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 RESPONSE OF TEL WEST RE ADMISSION OF BENCH REQUEST NO. 3 RESPONSES AND ANSWER TO QWEST'S MOTION TO RE-OPEN

Tel West Communications, LLC ("Tel West") both responds to the Commission's Notice to Brief the Issue of Admissibility of the Parties' Responses to Bench Request No. 3 as well as answers the Motion of Qwest Corporation, Inc. ("Qwest") to re-open because the two matters are related. The bench request responses contain unreliable and conflicting hearsay. Qwest's motion to re-open suffers not only from the same hearsay problem, but lacks any recognizable justification for the belated attempt to introduce an exhibit for which Qwest can lay absolutely no foundation. This case should be decided based on the record timely submitted, rather than competing post-hearing submissions.

DISCUSSION

I. The Commission Should Not Admit the Responses to Bench Request No. 3.

A. The responses consist of inadmissible hearsay and ambiguous documents that Qwest cannot authenticate or reconcile.

Bench requests are most commonly used to request specific information or data that is not in dispute. The problem that has arisen here is not due to the bench request. Bench Request No. 3 was certainly designed to elicit non-controversial information. However, the actual responses in this case are not conclusive nor in harmony. In a nutshell, the problem with

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admitting the bench request responses of the parties is that they are directly contradictory. Qwest says that it sent an SGAT template to Tel West before May 10, 2001, and Tel West says that it did not receive a template from Qwest until after May 10, 2001. Qwest's response is apparently based on an ambiguous calendar page of Heidi Higer, and Tel West's response is based on Don Taylor's recollection and the lack of any records showing receipt of such a template. Qwest admits that it does not have a copy of the alleged e-mail by Ms. Higer to Mr. Taylor. Accordingly, Qwest cannot demonstrate through conclusive documentary evidence that the March 16 template was transmitted to anyone at Tel West.

Qwest does have documents that purport to demonstrate that it sent the May 14th template, which Tel West ultimately signed, to Mr. Taylor after he sent the May 10th letter. Thus, to the extent Qwest can document the course of dealing between the parties, the documentation is consistent with the testimony admitted at the hearing as well as Tel West's response to Bench Request No. 3. In the spirit of fairness and impartiality, however, should Qwest's response to Bench Request No. 3 not be admitted, neither should Tel West's.

While Qwest has no records from which it can state with certainty what, if anything, Qwest provided to Tel West prior to May 21, 2001, the parties' responses are consistent with the transmission of the May 14th template on May 21, 2001. The parties disagree, however, on what occurred before that date. It is not appropriate for the parties to continue to try their cases regarding the competing versions of what occurred nearly a year ago based on recollections not subject to cross examination and inconclusive documentation. Indeed, had Qwest offered Ms. Higer's notes and the internal Qwest e-mails, it is doubtful they would have been admitted.

Even under the Commission's more relaxed rules of evidence, internal e-mails and other self-serving documents are generally excluded, particularly when the author of the documents is not available for cross-examination. In this instance, not only was the author of the documents, Ms. Higer, unavailable for cross-examination, but neither were the recipients of the

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e-mails. Ms. Higer distributed the e-mail to Qwest's negotiating team, and none of the three witnesses Qwest chose to attend the hearing had any involvement whatsoever in the negotiations with Tel West.

B. Unreliable and contradictory hearsay should not be admitted here where its probative value is minimal.

The responses to Bench Request No. 3 are not really probative on any issue properly before the Commission. Rather than resolving or simplifying the issues, they have the dangerous potential to confuse and obscure the issues. Qwest seems to be of the view that if Tel West received a template SGAT before Mr. Taylor wrote the May 10th letter, and then signed a template that contained similar language in certain sections of the agreement, that fact necessarily undercuts Tel West's arguments regarding the course of dealing between the parties. The problem with Qwest's approach is that it miscomprehends both the facts and the law.

The focus of Qwest's approach is on Qwest's subjective intent. Under Washington law, the subjective intent of one party is not material to interpretation of a contract. *Chatterton v. Business Valuation*, 90 Wn. App. 150, 155 (1998). The factual fallacy of Qwest's approach is that it is clear from Mr. Taylor's May 10th letter that he was not referring to a Qwest template SGAT. The purpose of the letter is to request changes from the parties' resale agreement signed in 1998 ("First Agreement"), not to request changes in Qwest's SGAT.[1] The problem with admitting hearsay such as that contained in Qwest's response to Bench Request No. 3 is that even if Mr. Taylor had a copy of the March 16th SGAT template, there is no way for Qwest to show that Mr. Taylor was referring to it in his May 10th letter, or that he even read it. For the March 16th template to have any significance, Qwest would have to connect up the next dot, which would be to show that Mr. Taylor was negotiating from that template, rather than simply ignoring it and requesting changes from the First Agreement.

[1] This intention is confirmed in the response to Bench Request No. 3. The Bench Request response of Tel West should be disregarded, however, unless Qwest's response is admitted.

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C. The hearsay in Qwest's response to Bench Request No. 3 is inherently unreliable because it is ambiguous and inconclusive.

Apart from being hearsay, Qwest's response to Bench Request No. 3 on its face is inherently lacking in reliability. From the response, Ms. Higer apparently did not specifically recall sending a template to Mr. Taylor on or about April 24, 2001. It appears she infers this from her calendar from that date. However, a close review of that calendar entry reflects that Ms. Higer has the practice of drawing a wavy line through each of the items on her "to do" list, presumably as she completes the tasks. With one exception, every single line of Ms. Higer's "to do" list for April 24th has a line through it, including the notation to call Don Taylor and his telephone number. That one exception is the entry that states "email temp to: DO Taylor at Qwest.net." Qwest's Response to Bench Request No. 01-003, Attachment A.

Qwest also provided a purported e-mail from Ms. Higer to Nancy Donahue dated May 2, 2001. In that e-mail, Ms. Higer claimed that she had provided a template agreement to Tel West. Assuming, for the sake of argument, that the document is authentic and that Ms. Higer was not fabricating the facts, this establishes that Ms. Higer *thought* she had sent the template to Tel West. But even assuming away two issues that ordinarily are subject to the authentication and cross-examination process at the hearing, this information is not sufficiently reliable to be admitted over a hearsay objection. For example, was Ms. Higer misreading her calendar, perhaps assuming that the strike through Mr. Taylor's name next to his telephone number also meant she had sent the SGAT template to him on May 24th? Did Ms. Higer send an e-mail but forget the attachment, a common occurrence with e-mails? Did Ms. Higer key in Mr. Taylor's e-mail address correctly? Did Ms. Higer provide a cover message that "flagged" the attachment in such a way that Mr. Taylor would not have deleted the e-mail message without checking the attachment? Or did the e-mail only discuss scheduling or some other matter that Mr. Taylor would have quickly glanced at and quickly deleted? Because the hearing is over and neither

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Mr. Taylor nor Ms. Higer are available for cross-examination, the Commission is left with nothing but speculation.[2]

II. Qwest's Motion to Re-Open Lacks Any Reasonable Justification and Seeks Admission of a Document That Is Inadmissible Hearsay In Any Event.

A. Qwest's has not shown that it could not have obtained the e-mail it seeks to admit at the time of the hearing with due diligence.

Qwest makes a startling, but apparently candid admission in its motion to re-open. Qwest's attorneys in this docket never contacted Ms. Donahue, Qwest's negotiator with Tel West, until **after** the hearing in Part 1 of the docket. Qwest belatedly claims that its failure to talk to its negotiator was due to "the extremely tight procedural schedule" in this docket. Motion at 2. Qwest asserts, therefore, that it meets the requirement of WAC 480-09-820(2)(b) to re-open, which is that the evidence is "essential to a decision and which was unavailable and not reasonably discoverable with due diligence at the time of the hearing. . . ." Qwest not only did not exercise due diligence on this matter, it exercised no diligence.

This case is about strict construction and interpretation of the plain language of the parties' agreement, if the agreement is unambiguous. If it is ambiguous, then the tribunal will look to all the surrounding circumstances relating to the agreement, including the parties' negotiations. Indeed, Tel West filed testimony of Mr. Swickard that described the circumstances leading up to the execution of the contract. Qwest itself recognized the potential importance of the parties' negotiation in its prehearing brief, asserting that "Tel West did not specifically negotiate this issue." Qwest Prehearing Brief at 8. However, Qwest cited in support of this statement the data request responses of Tel West. Qwest produced no evidence of its own to support this claim.

The whole reason for the dispute in Part 1 of this docket is that the parties could not agree on the meaning of their contract. In spite of the fact that the course of the parties'

[2] Mr. Taylor had to withdraw from this proceeding as a witness at the insistence of Qwest. Qwest appears to have intentionally named only witnesses who had no involvement in the negotiations with Tel West.

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dealings and negotiations was obviously implicated by the dispute, Qwest made a decision not to call its contract negotiator, Ms. Donahue, as a witness. Somehow Qwest found the time to locate, prepare testimony for, and file testimony of three witnesses plus dozens of exhibits. As was established at the hearing, however, ***not one*** of the three Qwest witnesses ever negotiated with Tel West nor even discussed the negotiations with the actual negotiators.

Plainly, Qwest would have had time to contact its Tel West negotiator had it chosen to do so. Qwest's failure to talk to Ms. Donahue was not the inability to conduct due diligence. Rather, it was a result of Qwest's strategic decision to present witnesses to discuss issues other than the actual negotiations between the parties. Now, with some 20/20 hindsight prompted by Bench Request No. 3, Qwest has second thoughts about its strategic decision on how to try Part 1 of this case. It is both unfair to Tel West and contrary to the Commission's rule on re-opening to permit Qwest to change its theories and strategies on the case after the conclusion of the hearings.

B. <u>The document Qwest seeks to admit has no foundation and is double-hearsay</u>.

Qwest's motion to re-open should also be denied because the document that it seeks to admit is the same type of unreliable hearsay discussed above in regard to the admissibility of Bench Request No. 3. Qwest admits the document in question is an internal e-mail. Further, Qwest admits in its motion that there is no evidence that Mr. Swickard was aware of the internal message. Moreover, Qwest has not identified a single one of its three witnesses who could have sponsored and authenticated the document had Qwest produced it at the hearing. Again, since the memorandum is described as relating to the negotiations between Tel West and Qwest, it is not surprising that Qwest's witnesses could not sponsor the exhibit. All three of them admitted at the hearing that they had nothing to do with the negotiations with Tel West. Certainly Mr. Swickard could not have authenticated or validated the contents of the document since he had never seen it.

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Qwest characterizes the e-mail message as "quite similar" to Mr. Taylor's notes which were admitted in Exhibit 19. What Qwest fails to note, however, is that Qwest itself chose to admit the opposing party's internal notes when it offered the exhibits. Had Tel West sought to introduce in a self-serving fashion the notes of its own negotiator, Qwest would rightly have strenuously objected that the documents constituted hearsay. Because Qwest introduced Mr. Taylor's notes, however, it effectively waived objection to what otherwise would have been objectionable exhibits.

C. The document should not be admitted because it is not relevant to the issue to which Qwest contends the document relates.

Qwest alleges that the Qwest internal e-mail messages are critical to show Mr. Taylor's state of mind in the negotiations. This argument is untenable as the document was not created by Mr. Taylor or sent to him. Qwest's argument indicates that it intends not only to use the hearsay of the document itself, but indeed, seeks admission of double hearsay, perhaps even speculation, i.e., the written statements of a Qwest employee about the state of mind of Mr. Taylor. Without the ability to cross-examine the author of the document or Mr. Taylor himself, such double hearsay is highly prejudicial as well as unreliable in the extreme.

CONCLUSION

For the foregoing reasons, the Commission should decline to admit the parties' responses to Bench Request No. 3. In the interests of fairness, however, if the Commission should admit Qwest's response to Bench Request No. 3, it should also admit Tel West's response. Additionally, the Commission should deny Qwest's request to re-open since it is based on a strategic shift by Qwest, not discovery of new evidence that was not reasonably discoverable at the time of the hearing.

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Respectfully submitted this 26th day of March, 2002.

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