BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC Petitioner v. QWEST CORPORATION, INC. Respondent.	Docket No. UT-013097 QWEST CORPORATION'S RESPONSE TO TEL WEST'S OBJECTION TO ADMISSION OF BENCH REQUEST NO. 3

Qwest Corporation, by and through its undersigned counsel, hereby responds to Tel West's objection to the admission of the parties' responses to Bench Request No. 3 ("BR 3"). This response is filed pursuant to the Commission's March 21, 2002 Notice of Opportunity to File Objections and Responses to the Admission of Bench Requests.[1]

Tel West's objections are understandable, but not well-founded. It is proper to admit the parties' responses to BR 3 for a number of reasons. First, the proper scope of a bench request is not as narrow as Tel West asserts. Second, Tel West's arguments go to the weight of the evidence, not to its admissibility. Lastly, in a strict evidentiary sense, Qwest's response to BR 3 is admissible under Washington law.

[1] Neither party objected to the admission of Tel West's response to Bench Request No. 2. Tel West's objection pertains only to the responses to Bench Request No. 3.

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1. A bench request is not as narrow a tool as Tel West asserts.

Tel West asserts in its objection that bench requests, and the responses thereto, are only appropriate and should only be considered when concerning "specific information or data *that is not in dispute*." Tel West cites no Commission statute or rule supporting such a narrow definition. WAC 408-09-480(3)(e) merely defines a bench request as a "request for data made by or on behalf of the presiding officer." It imposes no limitation that a bench request or a bench request response is only to be considered if all parties agree in all respects as to the responsive information.

Furthermore, WAC 480-09-530 liberally empowers the presiding officer to conduct the proceeding in a manner that best suits the nature of the petition. It also indicates that the proceeding does not conclude until the presiding officer concludes he or she has sufficient information to resolve the issues. As such, BR 3 was perfectly appropriate and the parties' responses should be considered and given the appropriate weight under the circumstances.

2. Tel West's arguments go to the weight, not to the admissibility of the evidence.

It is understandable why Tel West wants to preclude the Commission from considering Qwest's detailed, documented response to BR 3. Tel West recognizes that, if asked to draw a conclusion as to whether Qwest transmitted to Mr. Taylor before May 10, 2001 an SGAT template containing an identical Section 6.2.9 as that contained in the May 14, 2001 template, the Commission is likely to give greater weight to contemporaneous business records than it is to a retrospective answer compiled 11 months after the fact by Tel West's hired consultant.

Tel West asserts that the responses to BR 3 are "not really probative," "inherently unreliable," "ambiguous" and "inconclusive."[2] These arguments, plus Tel West's numerous other unsolicited arguments as to why Qwest's BR 3 response is not persuasive, all go to the weight to be given to the responses, not to their admissibility.

The Commission is fully competent to weigh the competing responses to BR 3 and to determine

[2] Without support, Tel West even implies that Qwest may have fabricated the documents attached to its response to BR 3. Qwest takes exception to this and will not further dignify this rather desperate attack other than to flatly deny it.

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which response is more credible and supported. It is for this reason that Qwest did not object to the admission of Tel West's response to BR 3. Tel West's response is self-serving, uncorroborated and incredibly unreliable. However, Qwest believes that when Mr. Taylor's retrospective "recollection" is weighed against the contemporaneous business records presented by Qwest, the Commission will give far greater weight to Qwest's response. That parties offer contradictory factual responses does not, as Tel West argues, render the responses inherently unreliable or inadmissible. It merely requires the finder of fact to weigh the evidence and the credibility of the respondents to determine which version of the facts to accept as true.

3. Qwest's response to BR 3 would be admissible in a Washington court.

The Commission does not strictly adhere to rules of evidence in determining the admissibility of evidence.

> Subject to the other provisions of this section, all relevant evidence is admissible that, *in the opinion of the presiding officer*, is the best evidence reasonably obtainable, having due regard to its necessity, availability, and trustworthiness. *In ruling upon the admissibility of evidence, the presiding officer shall give consideration to, but shall not be bound to follow, the rules of evidence governing general civil proceedings*, in matters not involving trial by jury, in the courts of the state of Washington.

WAC 480-09-750(1) (emphasis added). Thus, as an initial matter, Tel West's strict evidentiary analysis falls short since Tel West has disregarded this baseline for Commission evidentiary rulings.

Even assuming the Commission were to strictly apply Washington rules of evidence, Qwest's bench request response and its attachments would be admissible under the business records exception to the hearsay rule. That exception is referenced at ER 803(a)(6) and defined at RCW 5.45.010 and .020. The business records exception states:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and *if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.*

RCW 5.45.020 (emphasis added). Clearly, the contemporaneous records (including Ms. Higer's

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notes and the emails from Ms. Higer and Ms. Beuster) from April and May 2001 are admissible from a strict evidentiary sense under this exception to the hearsay rule. The response itself provides the context in which the attachments were created and the foundation for the Commission to adjudge their admissibility. They were generated in the ordinary course of business. Neither Ms. Higer nor Ms. Beuster at the time would have had any reason to suspect that their business records would, a year later, be probative to litigation that would not be initiated for 6 months regarding an interconnection agreement that would not be signed for 3 months. Hence, the records are highly trustworthy and reliable and should be admitted into the Part A record.

4. Conclusion

For the reasons stated above, Qwest supports the Commission's proposed admission of the parties' responses to BR 3.

RESPECTFULLY SUBMITTED this 29th day of March, 2002.

QWEST

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