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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

In The Matter Of  
TEL WEST COMMUNICATIONS, LLC  
Petition For Enforcement Of Its Interconnection  
Agreement With Qwest Communications Pursuant  
To WAC 480-09-530

Docket No. UT-013097  
ANSWER OF TEL WEST TO QWEST'S  
MOTION TO SUSPEND PART B  
PROCEDURAL SCHEDULE AND  
NARROW THE ISSUES

**INTRODUCTION**

Tel West strenuously opposes Qwest's motion to suspend the procedural schedule indefinitely pending the conclusion of another docket to which Tel West is not a party. The underlying premise of Qwest's motion appears to be that Qwest can use industry-wide, averaged, statistics that are the subject of litigation in the 271 docket to preclude Tel West from even having the opportunity to prove that Qwest has breached its contract with Tel West.

While Tel West would agree that a ruling in its favor in this docket would be something the Commission might want to take into account in determining whether or not to recommend Section 271 approval to the FCC, the converse is not true. Merely because Qwest may obtain the blessing of the Commission for a 271 application by Qwest does not mean that Qwest is performing each and every obligation, of each and every one of its contracts, with each and every CLEC with whom it has a relationship.

Tel West is but a single tree in the forest. The Commission is looking at the forest in the Section 271 docket. The Commission in this docket needs to focus on a single tree.

1 DISCUSSION

2 **I. The Section 271 Docket Will Not Resolve, Reduce, Or Eliminate Any Of The Issues In This**  
3 **Docket And It Would Be Inappropriate And Prejudicial To Directly Link The Two Dockets**  
4 **As Qwest Requests.**

5 **A. The Section 271 docket is much broader than this docket.**

6 Tel West applauds the efforts of the Commission and the parties in the  
7 Section 271 docket. The process is ambitious, daunting, and perhaps essential. The 271 docket,  
8 however, is as broad as this petition is narrow. It covers the entire 14-point checklist, all manner  
9 of interconnection and UNEs, in addition to resale, which is the focus of this petition. Unlike the  
10 three issues in Part B of this docket, Section 271 docket covers hundreds of issues. As Qwest  
11 admits, there are hundreds of PIDs and sub-PIDs. Only one such PID, OP-4C has been cited in  
12 this docket.

13 **B. Section 271, in looking at overall or "average" performance of Qwest, is overlooking**  
14 **the experience of a single CLEC, such as Tel West.**

15 Another flaw in the premise of Qwest's motion is that it presumes that Tel West  
16 experiences Qwest's average level of service. The decision on Qwest's Section 271 application  
17 will presumably turn to some degree on the statistical analysis being undertaken in the  
18 Section 271 docket. The statistical analysis averages Qwest's performance across an entire  
19 industry and as to all CLECs. In real life, however, it is unlikely that even a single customer will  
20 have an experience equal to the "average" experience. An average is a collection of data points,  
21 some of which are above the average and some of which are below or even well below the  
22 average. If Tel West is in the latter category, then it will be entitled to relief in this docket. It  
23 would not necessarily mean, however, that Qwest would be denied Section 271 relief.

24 As just one example of why Tel West's experience with Qwest might be different  
25 from the industry average, Qwest's failure to perform its contract may be the nature of the  
26 personnel assigned to handle Tel West's account. This is borne out by Qwest's data request  
responses to date. Qwest has a number of wholesale service centers. Attachment A (TEL 01-

1 010S1). Qwest operates most of them, but uses a subcontractor, Aegis, to handle Tel West's  
2 account. Id. Aegis representatives have less than one-tenth of the experience of Qwest  
3 representatives. Id. Thus, unless AT&T, WorldCom, and Covad are actually doing business  
4 with Aegis, their experiences could be very different from Tel West's.

5 Qwest exhibits slight acknowledgement of the nature of averages when it seeks to  
6 narrow the issues to determine merely if Qwest has "singled out" Tel West for "special disparate  
7 treatment." Qwest Motion at 9. In other words, Tel West would have to show some sort of  
8 actual malice toward Tel West in order to prevail in this docket. The breach of contract claim is  
9 not narrow as Qwest would like, however. There are any number of reasons why Qwest could  
10 be failing to meet its contractual obligations to Tel West while nevertheless meeting its broader  
11 industry benchmarks sufficiently for the Commission to recommend Section 271 approval.  
12 Qwest's request to narrow the issues is tantamount to a presumption that in order for CLECs to  
13 be receiving above or below average service, they must have been singled out either for  
14 favoritism, in the case of better than average performance, or for malicious reasons, in the case  
15 of CLECs receiving below average service. Qwest's suggestion again ignores the fact that  
16 statistics are merely a tool and do not predict or explain the performance in any individual  
17 instance or with regard to any individual customer. In the real world performance will be  
18 expected to vary. Moreover, Qwest's request to narrow the issues effectively places an  
19 additional, unwarranted burden of proof upon Tel West. Rather than simply having to prove that  
20 Qwest has not performed its contractual obligations to Qwest, Tel West would have to show  
21 malicious intent by Qwest to provide below average service. This is not an appropriate burden  
22 of proof for a proceeding to enforce contractual obligations.

23 The why behind Qwest's failure to perform its contract with Tel West is not  
24 something Tel West must prove to show a breach of contract. The Commission will recognize  
25 that "average" does not equal "everyone." Tel West is entitled to present its evidence on Qwest's  
26 performance to Tel West.

1           **C.     Tel West's "anecdotal" evidence is just what is required to show a breach of contract.**

2           Qwest simply dismisses Tel West's case as providing "anecdotal" evidence of  
3 noncompliance. But what anecdotal means is "real world" evidence of problems with Qwest's  
4 performance as opposed to statistical evidence. Statistical evidence is certainly useful to a broad  
5 review such as the Commission is undertaking in the Section 271 docket. The Section 271  
6 docket is a "big picture" docket intended to develop a single recommendation after review of  
7 hundreds of issues and performance indicators on whether or not Qwest has met the prerequisites  
8 for Section 271 approval. Tel West's anecdotal evidence would not be particularly probative on  
9 the industry-wide issues in the 271 docket. But it is exactly the kind of evidence needed in this  
10 docket. Most breach of contract cases are built up from either a single anecdote or a series of  
11 anecdotes. Very few breach of contract cases are proved based on statistical evidence.

12           If Qwest prevails on its request to have the outcome of this docket be determined  
13 by the outcome of this Section 271 proceeding, then presumably Tel West would have to seek to  
14 intervene and present its evidence in the 271 docket in order to protect its interests. It is very  
15 doubtful that the Commission and other parties would want to spend much time on the narrow  
16 disputes raised by Tel West.

17           **D.     Tel West does not have the resources to try this case in the 271 docket, the focus of**  
18           **which has been the experience and requirements of much larger CLECs.**

19           Qwest derides Tel West's "voluntary" "failure" to participate in the Section 271  
20 docket. In Tel West's view, the "opportunity" to participate in Section 271 docket is merely an  
21 opportunity to go bankrupt. The resources necessary to participate in the docket of the scope and  
22 scale of Section 271 are not only beyond Tel West, but have proven to be beyond the resources  
23 of many of the early participants in the docket. Either through bankruptcy or scaled back  
24 participation, a number of parties that intervened in the Section 271 have effectively left the  
25 process. This is not to fault the process. It is important for the Commission to exhaustively  
26 review all aspects of Qwest's compliance with the relevant provisions of the

1 Telecommunications Act to ensure that local markets are irreversibly open before Qwest is  
2 allowed to provide long-distance service in Washington. But such a broad approach is not well  
3 suited to determining the relatively narrow issues in this case relating to whether or not Qwest is  
4 meeting its contractual commitments to Tel West.

5 Because the Section 271 docket is extremely resource intensive, it has largely  
6 been the domain of very large companies, industry leaders such as AT&T, Covad, and  
7 WorldCom. These companies have very different business plans, concerns, and approaches from  
8 small niche companies such as Tel West. Moreover, large companies such as this have resources  
9 to develop the EDI gateway to Qwest's OSS. They do not use GUI. Accordingly, their  
10 experience can be expected to be totally different than what Tel West experiences with GUI.

11 **E. Qwest misrepresents Tel West's position on Section 6.2.3 of the Current Agreement.**

12 Qwest's claim that Tel West considers OSS to be a "telecommunications service"  
13 as the underpinning of its petition is a red herring. Section 6.2.3 of the current agreement  
14 provides that "Qwest shall provide to CLECs Telecommunications Services . . . in substantially  
15 the same time and manner that Qwest provides these services to itself . . ." (Emphasis added).  
16 Tel West does not contend that Qwest's OSS and "wholesale customer service infrastructure"  
17 constitute telecommunications services, because that is not the issue. Rather, the issue is  
18 whether Qwest is "providing" the telecommunications services in the same time and manner to  
19 Tel West as it is "providing" them to its retail division. The OSS and customer service  
20 infrastructure are part and parcel of provision of telecommunications services. Neither Qwest's  
21 retail side nor its wholesale side can offer telecommunications services without these other  
22 ancillary functions.

23 The quality and efficiency with which Qwest provides telecommunications  
24 services has a significant impact on Tel West's cost of doing business. Tel West would prefer  
25 that Qwest provide services at parity with other RBOCs that do a much better job, such as Bell  
26 South. But at the very least, Tel West is entitled to what it contracted for, which is parity with

1 Qwest's own retail provisioning. This demand is not seeking to expand the definition of  
2 telecommunications services. Rather, it is attempting to enforce the "shall provide" parity  
3 provisions of the interconnection agreement.

4 **II. Unless Qwest Agrees That 271 Approval Should Be Denied Based On A Single CLEC's**  
5 **Experience, Then Tel West Would Effectively Be Denied An Appropriate Remedy If Forced**  
6 **To Depend On The Outcome Of The Section 271 Docket.**

7 Finally, the fundamental flaw of Qwest's motion is the remedies available in the  
8 Section 271 proceeding. The remedy for Qwest's failure to meet the requirements of Section 271  
9 is that Qwest will not be permitted to enter into the interLATA long-distance market in  
10 Washington. That does nothing whatsoever for Tel West. Tel West does not even resell long  
11 distance, as its customers are not able to pay for such services. Qwest argues that it will  
12 voluntarily improve its processes in response to the deficiencies that the 271 process identifies.  
13 Qwest has acquiesced to numerous changes in its practices in the 271 process, which indicates  
14 that Tel West likely does have a case. Indeed, Qwest has already responded to one of the  
15 breaches Tel West raised by implementing a new policy that will restrict Qwest retail employees  
16 from requesting a shorter than standard interval due dates for new customer installations.  
17 Attachment B (TEL 01-002S2). In the future, Qwest retail order takers will have their orders  
18 rejected by Qwest's retail OSS the same as Tel West's requests for shorter than standard due  
19 dates have always been rejected. Id.; see Attachment C (TEL 01-003S1). To Tel West's  
20 knowledge, this is not an issue that was raised by any party in the Section 271 proceeding.

21 Qwest apparently wants the deferral to 271 to effectively preclude any remedy for  
22 Tel West regardless of the outcome. Qwest does not even make allowance for what would  
23 happen if the Commission were to find that its provisioning performance and OSS failed to meet  
24 the requirements of Section 271. Qwest presumes that it will be able to tweak its processes for  
25 measures in a way to satisfy the Commission. That is certainly far from a foregone conclusion at  
26 this point, however. Moreover, Qwest ignores the fact that if it is found to need changes in its  
processes and procedures in order to comply, that Tel West would be entitled to some relief.

1 Even a single failure of Qwest to perform a contractual obligation to Tel West should result in  
2 some form of relief being ordered for Tel West in this more narrow docket.

3 Qwest's "one-size-fits-all" approach, assuming that the industry-wide fix will  
4 necessarily remedy Qwest's breach of its contract with Tel West is an unwarranted and unproven  
5 leap of faith. Of course, if Qwest is given Section 271 approval, under the Qwest approach Tel  
6 West would have no remedy whatsoever unless it can show that it was affirmatively singled out  
7 by Qwest. As discussed above, this ignores the fact that it is extremely unlikely that Tel West is  
8 the "average CLEC." In the real world Tel West may continue to have substantial problems with  
9 Qwest's performance if it is receiving substantially below-average service, even though Qwest  
10 has not consciously attempted to single out Tel West for punitive or malicious reasons.

11 **III. Tel West Would Be Substantially Prejudiced By A Grant Of Qwest's Motion.**

12 Finally, Qwest's assertion that Tel West will not be prejudiced by the delay is  
13 speculative and unsupported. While Tel West is currently serving a niche market of customers,  
14 Tel West's contract is not so limited. Tel West has plans to expand the scope of its services, and  
15 Qwest's failures to perform the contract as to existing services discourage it from doing so.  
16 Moreover, as Tel West pointed out in part one of the docket, Qwest's practices drive up Tel  
17 West's costs to where it costs substantially more to serve customers in Washington than in other  
18 states. Further, the higher rates that Tel West must charge reduce its market penetration, which  
19 reduces Tel West's revenues. These dollar damages accrue daily and are likely unrecoverable  
20 from Qwest due to contractual limitations of liability.

21 The Section 271 proceeding has gone on more than a year longer than Qwest  
22 originally expected. There is no certainty as to when the docket will be concluded. Contrary to  
23 Qwest's unsupported assertions, Tel West will suffer substantial prejudice if this docket is  
24 substantially delayed. Indeed, Tel West is extremely disappointed that the procedural schedule  
25 had to be suspended due to Qwest's insufficient data request responses. Tel West continues to  
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1 need the most expeditious handling of its petition as reasonably possible under the  
2 circumstances.

3 CONCLUSION

4 Qwest is correct that the issues in Section 271 in this docket are related. Certainly  
5 the Commission should take the outcome of this proceeding into account, particularly if Qwest is  
6 found to have violated any provisions of Tel West's interconnection agreement. But while the  
7 issues are related, they are far from identical. Certainly if Tel West prevails on its petition, in  
8 whole or in part, Qwest will argue vociferously in the Section 271 proceeding that the specific  
9 performance as to Tel West should not necessarily be determinative on the broader issues under  
10 consideration in Section 271. The converse must also be true, that approval of Section 271 for  
11 Qwest does not mean that Qwest is necessarily performing all aspects of its obligations to Tel  
12 West under their interconnection agreement.

13 Qwest is correct that granting its motion to suspend and narrow the issues would  
14 be more efficient. Denial of due process is always more efficient. That does not make it  
15 appropriate or proper, however.

16 Respectfully submitted this 26<sup>th</sup> day of March, 2002.

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