. What we're trying to do is find a way to
19 suggest that the Commission might craft some meaningful
20 relief. If we could turn back the clock and the April
21 to October time, well, October delay hadn't occurred, I
22 doubt very much there would have even been a petition,
23 at least on this issue. Tel West experienced a very
24 frustrating delay, and in spite of negotiations and the
25 threat of the petition, Qwest just didn't expedite the

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1 review of those disputes, and that was before there were
2 quite a lot of them, as Qwest pointed out. There were
3 more under the new agreement in December.

4 And so for the Commission to simply enter an
5 order that Qwest shall expedite review of billing
6 disputes is meaningless, because, you know, Qwest has
7 always been under an obligation to deal with billing
8 disputes under the old agreement, not under the term
9 expedite, but at least within a reasonable time period.
10 And because Tel West has this experience of substantial
11 delay, we're seeking to put a little more definition, if
12 you will, on the meaning of the term expedite.

13 We initially offered 30 days. That seemed
14 reasonable. Tel West has 30 days to submit the dispute,
15 so Qwest should have 30 days to respond. In response to
16 Qwest concerns that, well, sometimes they may get really
17 big and really complicated, that in spite of all the
18 resources Qwest has we can't do it in 30 days, we came
19 up with an alternative recommendation in our brief,
20 which is, whatever the number of days is it takes Tel
21 West to review the bills, audit them, create the billing
22 spreadsheets which Mr. Swickard described is a fairly
23 involved process as well, that Qwest would actually get
24 1 1/2 times that number of days in which to respond. We
25 think the alternative proposal in particular does

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1 provide the flexibility and yet puts some more meaning
2 on the term expedite so that Qwest knows what it has to
3 do, and under the term expedite, Tel West knows what it
4 has -- what it can expect.

5 The credits under the current agreement going
6 forward, we have requested in our brief, request for
7 relief number 4, that Qwest issue credits to Tel West
8 for all bills rendered under the current agreement for
9 all OS and DA services regardless of whether or not
10 there was blocking under the line. And this relief
11 would be appropriate if the Commission were to find in
12 Tel West's favor on the OS and DA issue. In the
13 alternative, if the Commission does allow Qwest to
14 bundle OS and DA with the local exchange service, then
15 Qwest should on the billing dispute side be ordered
16 generally, not a dispute by dispute, line by line
17 ruling, but order generally to credit every call where
18 blocking was ordered on the line in question prior to
19 the call in question taking place. And I'm not sure
20 really whether Qwest disputes that. The contract, of
21 course, requires that Tel West not be discriminated
22 against vis-a-vis the retail customers, and the evidence
23 yesterday was quite clear that Qwest does issue credits
24 to retail customers who have blocking on their line if
25 calls slip through, so we feel that's an appropriate

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1 alternative contractual remedy should we not prevail on
2 the OS/DA issue.

3 Now let me turn to OS/DA unless the Bench has
4 any questions at this time.

5 JUDGE BERG: No, go ahead, Mr. Harlow, that's
6 fine.

7 MR. HARLOW: Thank you, Your Honor. The
8 reason for this case, the reason for this petition on
9 this issue is that Qwest says Tel West must take and pay
10 for OS and DA. In effect, what Qwest is saying is that
11 provisioning of OS and DA is mandatory, and we will get
12 into this more, but Your Honor in your introductory
13 questions talked about the access language, and it's
14 important that we distinguish a couple of things.

15 Number one, the meaning of the term access is
16 different from the meaning of the term provisioning or
17 from the terms take and pay, and we will examine that in
18 more detail. And secondly, it's important to remember
19 the distinction, which I think we made pretty clear
20 yesterday in cross, between Qwest as a local exchange
21 provider and Qwest as an OS provider and Qwest as a DA
22 provider, and so on and so forth. Again, we will come
23 back to this.

24 But in terms of an analytical approach to
25 contract analysis, the first step for the Commission to

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1 take is to read the contract as a whole and see if
2 somewhere in the contract it unambiguously says that
3 provisioning of OS and DA are mandatory, that the CLEC,
4 provisioning to the CLEC is mandatory. Now Mr. Swickard
5 read the entire contract when he signed it, and he
6 couldn't find in the contract such an unambiguous
7 statement. Qwest's attorneys who are very well
8 qualified have scoured the agreement, and they haven't
9 come up with any language that unambiguously says that
10 OS and DA service as opposed to the access is mandatory
11 on the CLEC. We believe the contract is unambiguous.

12 Of course, under Washington law, unless the
13 context requires otherwise, you will look to the
14 ordinary meaning of the terms used in the contract. And
15 when we look at those ordinary terms, let's start with
16 Section 6.1.1.

17 Your Honor, we actually have an extra copy of
18 the SGAT Lite, if you will, that just has the terms I'm
19 going to address. If you would like this, we will be
20 happy to hand it up.

21 JUDGE BERG: Are they different than the
22 language in the agreement itself?

23 MR. HARLOW: No, they are just highly
24 truncated.

25 JUDGE BERG: I appreciate it. It would be

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1 easier for me to follow in my copy --

2 MR. HARLOW: Okay.

3 JUDGE BERG: -- of the agreement.

4 MR. HARLOW: Then I will give you a moment to
5 turn to Section 6.1.1.

6 JUDGE BERG: I'm there.

7 MR. HARLOW: Right in the first sentence, it
8 says:

9 Qwest shall offer for resale any
10 telecommunications service it provides
11 at retail to subscribers.

12 The ordinary meaning of the term offer is
13 that the other party has the option. Then we turn to
14 Section 6.2.9, which says again right in the first line,
15 if Qwest provides and CLEC accepts OS and DA, et cetera.
16 Now the ordinary meaning of the term if is it's a
17 conditional term. Plus the conjunction of and means
18 that both elements must be satisfied, Qwest provides and
19 CLEC accepts.

20 Now the Bench posed a question of whether or
21 not Qwest's provision is optional because of the
22 language if, and if that were the only language in the
23 agreement, that could be the case. But there is much
24 other language in the agreement that gives Qwest, excuse
25 me, gives Tel West or the CLEC the right to not only

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1 have access to but to actually have provisioning of OS
2 and DA services. So that specific other language
3 doesn't make it optional that Qwest would provide, but
4 it does make it optional whether CLEC must accept, both
5 this language as well as the offering language.

6 Section 6.2.9 gives the CLEC another option,
7 and that's in the clause in the third line, that it may
8 be provided with branding. Qwest argues that Section
9 6.2.9 is only about branding and that the only reason
10 that is in there is for the branding. But, of course,
11 branding is addressed in the ancillary services section
12 of the agreement, so this language doesn't have to be in
13 there to offer branding. But more importantly, under
14 Washington law, you need to try to give effect to every
15 term in the contract, and Qwest's interpretation of
16 6.2.9 as simply a cross reference to branding reads out
17 that introductory language and renders it superfluous,
18 that if Qwest provides and CLEC accepts. If Qwest's
19 interpretation were correct, the agreement would simply
20 say, Qwest's OS and DA may be provided with branding.
21 You wouldn't need that language, if Qwest provides and
22 CLEC accepts. That language makes it clear that OS and
23 DA provisioning are optional.

24 Then we turn to Section 10.5.4, which
25 provides how the CLEC indicates its acceptance of

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1 directory assistance provisioning.

2 CLEC will order directory assistance
3 service by completing the questionnaire.

4 Similarly 10.7.4:

5 CLEC will order operator services by
6 completing the questionnaire.

7 Now Qwest tries to read provisions in the
8 contract that clearly aren't there. First of all, Qwest
9 says that Section 6.1.1, which we looked at earlier,
10 makes Tel West liable for OS and DA because it
11 incorporates the retail tariff. But throughout Qwest's
12 brief when they quote that section, they leave off the
13 last sentence, and it's in our brief, I'm going to read
14 it today:

15 To the extent, however, that a conflict
16 arises between the terms and conditions
17 of the tariff, catalog, price list, or
18 other retail telecommunications service
19 offering and this agreement, this
20 agreement shall be controlling.

21 In other words, the agreement trumps the
22 tariff or the price list. So thus if the contract
23 doesn't say that Tel West must accept and pay for
24 provisioning of OS/DA, there is no need to look at the
25 retail tariffs.

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1 But second, if you look at the retail tariffs
2 just for sake of argument, the retail tariffs apply to
3 the retail customers. Now in the case of local exchange
4 service, the end user is clearly the customer of Tel
5 West, because Tel West has clearly ordered local
6 exchange service. So under 6.1.1, the terms and
7 conditions of local exchange service apply to Tel West
8 as the resaler of local exchange. But in the case of
9 OS/DA, the end user is the customer of Qwest. Tel West
10 hasn't ordered the service, Tel West is not selling or
11 reselling the service. In fact, if you look at Tel
12 West's price list, which is an exhibit, OS and DA are
13 not in the price list. Tel West has billed OS and DA on
14 occasion as a way to mitigate, but it's not selling it
15 or reselling it. It's not marking the service up. It's
16 simply passing it through at cost and in an effort, a
17 rather vain one at that, to mitigate its damages from
18 the bundling of OS and DA. Qwest has promoted and
19 advertised its OS and DA services, and its operators
20 accept the calls from the end user, creating a
21 relationship between Qwest and the end user that Qwest
22 voluntarily undertakes and thereby making the tariff
23 apply to the end user, but not to Tel West, because Tel
24 West hasn't requested, ordered, or accepted those
25 services.

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1 to make contact with or gain access to,
2 be able to reach, approach, enter, et
3 cetera.

4 And clearly because of the design of the
5 telephone network and the switching capability of the
6 local switch, the local switch is capable of providing
7 access to trunks that lead to another completely
8 separate service, which is OS/DA. But Qwest tries to
9 eliminate this important distinction between its local
10 exchange service and the OS and DA services.

11 And if I may, I would like to approach the
12 white board and draw a very basic diagram.

13 JUDGE BERG: All right.

14 MR. HARLOW: Can you see it all right?

15 JUDGE BERG: If that chair is moved, I can
16 see it fine.

17 MR. HARLOW: This is how Qwest wants you to
18 view the telephone network. Here's local exchange,
19 here's OS, here's DA, and I guess 911 is in here too,
20 and Qwest provides it all. But this is a diagram of the
21 Bell system, which was broken up almost 20 years ago.
22 In reality, what we have both in a business sense and in
23 a network sense is we have Qwest the LEC, and it
24 provides access to Qwest DA, it provides access to Qwest
25 OS, through separate trunks to separate platforms.

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1 Indeed Qwest even has a pay phone service provider who
2 serves the prisons and other locations and routes calls
3 in, but it's two steps routing for the local exchange
4 server. But, of course, Qwest also provides access to
5 911, separate platform, separate trunks. They're not
6 trying to make us pay for 911 service. Access to 911 is
7 included in the basic line rate.

8 Qwest provides access to AT&T and to WorldCom
9 and to Oncor if they're still in business, and dozens if
10 not hundreds of other outside providers. But no other
11 outside provider can leverage its control over the local
12 exchange to try to bundle and cram down these separate
13 services, OS and DA. Yes, Tel West end users have
14 access to AT&T and WorldCom and other OS and DA
15 services, but Tel West does not have to pay them.

16 Tel West end users have access to 911 under
17 the very same section that Qwest quotes. It's right
18 there in 4.7, 911, directory assistance, and operator
19 services, but Tel West end users don't have to pay extra
20 for it. The PSAP pays. Access is included in the flat
21 monthly fee, but the provision of the actual services
22 like 911 is not the same as provisioning.

23 Similarly, look to other sections of the
24 contract, and they use the very same term access in
25 giving Tel West the option to have access to poles,

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1 ducts, conduits, and right of way. Same thing with
2 UNEs, same thing with 911 trunks. So not only is the
3 plain meaning of access something different than
4 provisioning, but internally within the contract itself,
5 the very same language access is used with regard to
6 other offerings of Qwest, and yet Qwest has not
7 attempted to cram down poles, ducts, and right of way or
8 UNEs.

9 Qwest's argument stretches the contract
10 beyond the breaking point in our view. If you read it,
11 it simply does not say that OS and DA provisioning are
12 mandatory, not the contract as a whole and not any
13 single provision. At most, the sections that Qwest cite
14 create an ambiguity, so we will address briefly contract
15 interpretation in the case of an ambiguity. And under
16 Washington law, you look to the negotiations and
17 circumstances surrounding and leading up to the entry
18 entering into the contract.

19 Now Tel West asked for no OS and DA. It's
20 just undisputed. There's a letter attached to
21 Mr. Swickard's testimony. Qwest and Tel West evidently
22 met at least twice. Tel West produced and Qwest
23 introduced evidence of two meetings or phone
24 conversations that occurred in May of 2001. We don't
25 know exactly what happened between May and August of

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1 2001, because Tel West couldn't find any evidence of
2 further communications in that time frame, and Qwest did
3 not produce any, nor did they produce any testimony on
4 it. So the way to characterize the record at this point
5 is there's no evidence of further negotiations. There's
6 certainly no evidence in the record that Qwest ever
7 rejected Tel West's request for no cram down of OS and
8 DA. I think we can be certain that if Qwest had done
9 so, it would have produced that evidence.

10 Instead what happens is we have the May
11 discussions where no answer was provided by Qwest and
12 then takes you up to August, and they sent out a
13 contract. And that contract contains very different
14 language from the earlier contract. That contract
15 contains the language that we have just talked about
16 where if you read through it, you don't find anywhere in
17 the contract that it says Qwest provides and Tel West
18 must take and pay for OS and DA. So Mr. Swickard reads
19 it, and he signs it, and he reasonably believed at that
20 time that Qwest had met his request with regard to the
21 provisioning of OS and DA. There is absolutely no
22 dispute on the record. Mr. Swickard stated repeatedly
23 under cross, when he read it, he thought he had gotten
24 what he wanted, because he had asked for it, and they
25 sent a contract which contained this language.

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1 So the course of dealing is undisputed.
2 There was no Qwest rebuttal, not even any of the Qwest
3 witnesses had knowledge of the course of dealing. Only
4 after Mr. Swickard signed the contract did Qwest say
5 that OS and DA are still mandatory and you must still
6 buy blocking. And for that reason and that reason only
7 as a way to mitigate its damages, Tel West continued to
8 purchase dial lock to block OS and DA.

9 In Washington, you look at the objective
10 manifestations of the parties' intent, so whatever Qwest
11 secretly intended, whatever Qwest's Corporation's policy
12 is or was, is completely irrelevant. You simply look at
13 the objective course of dealing, and the objective
14 course of dealing is clear and undisputed. Qwest asked
15 for no OS and DA, excuse me, Tel West asked for that,
16 and Qwest sent a contract that should be read that way
17 in our view. So if there -- if it comes down to an
18 ambiguity, a finding of ambiguity in contract
19 interpretation, the evidence is quite clear that the
20 parties' objective manifestation of intent leads to the
21 conclusion that Tel West does not need to take and pay
22 for OS/DA that it doesn't order.

23 Thank you, Your Honor.

24 JUDGE BERG: Thank you, Mr. Harlow, we will
25 come back to you.

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1 MS. ANDERL: Thank you, Your Honor, Lisa
2 Anderl on behalf of Qwest. Mr. Harlow started with the
3 billing disputes issue, and I think I will end with that
4 so I can pick right up on the OS and DA issues he just
5 left with. I guess, you know, we agree with Tel West on
6 some things in terms of how a contract ought to be
7 interpreted and what you should look at, but much beyond
8 that we don't agree with Tel West. And I think that Tel
9 West's reading of the contract and their after the fact
10 construction of what they believed that that language
11 meant is strained in the extreme. I think if you look
12 at the contract language, if you look at the behavior of
13 the parties, if you look at the context of the contract
14 as a whole, all the things that you're required to look
15 at in making a decision about what this contract means,
16 you have to find that Tel West has the option to have
17 access to OS/DA, that they are not mandated to have
18 access to OS and DA, but that in order to avail
19 themselves of the option to block OS and DA, they have
20 to take some affirmative steps, and they have to either
21 order customized routing from Qwest, they have to order
22 a blocking service from Qwest, or they have to self
23 provision their own OS and DA. They haven't done any of
24 these things. They can not though under the terms of
25 the contract simply sit on their hands and say, well,

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1 gee, we think OS and DA are optional, and not only that,
2 but they're optional in the sense that we don't get them
3 unless we affirmatively request them.

4 I will tell you, Your Honor, that this
5 contract is an SGAT, it's out there with a lot of CLECs,
6 and per the testimony that you heard from the witnesses
7 yesterday, we have not had any requests for customized
8 routing. The type of blocking service that Tel West is
9 demanding as a default right under this contract does
10 not exist with any CLEC. There are going to be a lot of
11 CLECs out there in for a very rude surprise if Your
12 Honor holds in this case that this contract language
13 means that all of these CLECs are now going to be cut
14 off from their access to operator services and DA
15 because they have not taken some affirmative steps to
16 order it.

17 In fact, just the reverse is true. Tel West
18 has the option to block access to OS and DA for its end
19 users, but they have to take some affirmative steps to
20 do that. We laid out in our testimony a number of the
21 things that they could do. They have not diligently
22 researched those options to them. They have not
23 diligently ordered the retail blocking services that are
24 available to them.

25 And we think that the type of request or the

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1 type of relief that they're requesting from you here
2 today is simply so far outside what this contract could
3 mean that you can not in a reasoned decision come to the
4 conclusion that Tel West's interpretation is
5 sustainable. I think that Tel West relies very, very
6 heavily on what they now claim Mr. Swickard believed
7 when he signed the contract in August, but I don't think
8 that you can rely on those representations, Your Honor.
9 I think you need to look at all of the factors that go
10 into the formation of this contract, including the
11 language that is in the contract, and importantly the
12 parties' actions around the negotiations and the
13 subsequent actions after the contract was signed.

14 Mr. Swickard's representative initially sent
15 Qwest a demand for certain provisions in a contract.
16 Qwest sent after some negotiations a contract back.
17 There are no representations as to which of the demands
18 that Tel West made Qwest was willing to meet. If you
19 look at the exhibit, it shows that Tel West demanded a
20 wholesale discount of 18% to 20%. The contract that
21 Qwest sent back did not contain that term. If you read
22 the letter of demand from Tel West's representative, it
23 shows that they demanded an option to not be forced to
24 purchase OS and DA. The contract that Qwest sent back
25 does contain provisions that allow Tel West to have the

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1 option not to purchase OS and DA. However, again, it
2 does not contain a provision that says, Qwest's retail
3 services are hereby modified so that when you, Tel West,
4 resell Qwest's services, you're reselling something
5 different from what the general public gets. Again,
6 that's the strained interpretation that Tel West would
7 have you put on this contract.

8 The language that Mr. Harlow has been fond of
9 quoting, the first five or six words of 6.2.9, if Qwest
10 provides and CLEC accepts, are conditional words, and
11 they do have meaning in the context of this contract.
12 They mean what we have said they mean, which is the CLEC
13 does have the option. I guess I can't say it often
14 enough that we don't dispute that. We're not forcing
15 the CLEC to accept operator services and DA from Qwest.
16 But they have to do something rather than just stand on
17 the sidelines, fold their arms over their chest, and
18 say, well, make it happen. The CLEC needs to tell us
19 how they want to either avail themselves of a different
20 option for either blocking or alternative access to OS
21 and DA. So those first six words do mean something, and
22 the next part of the Section 6.2.9 also means something.
23 It says that if you're going to take Qwest's OS and DA,
24 you can have it branded with your own name, and it
25 directs you to the proper sections for that.

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1 If you read the contract in the manner that
2 Tel West would have you read it, it is going to nullify
3 various other provisions of the contract, and we think
4 that's contrary to accepted contract interpretation and
5 an incorrect result. If you read Section 6.2.9 the way
6 Tel West would have you read it, it would nullify
7 Section 6.1.1, which states that Qwest makes available
8 its retail services for resale. It will nullify Section
9 6.3.5 where Tel West agrees to pay for services that its
10 users activate on a per use or per activation basis.
11 Those include call trace, call waiting, or I'm sorry,
12 not call waiting, three-way calling, those items that
13 were defined by Tel West as pay per use services, but no
14 one can dispute that directory assistance also is an
15 item that is charged on a per activation or per use
16 basis.

17 Under Qwest's retail tariffs in Washington,
18 as a residential customer, you get one free call to
19 directory assistance in a billing cycle, and the rest
20 costs I think \$1.25. That's a per use charge, and it is
21 captured by the CLEC's agreement under 6.3.5 to pay
22 Qwest for those charges that its end users incur on that
23 basis. Tel West's interpretation of the contract would
24 also nullify the customized routing section, Section
25 9.12, because there would be no need for an option of

0413

1 customized routing if Tel West's default interpretation
2 pertained. So that's the context of the contract itself
3 that we think it's important for you to look at when you
4 make these decisions.

5 The parties' behavior at the time of and
6 subsequent to the negotiations are also important. What
7 did Tel West do after it signed this contract with
8 Qwest? Were their actions consistent with the
9 interpretation they now say is the interpretation that
10 is the one that they had all along. I think the answer
11 to that is no. If Tel West truly believed that this
12 contract gave them what they're now telling you they
13 thought it did, they would have taken dial lock and the
14 other blocking services off of their lines, because
15 those services cost them money every month, but they
16 didn't do that.

17 Tel West will say, oh, well, we didn't do
18 that because someone at Qwest told us that the contract
19 didn't do what we thought it did. Well, that is also
20 very, very hard to believe, because during the September
21 and October time frame when Tel West was preparing its
22 complaint documents to file here at the Commission,
23 documents that it signed on October 10th, documents that
24 it filed on October 30th, one day before the effective
25 date of the new agreement, Tel West did not characterize

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1 this as a contractual dispute. It characterized it as a
2 non-contractual complaint.

3 It seems to me that if they want to now
4 assert that 6.2.9 is a contractual provision that gives
5 them the right to have a default lack of access to OS
6 and DA and they knew that that was contrary to Qwest's
7 interpretation of the contract in October, it seems
8 absolutely unbelievable to me that they did not raise
9 that. I think the only conclusion that you can reach is
10 that their interpretation of 6.2.9 has been crafted in
11 the new year in January and subsequent in 2002. The
12 first time we heard about this interpretation was in
13 January of 2002 in the first amended petition. We think
14 it's a creative interpretation by Tel West's excellent
15 counsel, but we think it's wrong.

16 Your Honor, I think to go, kind of before I
17 leave this issue of 6.2.9 and 4.7 and the other things,
18 I do want to address your question specifically, and
19 that question I think is along the lines of, you know,
20 are there other requirements out there that mandate that
21 Qwest provide access to OS and DA or OS and DA services.
22 And I think that -- I'm trying to remember which order
23 it was, it may have been in the old rate case order with
24 U S West, the 950200. I believe it was during that rate
25 case that the company sought to have -- be relieved it

0415

1 its obligation to provide free directory assistance
2 calls as a part of the local line, and I believe that
3 the Commission reduced the requirement of the number of
4 free directory assistance calls that the company is
5 obligated to provide with a local line but did not
6 eliminate that requirement.

7 Qwest's tariffs in the state of Washington,
8 which have the force and effect of law, still say that a
9 residential line is entitled to one free call to
10 directory assistance per month. Qwest doesn't have the
11 option to not provide that.

12 JUDGE BERG: What I was thinking of,
13 Ms. Anderl, was it seemed to me at some point in time
14 there was a docket to address, if not a further
15 definition of basic service, then maybe it was to
16 consider whether or not some other element such as high
17 speed access or lines that would facilitate certain
18 modem speeds should also be made part of basic service.
19 And I really am to some extent looking for counsel to
20 help me do some of my research, but I hope you will
21 understand it's because I have an expedited period to
22 produce results, and any direction parties can give me
23 to other orders or other statutes that they think may be
24 pertinent to an obligation to provide OS and DA would be
25 helpful, even if you're not prepared to fully argue or

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1 represent what those orders or cases conclude.

2 MS. ANDERL: Sure, well, and I think Qwest's
3 obligation to provide access to operator services, which
4 is also in its tariff, Qwest has two types of operator
5 services that it provides, access to operator services
6 for purposes of toll calling, and that's been
7 competitively classified, but access to operator
8 services and operator services on a local exchange basis
9 is still a tariffed service not competitively
10 classified.

11 Directory assistance is also kind of oddly
12 bifurcated in that way in that the obligation to provide
13 one free directory assistance call is bundled with a
14 line by Commission order and contained in the tariff.
15 The rest of the directory assistance services after that
16 every month for a residential customer are price listed.

17 Clearly there is a statute in the state at
18 80.36.600, it's cited in I believe both our brief and in
19 Mr. Teitzel's testimony, defines basic
20 telecommunications services for purposes of receiving
21 universal service funding. Now that statute is not one
22 upon which we squarely rely, because there is no
23 universal service fund yet in place in the state that's
24 been approved by the legislature, and the statutory
25 requirement does not mandate provision of those

0417

1 services, rather it mandates provision of those services
2 as a condition of receiving universal service funding.
3 So we're not going to sit here today and tell you that
4 it's under that statute that we're obligated to provide
5 that. However, you know, certainly I believe that if a
6 universal service fund were put in place and Qwest were
7 otherwise eligible, then it is providing services such
8 that it meets those requirements.

9 So I hope that addresses your question. I
10 don't believe that the Commission has promulgated rules
11 or that there are other statutory requirements that
12 mandate the provision of these services other than what
13 I said earlier, which is they're contained in Qwest's
14 tariffs. Those tariffs do have the force and effect of
15 law. We can not unilaterally modify them without a
16 Commission authority or mandate, and we therefore think
17 that those are the legal definition of the retail
18 services that we are both obligated and willing to
19 provide for resale.

20 And I think that kind of brings me to an
21 important point that I wanted to make, and that is we
22 ought to look at what we're trying to do here,
23 recognizing the very narrow and expedited scope of a
24 480-09-530 proceeding. I think we ought to ask the
25 question, well, are we here to craft special services

0418

1 for resalers that are not currently contained in the
2 contract, and I think the answer has to be no. The
3 other question I think we should ask is, are we here to
4 examine the wisdom or merit of how Qwest's retail
5 service offerings are currently structured, and I think
6 again the answer has to be no.

7 Under federal law and under the
8 interconnection agreement, the question is, what are
9 Qwest's retail service offerings, and is Qwest providing
10 those for resale to the resaler, and there I think we
11 have a clear definition that the retail service offering
12 on a residential line includes access to operator
13 services and directory assistance. Does Qwest offer
14 those to Tel West for resale? Yes, it does, at a 14.74%
15 discount. Does Qwest offer Tel West the ability to
16 block that access under certain circumstances? Yes.
17 Does it do so in the same manner as it does for its
18 retail customers? Yes. Are those services free? No.
19 Are those services ones that a carrier or end user
20 customer obtains automatically without making an
21 affirmative request or taking affirmative steps? No.
22 And that's really the heart of this question.

23 My frustration with this entire litigation
24 has been that it seems so simple for Tel West to get
25 what they want, and they refuse to take the affirmative

0419

1 steps necessary to control and manage the business in --
2 to achieve the goals that they desire, to provide the
3 services to their end users that they want to, to obtain
4 the things to which they have a right under the
5 interconnection agreement.

6 Let me just see if there are some other
7 things that Mr. Harlow brought up that I want to
8 discuss, and then I do want to save some time to talk
9 about the billing disputes.

10 Your Honor, I guess the next area before I
11 move into the billing disputes is kind of a separate
12 consideration. It relates to both the contract
13 interpretation and the billing disputes and the remedy,
14 and what I want to talk about here for a moment is the
15 credibility of Tel West's witness. And I think that it
16 is called squarely into question by, and into issue, by
17 Mr. Harlow's oral argument earlier today where he tells
18 you that you have to rely on Tel West's witness, you
19 have to accept the word of Tel West's witness on a
20 number of issues, including the very important ones
21 about the parties' intent at the time of the formation
22 of the contract, his understanding of what the
23 interconnection agreement said when he signed it, his
24 representations in terms of the ability of Tel West to
25 collect for various pay per use and other charges that

0420

1 they claim that they can not, his credibility with
2 regard to Tel West's claims that they must have certain
3 services from Qwest because it's their only remedy,
4 their representations that they do or do not do certain
5 things to allegedly mitigate any damages they might
6 incur, all of which we believe Tel West is asking you to
7 rely on Mr. Swickard's word for, and we simply think
8 that there's evidence in the record that that word is
9 not reliable.

10 As discussed yesterday, we believe that Tel
11 West actively misrepresented the availability of the
12 billing statements, some of which were prepared as early
13 as February 4th, and withheld those documents from Qwest
14 until the close of business on March 8th. We believe
15 that those billing statements once produced show that
16 Tel West's data request responses and Mr. Swickard's
17 testimony to be false, because those representations
18 made to Qwest and to the Commission were that they did
19 not bill their customers for pay per use services, that
20 they did not try to collect operator services and
21 directory assistance. I think those bills show that to
22 be contrary, show that to be the contrary. There are a
23 number of billing statements that show charges for
24 operator services and DA.

25 And we believe that Tel West actively

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1 misrepresented in discovery that it disconnects
2 customers when pay per use is discovered. We believe
3 that the billing statements and the spreadsheets that
4 are contained as Exhibit 3 show the same customers month
5 after month after month after month retaining service,
6 incurring pay per use charges. It's the same customer,
7 because Mr. Swickard testified that they don't reuse
8 telephone numbers. Tel West does not reuse telephone
9 numbers, so if this account goes from one month to the
10 next, you will see in these spreadsheets that Tel West
11 provided, some customers' telephone numbers show up
12 every month for showing pay per use services. Were they
13 ever disconnected? No. Did Tel West represent to this
14 Commission that they were disconnected? Yes. We don't
15 think that the representations that you should rely on
16 testimony from this company to make findings of fact
17 don't -- I don't -- upon which you will draw
18 conclusions, I don't -- I simply don't think that
19 they're reliable, and that's unfortunate.

20 And it also goes to the billing disputes
21 issue. One of the things that I think has been kind of
22 brushed aside in the billing disputes issue is that Tel
23 West is obligated to submit to Qwest billing disputes
24 only on charges that they dispute in good faith. We
25 have an admission yesterday that Tel West doesn't even

0422

1 check to see if there's been a blocking service ordered
2 on any lines when it submits billing disputes to Qwest.
3 I think that that's manifestly a violation of Tel West's
4 obligation to submit billing disputes in good faith, and
5 I think that that's something that needs to be taken
6 into consideration when Tel West comes and asks the
7 Commission for essentially an extraordinary remedy of a
8 self executing penalty provision, which is what Tel West
9 has requested here.

10 I do agree with Mr. Harlow that the billing
11 dispute issue is largely behind us, and it's puzzling to
12 me why Tel West continues to assert a need for
13 extraordinary remedies in a circumstance where there is
14 no longer any factual basis for such assertion. Tel
15 West and Qwest had, we believed, a good relationship
16 with regard to the billing issues. There was a backlog
17 that was created during the spring and summer and fall
18 of last year that Qwest worked diligently to address.
19 Qwest has installed, or not installed, instituted
20 processes to make sure that that doesn't happen again,
21 and we don't think that it will. And we take seriously
22 our obligation under the new interconnection agreement
23 to expedite resolution of the billing disputes. I don't
24 think that there's any evidence on the record that such
25 resolution hasn't been expedited.

0423

1 Mr. Brotherson testified yesterday that it's
2 not going to be appropriate to establish a formulaic
3 approach to what expedited resolution means, because the
4 billing disputes are going to vary in nature and in
5 number, so it's certainly not appropriate to just put a
6 30 day clock on the billing disputes. And nor do we
7 think it's appropriate to put a 1.5 times clock on the
8 disputes, especially given the disparate nature of the
9 type of research and investigation that the two parties
10 do in connection with the billing disputes.

11 All Tel West does is compile a spreadsheet of
12 all the charges, all the pay per use, all the operator
13 services, all the toll, lines them up with their
14 telephone numbers, and sends them to Qwest. Qwest
15 researches every single account on an individual account
16 by account basis to determine if the customer service
17 record shows that the blocking service was ordered
18 properly, et cetera. That's extraordinarily more time
19 consuming than simply compiling a spreadsheet of the
20 disputed charges. And so I don't -- I don't think you
21 can ever tell that it's going to be appropriate to put a
22 1.5 times formula on there. If Tel West were able to
23 pull all of its disputed charges in 10 days, there's no
24 evidence on this record that it would be a reasonable
25 amount of time for Qwest to have to research and resolve

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1 those disputes in 20 days, but that's what Tel West's
2 approach would produce.

3 Additionally, we think that this type of a
4 requirement puts Qwest at significant risk in a 252(i)
5 sort of a situation where other parties can opt into the
6 billing dispute resolution provision, and we're
7 concerned about that, because we don't -- we don't know,
8 again, because of the nature of the disputes, that what
9 would be appropriate in one situation would even be
10 workable in another situation, and yet Qwest would be
11 bound to that.

12 And I know I'm coming near the end of my
13 time, but let me just sum up. On the billing disputes,
14 we think that the past is resolved, and the future is
15 addressed by the current interconnection agreement, and
16 there's no need to modify that interconnection
17 agreement. With regard to the operator services and
18 directory assistance issues, I think there's no doubt
19 that Qwest has complied with both the letter of the law
20 and the letter of the contract requirements. Qwest has
21 made significant efforts to communicate to Tel West the
22 options that it has available to it to obtain the types
23 of services that it wants on a customized basis from
24 Qwest, and there is absolutely no need to impose upon
25 Qwest and the other CLECs in the community the type of

0425

1 contractual interpretation that Tel West seeks to
2 impose.

3 Tel West is not without a remedy here though.
4 Tel West can obtain the blocking through CustomNet
5 and/or toll restriction services that it seeks, it can
6 obtain customized routing, it can provide its own
7 operator services and directory assistance. The options
8 are there. The options are permitted under the language
9 of the contract, and all Tel West has to do is make a
10 decision operationally as to how it wants to proceed and
11 order those services.

12 Thank you.

13 JUDGE BERG: Thank you, Ms. Anderl.

14 Before we turn to you, Mr. Harlow, I did
15 have, let me just look, there was one, I have a couple
16 of notes, I think what I will do is I will hold them
17 until after your response, Mr. Harlow, so as not to
18 interrupt the flow, and then there will be a couple of
19 questions for both parties in general, whoever can
20 answer them, and then one question for Tel West.

21 I'm ready, sir.

22 MR. HARLOW: Thank you, Your Honor. Again
23 I'd like to start with the billing disputes issue, and
24 let's see, I guess we kind of jumped around here. I
25 think this is where Ms. Anderl argues the -- addresses

0426

1 the Tel West credibility supposed issue. What I saw
2 yesterday was a company that's a relatively small
3 company compared to Qwest trying to run a business and
4 deal with the crushing blow of over 100 data requests
5 including sub parts, some of which were repetitive.
6 Mr. Swickard admitted that some mistakes were made.
7 Clearly there were some misunderstandings. But I saw a
8 witness who didn't dodge the difficult questions, who
9 admitted the mistakes.

10 Mr. Swickard said he's not the billing
11 person. We did see dates on supplemental responses.
12 Since Mr. Swickard is not the billing person, you know,
13 we don't know exactly why some of those bills that were
14 provided last Friday were dated much earlier than that.
15 I don't think that goes to credibility. That's just
16 part of the rough and tumble of litigation.

17 The issue of some customers incurring OS and
18 DA and I guess maybe pay per use as we use that term,
19 repeatedly, again, there is no explanation of why that
20 was -- occurred. Qwest did not ask that of
21 Mr. Swickard. Qwest did establish that some of the
22 bills in question were from Qwest -- were from Tel West
23 employees, and I think we can understand that employees
24 would probably be treated differently if they incurred
25 pay per use or operator services or directory assistance

0427

1 charges than the average customer. Since it's not on
2 the record, we won't speculate why, but that does not
3 establish an overall lack of credibility on
4 Mr. Swickard's testimony.

5 Qwest claimed that Tel West should -- does
6 not check for the existence of blocking on every
7 disputed call. Turn that around for a minute. I mean
8 who has the burden of proof in a collection action of a
9 bill for services rendered? Who has the burdon of
10 coming forward and proving the service was duly
11 rendered? Qwest does. But we asked Qwest, do you check
12 out the bills before you send them out? No, we just --
13 our computer cranks them out, and out they come. And
14 yet we know month after month after month there are
15 bills that shouldn't be there where there was blocking
16 service, where the service wasn't ordered, where it's
17 not a telephone number that belongs to Tel West, and so
18 on and so forth. We have a lot of disputes. I would
19 submit it's just as incumbent on Qwest to check their
20 bills before they send them out as it is on us to check
21 whether there's blocking in place before we dispute a
22 call. Of course, if our theory is upheld, on OS and DA
23 under the current agreement, we have no obligation to do
24 so, because those charges shouldn't be there anyway.

25 The timing of Tel West disputing the bills

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1 were very close to 30 days if you compare the submission
2 of the disputes to the bill date. But again, the bill
3 date is not the operative date under the agreement. As
4 Mr. Brotherson admitted, it's the receipt date. And
5 Mr. Brotherson admitted, for example, the December 7th
6 bill was not actually mailed even until the 11th, and
7 that came out of the Midwest. Even if it got there in
8 one day, it was there on the 12th, so Tel West took 35
9 days to dispute. But more importantly, you know, Tel
10 West's timing on disputes is not what's on trial here.
11 Tel West acts reasonably. If it takes them a little
12 longer, I think our alternative remedy, which would give
13 Qwest a little longer to respond, takes care of that.

14 Finally, on the billing disputes, the 252(i)
15 issue, this is a complete red herring and ties into
16 their claim that we're trying to rewrite the contract,
17 which is not what we're doing. We're asking for an
18 order based on showing a history of a problem and
19 Qwest's obligation if the Commission adopts one of our
20 two recommendations on what expedited means. And to put
21 some flesh on that, that would be under order, not under
22 contract, and therefore there would be no 252(i)
23 obligation.

24 Let me finish up now on the OS and DA issue.
25 And Qwest's argument if you really look closely at it

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1 and kind of look behind the curtains, and particularly
2 if you look at the way the real, you know, the network
3 is structured and the way the contractual obligations
4 are structured today, post divestiture, is it, well,
5 because we have always defaulted to OS and DA to Qwest,
6 well, that must mean the contract requires Tel West to
7 take and pay for OS and DA. But, you know, wishing that
8 it's so doesn't make it so.

9 The contract doesn't say that, and the fact
10 that Qwest may have expected that to be the case because
11 that's the way they have always done it because no CLEC,
12 as Ms. Malone testified, no CLEC has ever requested our
13 local service without OS and DA, they all want it, and
14 that was the presumption, you know, when the Act was
15 passed. But that's not what this contract says, and now
16 you have a party who wants to enforce the contract as
17 written, and so you need to look at how the contract is
18 written, not at how Qwest has always done it.

19 Qwest says, well, Tel West has another
20 remedy, which of course begs the question of what the
21 contract says, but customized routing, a prime example,
22 if you will look at the customized routing section of
23 the contract, which is 9.12, I believe, yeah, 9.12.1.1
24 states, customized routing permits CLEC to designate a
25 particular outgoing trunk. The section is over a page

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1 long, but nowhere in the section does it say it permits
2 a CLEC to use customized routing as a sub -- as a
3 blocking service. CLEC, in Section 9.12.4.6 says:

4 CLEC must place the associated trunk
5 orders prior to the establishment or
6 deployment of the line class codes in
7 specific end offices.

8 Now that's not optional language. Must is a
9 requirement. If you look at the form which we cross
10 examined Ms. Malone on, the form is consistent with
11 that. So talk about trying to rewrite the agreement,
12 you know, this might, if we don't prevail on our
13 contract interpretation issue, this might be something
14 we would want to talk to Qwest about too, but this
15 wasn't the ruby slippers. We did not always have this
16 option. This is an afterthought by Qwest to suddenly
17 say, well, you don't really have to order trunks like
18 9.12.4.6 says you do, and customized routing is not
19 really just limited to routing calls to another OS/DA
20 provider, you can also use it for blocking. This is an
21 afterthought, it's not consistent with the agreement,
22 and it's an offer Qwest has made, but it's not the
23 contract that the parties entered into.

24 Instead, what really what customized routing
25 is, and I will kind of tie back to the cross we did

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1 yesterday, customized routing is accomplished through
2 line class codes. CustomNet screening or blocking is
3 also accomplished through line class codes. Essentially
4 what Qwest is saying is that we can -- we can through
5 customized routing develop another blocking product for
6 Qwest. Ms. Malone again on cross-examination claimed,
7 well, if you develop that, we can't let other CLECs use
8 it, but I defy you to find in the contract where it says
9 that. And, in fact, Ms. Malone went so far as to say,
10 well, you could actually resell your line class codes
11 developed under Section 9.12 to other CLECs. Again,
12 total fabrication, not in the agreement.

13 This is not the issue, Your Honor. The issue
14 is whether or not the CLEC has to do something to get OS
15 and DA or whether or not the CLEC has to do something to
16 block OS and DA. Or turned around, does Qwest's OS and
17 DA divisions have to do something to ensure that when
18 they get calls coming in or when they terminate collect
19 calls too, do they have to do something to make sure
20 that they've got a way to bill and collect for that
21 call. Well, AT&T and WorldCom do. They have to have a
22 billing and collection agreement, they have to bill to a
23 credit card, they have to bill to a valid third number,
24 they can bill to a commercial credit card, or they have
25 to have a billing and collection agreement in place with

0432

1 the LEC where the call supposedly -- that serves the end
2 user that supposedly is to be billed for the call.

3 Qwest is just as capable of blocking these
4 calls on behalf of or at its OS and DA platforms as we
5 are. And indeed, if you look, Qwest even has a tariff
6 for alternate billing of directory assistance. Qwest,
7 excuse me, it's the price list, it's competitive
8 service, Qwest's price list Section 6.2.4.A.3(b), it's
9 cited in our brief, Your Honor. Qwest is not helpless
10 here. Qwest can -- Qwest can make the same
11 determination that Tel West must make when it takes on a
12 local exchange customer. You know, is this a call that
13 I can bill and collect for. And if not, well, I better
14 block it. Qwest OS and DA can do the same thing that
15 AT&T and WorldCom and Opticom and Oncor and so on have
16 to do, that is figure out how they're going to do this.

17 And instead, Qwest is saying, well, no,
18 access really means provisioning, and even though you
19 haven't ordered it, even though you have tried to block
20 it under your contract, you have to pay for it or -- as
21 a resaler, but Tel West isn't reselling, because it
22 doesn't have a resale tariff for OS and DA, or
23 apparently I think this is more like -- it looks to me
24 more like a billing and collection situation, because
25 Qwest brands the call Qwest, and they rate the calls

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1 under Qwest's price list. Tel West can't resell them at
2 its own rate. Qwest imposes the rate under its rating
3 mechanism of its OSP division. And so really what Qwest
4 is trying to force Tel West to do is to function as its
5 billing and collection arm for these end users.

6 In terms of the argument that CLECs would be
7 surprised and shocked I guess if they lose their Qwest
8 OS and DA because they don't order it, this is a boogie
9 man, this is not real, this is -- first of all, this is
10 not what we're asking. Qwest certainly for CLECs that
11 are taking Qwest OS and DA and accepting it and paying
12 for it and not complaining about it, there's no reason
13 that Qwest has to suddenly jerk that service. At the
14 most, all Qwest would have to do is say, you know, we
15 think you want this, if you want to keep getting this
16 service, fill out our order form. Maybe they have
17 filled out the order forms. We don't know.

18 JUDGE BERG: Mr. Harlow, at this time, would
19 you be conceding additional time to Qwest for further
20 response, or do you want to wrap?

21 MR. HARLOW: I think I ought to wrap, Your
22 Honor. Let me just address the old petition that was
23 drafted by a non-lawyer. It was undisputed that Tel
24 West interpreted the new agreement not to require
25 purchasing and paying for OS and DA, and that simply

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1 because they didn't put it in the old petition, which
2 addressed only the old agreement, you wouldn't expect
3 non-lawyers necessarily to parse the agreement the way
4 we have as lawyers. In sum, Your Honor, the contract
5 simply doesn't say what Qwest wishes it said, what Qwest
6 thought it said. The contract unambiguously changed the
7 terms between the parties from the old agreement and
8 does not require Tel West to accept provisioning of OS
9 and DA.

10 JUDGE BERG: Okay, thank you, sir.

11 Mr. Harlow, one question I had was in terms
12 of traditionally resold service, by traditionally, it's
13 a short tradition, resold services are priced at the
14 retail price minus wholesale costs, voided costs. In
15 this instance, what should I make of the agreement that
16 from Tel West's perspective provides for a resold basic
17 exchange line minus OS/DA, but there's no provision for
18 how that's to be priced in 6.3? Because I got the
19 impression from the, if not the restatement of remedies
20 in the brief, that in the amended complaint there was an
21 expectation that there would be -- that Tel West had
22 overpaid and that there should be some price for a
23 resold exchange line without OS and DA that should be
24 different from a resale price with OS and DA.

25 MR. HARLOW: No, Your Honor, and, of course,

0435

1 we tried to get a little bit into costs and we didn't.
2 You know, our offer of proof was that a CustomNet
3 screening costs nothing. We do have a little evidence
4 in terms of CustomNet, which is priced at \$2, is really
5 the same as, because it's done through line class codes,
6 is the same as customized routing, you know, without the
7 trunks used as the blocking mechanism.

8 JUDGE BERG: Sure.

9 MR. HARLOW: So there's just a one time cost
10 to set it up, and then it's programmed into the switch,
11 and it's just there.

12 JUDGE BERG: But my point is what am I to
13 make that from Tel West's perspective it's a part of the
14 agreement that it not be required to accept OS and DA
15 services, but I don't see any reference to how that's to
16 be priced in 6.3? Is Tel West's position is that it
17 pays for the cost of a basic line less the wholesale
18 discount without regard to whether or not it accepts
19 access to OS and DA?

20 MR. HARLOW: Yes, Your Honor, and I was
21 working toward that. And, of course, this is Qwest's
22 we're asking for a "free service" argument. They're
23 characterizing our request, which is that the basic
24 line, discounted line, resold line costs -- they're
25 characterizing as, well, we're asking for the line plus

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1 blocking for free, and that's not what we're asking for.
2 We're asking for the line and saying it includes access
3 but it doesn't include the provision of OS and DA. And
4 Qwest, you can, if you don't want to provide OS and DA
5 to our customers, you have a number of options, and
6 we're really indifferent to what options Qwest has.

7 I guess one of them would be they could
8 approach us and say, well, you know, we want to keep OS
9 and DA defaulting to our Qwest operator services. Tel
10 West, would you try and bill -- collect those calls for
11 us, and that's something conceivably we could do. Qwest
12 could put on blocking. It could put on CustomNet. It
13 could develop line class codes that handle things
14 differently. Qwest could, and we got into this some on
15 cross with Mr. Teitzel, Qwest could have its OS/DA and
16 even -- or its OS division already has this capability
17 and DA could have it as well, could do -- could check
18 LIDB and see whether those lines can be billed. And
19 this is what other OSPs and other DA providers have to
20 do to protect themselves. Qwest wants to be treated
21 specially.

22 So the question is, who must block, the LEC
23 or the OS and DA providers? And this is why Qwest's
24 argument about, well, we're just providing
25 nondiscriminatory access, no, we say it is

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1 discriminatory, because everybody else in the world,
2 every other OS and DA provider, has to -- has to pay
3 Qwest something to block these calls. Qwest gets it for
4 free. And now we're talking about Qwest qua OS Qwest
5 OS/DA, and this is why they're trying to kind of bring
6 them all together as though they're one. They're not.

7 JUDGE BERG: This goes way beyond --

8 MR. HARLOW: Okay.

9 JUDGE BERG: -- where I was thinking, and I
10 -- but I do understand those other arguments that you
11 have made. It was, you know, my understanding that Tel
12 West was expecting a price for its resold lines that was
13 something less than retail minus wholesale.

14 MR. HARLOW: No, Your Honor, we just simply
15 don't think we have to order blocking. We don't have to
16 have that service.

17 JUDGE BERG: All right.

18 MR. HARLOW: That's up to Qwest's OS and DA
19 side if they want to block it.

20 JUDGE BERG: All right.

21 And just to be even handed about it,
22 Ms. Anderl, it was mainly a clarification from counsel
23 or a question to counsel that was based on my
24 misunderstanding of what they were looking for in the
25 way of a price.

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1 MS. ANDERL: Sure.

2 JUDGE BERG: If you felt there was something
3 else to be said on the matter, I would give you a couple
4 of minutes.

5 MS. ANDERL: I would just bring us back to
6 the issue of what Qwest is obligated to do and what Tel
7 West is entitled to ask for as a resaler.

8 JUDGE BERG: Sure.

9 MS. ANDERL: And, you know, if they want to
10 be a UNE-P provider, boy, I have a whole lot of new and
11 different stuff to tell you, because the rights and
12 obligations are different. But as a resaler, they get
13 what our retail end users get. Our retail end users
14 don't get a line free from operator services and DA.
15 They pay to block access to those services if they want
16 to, and that's exactly what Tel West gets.

17 JUDGE BERG: We're going to take five
18 minutes, and then we'll go for about five minutes.

19 (Recess taken.)

20 JUDGE BERG: Let me just indicate to the
21 parties that it was clear from the outset that there was
22 a certain hot button associated with the subject of
23 UNE-P. UNE-P was the subject of a Bench Request. At
24 this point in time, I don't want to open up arguments to
25 address what is or what isn't happening with UNE-P other

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1 than to just take note that according to the Bench
2 Request that was received, it did not appear that under
3 Qwest's offering at that time of UNE-P that there was a
4 version available which may bump it into a category of
5 UNE-C where it was available without the switching
6 function, without the integrated switching function of
7 operator services and directory assistance.

8 Is that accurate, Ms. Anderl?

9 MS. ANDERL: Yes and no, I guess, if I could
10 explain for a moment. And I don't want to really expand
11 this docket, but I think what we were responding to you
12 was a description of what constituted the UNE platform
13 for local service. That does include local switching,
14 and it's a switching function that directs the call to
15 the operator services or directory assistance platform
16 or provider.

17 However, that said, and maybe this question
18 wasn't specifically asked, but I would like to clarify
19 it now, and I don't think it will come as any surprise
20 to Tel West, as I think everyone knows, the Commission
21 in Washington has ordered that the vertical features
22 that are available through the unbundled switching
23 function have to be included with switching at no
24 additional incremental cost or charge to the CLEC. One
25 of those features is in our view the CustomNet function

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1 that Tel West could avail itself of. It's listed in
2 their interconnection agreement as something that's
3 available. And so in a UNE environment, there would be
4 the CustomNet functionality associated with switching
5 available at no additional charge over and above the
6 price for the combination of unbundled network elements,
7 which would include the loop and switching and
8 transport.

9 JUDGE BERG: And are you saying then that
10 from Qwest's perspective, that CustomNet functionality
11 achieves all blocking that has been -- that Tel West
12 requires to your knowledge?

13 MS. ANDERL: Based on the testimony that our
14 witnesses provided, we believe that that functionality
15 or that service on a retail basis or that functionality
16 on a wholesale basis is what Tel West is looking for.
17 Now we have had some push back from Tel West that, well,
18 you know, in a DMS-10 office, if you put the CustomNet
19 feature on, you can't have call waiting, and call
20 waiting is important to us is what Tel West said. I
21 think they said it in their brief, and they, of course,
22 brought it out on cross a little bit. But I mean I
23 guess I just want to say, well, okay, that is what it
24 is, but in the DMS-100 and the 5AESS offices, which are
25 I think the majority of our offices and the larger

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1 central offices, that certainly we believe appears to
2 address all of the things that they have asked us for to
3 date. And in the DMS-10 it still works, it just is not
4 compatible with call waiting, so you have to pick, as do
5 our retail customers, which you get.

6 JUDGE BERG: And I do remember you making
7 that point, Mr. Harlow, on cross examination of I
8 believe it was Ms. Malone.

9 All right, then there was one other question
10 I had, and I want to make it clear that I'm not asking
11 counsel to testify here, but is there somewhere in the
12 agreement itself that specifies what late charges accrue
13 when a CLEC, in this case Tel West, chooses to withhold
14 payment of disputed funds and later the charge is found
15 to be legitimately assessed? If it's not in the
16 agreement, I may make a Bench Request, but I thought if
17 it was in the agreement, perhaps that would --

18 MS. ANDERL: Mr. Sherr has the agreement
19 electronically, so we're going to do a couple of switch
20 searches.

21 MR. HARLOW: We do too, but we're not booted
22 up yet, so.

23 MS. ANDERL: Oh, here it is, 5.4.6 says,
24 interest will be paid, let's see, oh, that's on cash
25 deposits.

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1 JUDGE BERG: It would probably be in 5.4.4.1
2 or 5.4.4.2.

3 MS. ANDERL: Those just talk about there
4 being late payment charges and then saying that the
5 interest rate if we credit them back is the same as a
6 late payment charge, and I was just wondering if 5.4.6
7 because it identified an interest rate also kind of
8 backed you into a late payment charge, but I'm not sure
9 it does.

10 MR. HARLOW: Is it in Attachment A, which I
11 don't have for some reason?

12 MS. ANDERL: I don't know. I have it. 5.4.8
13 says the late payment charge shall be in accordance with
14 Commission requirements, so which is I think 1% per
15 month, which is what we've got authorized in our tariff.

16 MR. SHERR: Those are the only references to
17 late payment in the agreement.

18 MS. ANDERL: Mr. Sherr tells me that those
19 are the only references to late payment when you do a
20 search for that electronically.

21 JUDGE BERG: So the tariff, then under the
22 terms of the agreement, the way the tariff provision
23 would be applied is that for the disputed sums withheld,
24 if the disputed sums withheld were \$10 that there would
25 be a 1% per month assessment, so that 60 days later if

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1 it was resolved adverse to the withholding party, the
2 sum that would then be due would be the \$10 plus 10
3 cents interest for two successive months?

4 MR. HARLOW: \$10 plus \$2.

5 JUDGE BERG: 10%, \$1.

6 MS. ANDERL: Well, but it's 1% per month.

7 JUDGE BERG: 1% per month.

8 MR. HARLOW: 1%, my mind is long beyond math.

9 JUDGE BERG: So does that at least --

10 MR. HARLOW: I think it would be.

11 JUDGE BERG: Does that help counsel to then
12 interpret this agreement and the tariff?

13 MS. ANDERL: Yeah, I would probably like a
14 little bit more time to think about it, Your Honor.

15 JUDGE BERG: All right, well, let's take a
16 simple --

17 MR. HARLOW: The whole -- the point of that
18 cross was that there is a risk to the CLEC of
19 withholding.

20 JUDGE BERG: Yes.

21 MR. HARLOW: What exactly it is, I'm not
22 prepared to admit.

23 JUDGE BERG: All right, I will leave it at
24 that.

25 I don't have any other questions. Is there

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1 anything -- let me just make one quick note here.

2 Mr. Harlow, if --

3 MR. HARLOW: There is one other item, but go
4 ahead.

5 JUDGE BERG: With regards to Bench Request
6 Number 2, when could Tel West file a written response?

7 MR. HARLOW: We could probably do it
8 tomorrow, but it's always nice to have a cushion, so
9 maybe Thursday.

10 JUDGE BERG: Sure.

11 MR. HARLOW: Okay.

12 JUDGE BERG: If we can say, tell you what,
13 let's just make it Friday at noon if possible.

14 MR. HARLOW: Okay, we will try to submit it
15 earlier, Your Honor. And is that designated Bench
16 Request Number 2?

17 JUDGE BERG: Yes, it is.

18 MR. HARLOW: And, Your Honor, I appreciate we
19 didn't quite make a day, but we made a day and a half,
20 but after driving back to Seattle the better part of a
21 second day will be done, we had scheduled in part 2 Tel
22 West discovery responses last day to serve being
23 tomorrow.

24 MS. ANDERL: Requests.

25 MR. HARLOW: Requests, yes. And that was on

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1 my assumption we wouldn't lose the better part of a day
2 today, so I would like to address the possibility of
3 kicking that over by a day, which would kick over
4 Qwest's response, which I'm not sure what that does to
5 the --

6 JUDGE BERG: Let me pull out the schedule.
7 Let's be off the record.

8 (Discussion off the record.)

9 JUDGE BERG: There was a discussion off the
10 record regarding scheduling for the provisioning and
11 parity part of this proceeding. Those scheduling dates
12 will be documented in a pre-hearing conference order
13 that will also include other dates that were discussed
14 and agreed to at the last pre-hearing conference.

15 With that, all arguments and other matters
16 have been concluded, and the hearing is adjourned.

17 (Hearing adjourned at 12:15 p.m.)

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