

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC

Petitioner

v.

QWEST CORPORATION, INC.

Respondent.

Docket No. UT-013097

QWEST CORPORATION'S REPLY TO TEL WEST'S ANSWER TO MOTION TO SUSPEND PART B PROCEDURAL SCHEDULE

1. Introduction

Qwest Corporation, by and through its undersigned counsel, hereby replies to Tel West's answer to Qwest's motion to suspend the Part B procedural schedule. This reply is made pursuant to the Commission's March 27, 2002 notice requesting Qwest to reply by April 3.

Tel West's answer is replete with clever, but unpersuasive arguments aimed at distracting the Commission's focus from the issue at hand. Each will be discussed below. In summary, despite Tel West's statements to the contrary, its Part B allegations require a comprehensive review of the sufficiency of Qwest's OSS. In doing so, the Commission is faced with two alternatives. It can suspend this proceeding for a few months to await the conclusions reached in the impending April-June¹ 271 hearings, which are the culmination of a two-year third party test involving over 120,000 transactions and the input

¹ Qwest's motion refers to the impending 271 hearings as the "April/May hearings." On April 2, 2002, the Administrative Law Judge in the 271 dockets amended the procedural schedule and moved the OSS hearings to June 4 and 5. In this reply, Qwest will therefore refer to the series of 271 hearings as the "April-June hearings."

1 of state commissions, commission staff, CLECs, Qwest, public counsel and multiple independent
2 vendors.² Or, it can litigate this vast issue anew in this time-compressed docket based on isolated,
3 potentially unverifiable anecdotes of the kind set out in the Amended Petition. Qwest urges the
4 Commission to opt for the former approach.

5 Despite Tel West's accusations, Qwest is not seeking to deny Tel West's issues from being
6 resolved fairly and thoroughly. Qwest is simply concerned about the parties and the Commission
7 needlessly expending resources to litigate complex issues currently being more thoroughly and thoughtfully
8 litigated in the 271 dockets.

9 While Qwest's motion to suspend and Tel West's answer do not address the issues raised by the
10 Administrative Law Judge in Bench Request No. 4 (issued on March 27), Qwest will briefly address the
11 issue in this reply since the Judge appears to believe that the parties' responses to the bench request
12 weigh on Qwest's motion to suspend. The bench request seeks information as to whether the
13 performance measures (the PIDs) or the payments contemplated by the Qwest Performance Assurance
14 Plan (the "QPAP") must be incorporated into the parties' interconnection agreement once Qwest is
15 granted 271 relief by the FCC for the state of Washington. As will be discussed below, the answer to
16 that question does not bear on whether it would be appropriate to suspend the Part B procedural
17 schedule.

18 **2. Tel West is intentionally obscuring the relief requested by Qwest.**

19 Tel West's answer at least three times mischaracterizes the relief requested by Qwest in its
20 motion to suspend. First, Tel West makes frequent reference to how much broader the 271 dockets are
21 than this proceeding. Tel West implies that it would thus be inappropriate for the Commission to defer to

22 ² As explained in Qwest's motion, the ROC third party test has been performed under the guidance of the ROC
23 Technical Advisory Group ("TAG"). The TAG is a collaborative forum comprised of and open to representatives of
24 the ROC, Commission staff, test vendors, CLECs, industry associations, consumer groups and Qwest. The third party
25 test has been performed through a series of transactional and operational evaluations. These evaluations tested and
26 are testing the five primary components of Qwest's OSS – pre-ordering, ordering, provisioning, maintenance and repair,
and billing – as well as the technical assistance Qwest offers CLECs and Qwest's Change Management Plan. The test
has been massive in scope and has involved the processing of at least 124,715 pre-ordering and ordering transactions
covering a broad base of products and service. In addition, the ROC OSS website shows that 55 individuals have
officially registered as participants in the OSS test. These individuals represent 31 CLECs and other organizations,
including state Commissions, the FCC and the Department of Justice.

1 the conclusions reached in the 271 dockets. Tel West is obscuring the issue. Qwest simply asks the
2 Commission to suspend the Part B procedural schedule until the Commission has issued a final order on
3 the issues raised in the April-June hearings. Qwest is not asking the Commission to suspend the Part B
4 procedural schedule “indefinitely” or until all aspects of the Washington, region-wide of FCC 271
5 dockets are resolved.

6 Second, Tel West implies that Qwest is asking the Commission to find that, if the Commission
7 recommends 271 approval to the FCC, Tel West’s petition be dismissed. Rather, Qwest is seeking a
8 delay of a few months until the identical issues regarding the sufficiency of Qwest’s OSS are resolved in
9 the Washington 271 dockets. Interests of consistent application of the law and facts and of conserving
10 the parties’ and the Commission’s resources make Qwest’s request highly appropriate.

11 Third, Tel West mischaracterizes Qwest’s request to narrow the issues. Qwest’s motion asks the
12 Commission to narrow the issues to whether Tel West is receiving different, inferior treatment than other
13 CLECs in terms of accessing Qwest’s OSS. Qwest does not assert that Tel West needs to prove actual
14 malice or intent, but rather that its allegedly-inferior access to Qwest’s OSS is different in form or function
15 than the OSS that the Commission will have already ruled upon. If it is not, there will be no need to re-
16 litigate the issue.

17 **3. The Part B issues are much broader than Tel West contends in its answer**
18 **to Qwest’s motion and should not be resolved based on anecdotal**
19 **evidence.**

20 Tel West would have the Commission believe that Part B involves narrow issues. But its colorful
21 references to the “relatively narrow issues in this case” and that the 271 docket “is as broad as this
22 petition is narrow” are unsupportable. Indeed, the Administrative Law Judge recognized the complexity
23 of the Part B issues when informally discussing scheduling matters with the parties late last month.

24 It is true that Tel West’s Part B allegations relate only to one sentence of one section of the
25 parties’ interconnection agreement.³ However, evaluating Qwest’s performance under that single

26 ³ Tel West’s First Amended Petition alleges that Qwest is in violation of the following sentence of Section 6.2.3:
27 “Qwest shall provide to CLEC Telecommunications Services for resale that are at least equal in quality and in
substantially the same time and manner that Qwest provides these services to itself, its subsidiaries, its affiliates, other
resellers, and Qwest’s retail end users.

1 sentence requires a very broad inquiry into whether Qwest is providing Tel West provisioning of services
2 at parity with retail and is providing non-discriminatory access to its OSS.⁴ These issues are chief among
3 the subjects to be considered by the Commission during the April-June hearings in the 271 dockets.
4 These are not in any respect narrow issues.

5 Furthermore, Tel West asserts that Part B must be litigated based on anecdote rather than a deep
6 and meaningful review of Qwest's OSS. In this regard, Tel West argues at page 4 of its answer that its
7 "anecdotal evidence would not be particularly probative on the industry-wide issues in the 271 docket.
8 But it is exactly the kind of evidence needed in this docket. Most breach of contract cases are built up
9 from either a single anecdote or a series of anecdotes." For three reasons, Tel West's argument is
10 without merit.

11 First, the type of evidence required to support a breach of contract claim varies entirely with the
12 nature of the contractual violation being asserted. If in this case Tel West were alleging Qwest violated a
13 hypothetical contractual provision that required Qwest to answer each Tel West call to the Interconnect
14 Service Center in 5 seconds, anecdotal evidence would be appropriate to determine if Qwest has failed
15 to meet such a specific requirement in particular instances. However, Section 6.2.3 relates to a much
16 broader duty, the requirement to provide non-discriminatory access to Qwest's OSS. A review of
17 Qwest's performance in this regard can not be limited to reviewing anecdotal experiences relating to

18 _____
19 ⁴ The FCC's Bell Atlantic New York order clarifies that the "substantially the same time and manner" language
20 found in Section 6.2.3 of the parties' interconnection agreement relates directly to the issue of whether an ILEC is
21 providing non-discriminatory access to OSS. In reciting the standards for the FCC's review of the sufficiency of Bell
22 Atlantic's OSS, the FCC stated:

23 As part of its statutory obligation to provide nondiscriminatory access to OSS functions, a
24 BOC must provide access that sufficiently supports each of the three modes of competitive
25 entry envisioned by the 1996 Act - competitor-owned facilities, unbundled network elements,
26 and resale. *** For OSS functions that are analogous to those that a BOC provides to itself,
27 its customers or its affiliates, the nondiscrimination standard requires the BOC to offer
28 requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness. ***
29 *The BOC must provide access that permits competing carriers to perform these functions in*
30 *"substantially the same time and manner" as the BOC.* *** The Commission has recognized
31 in prior orders that there may be situations in which a BOC contends that, although
32 equivalent access has not been achieved for an analogous function, the access that it
33 provides is nonetheless nondiscriminatory within the meaning of the statute. *** (footnotes
34 omitted; emphasis added)

35 *In the Matter of the Application by Bell Atlantic New York for Authorization under Section 271 of the*
36 *Communications Act to Provide In-region InterLATA Service in the State of New York*, 15 FCC Rec'd.
37 3953 (1999) ("New York Order"), ¶ 85.

1 slivers of Qwest’s OSS. Instead, it requires a thorough review of the various systems that comprise the
2 OSS and an evaluation of whether those systems afford CLECs a meaningful opportunity to compete.
3 The third party test administered by KPMG is exactly the type of inquiry needed to do so.

4 Second, Qwest’s position is consistent with the FCC’s guidance in terms of how it reviews
5 whether an ILEC is providing non-discriminatory access to its OSS to CLECs. *See, e.g., New York*
6 *Order, at ¶ 100 (“The scope and depth of KPMG’s review, and the conditions surrounding it,*
7 *including KPMG’s independence, military-style test philosophy, efforts to place themselves in the*
8 *positions of an actual market entrant, and efforts to maintain blindness when possible, lead us to*
9 *treat the conclusions in the KPMG Final Report as persuasive evidence of Bell Atlantic’s OSS*
10 *readiness.”).*

11 Finally, as a practical matter, there is no reason for the Commission to rely on anecdotes to
12 resolve the issues central to Part B given that the record developed in the rigorous OSS test process is
13 immediately at the Commission’s disposal.

14 **4. Tel West’s argument that it is not the “average CLEC” is not responsive**
15 **to Qwest’s motion.**

16 Tel West argues that the Commission’s conclusions on KPMG’s final OSS report will be
17 irrelevant to Part B because the “decision on Qwest’s Section 271 application will presumably turn to
18 some degree on the statistical analysis being undertaken in the Section 271 docket. The statistical
19 analysis averages Qwest’s performance across an entire industry and as to all CLECs.” Tel West’s
20 comments reveal a misunderstanding of how KPMG and Qwest are utilizing statistical analysis, a
21 misunderstanding of the PIDs themselves and a misunderstanding of how Qwest tracks and reports its
22 hundreds of performance measures.

23 As explained in paragraph 12 of Qwest’s First Amended Answer to the First Amended Petition,
24 two statistical measures are used to assist in analyzing the vast commercial data Qwest tracks on a
25 monthly basis – the Z score and the parity score. Those measures have nothing to do with averaging
26 together all CLEC data, as Tel West implies. Rather, those measures assist the reader in determining
27 whether a particular PID result (for example, OP-4C for residential resold service) for a particular month

1 is statistically significant or perhaps the result of random chance. *New York Order, at 58, n.110.* This is
2 highly relevant by virtue of the FCC’s conclusion that an ILEC is providing parity performance on a given
3 metric if there does not exist a statistically-significant disparity between the ILEC’s service to its retail
4 customers and its service to its wholesale customers. *New York Order, at ¶ 58 (“In this case, we*
5 *conclude that to the extent there is no statistically significant difference between Bell Atlantic’s*
6 *provision of service to competitive LECs and its own retail customers, we need not look*
7 *further.”).*⁵

8 Tel West’s assertion that the data gathered in connection with the 271 dockets is industry-wide
9 and somehow cumulative of all CLECs’ experiences is also generally untrue. Qwest tracks many (if not
10 most) of its measures for each CLEC on a state-by-state basis each month. It also tracks such data for
11 all CLECs combined on a state-by-state and region-wide basis each month.

12 Furthermore, the broad nature of Tel West’s Part B allegations do not lend themselves to
13 reviewing, in isolation, Tel West’s alleged experiences with the IMA-GUI interface and Qwest’s
14 wholesale customer service employees and vendors (Aegis).⁶ These systems are the same systems
15 utilized by other CLECs across Qwest’s region. If Tel West is experiencing more difficulties in using
16 these systems than are other CLECs, it may be due to Tel West’s internal training processes and policies.
17 If so, Tel West’s failure to properly train its employees to use Qwest’s systems does not translate to
18 discriminatory treatment by Qwest. Thus, KPMG’s comprehensive review of Qwest’s OSS is highly
19 meaningful to Part B. If Tel West believes it is receiving different, inferior access to Qwest’s OSS than
20 are other CLECs, Qwest’s motion would in no way preclude Tel West from raising such an issue.

21 _____
22 ⁵ Incidentally, as may become an issue later in this proceeding, the converse is not necessarily true. Under the
23 FCC’s analysis, if a particular metric does show a lack of parity for a particular period or periods, the FCC then looks
24 deeper into the context of the results to determine if there are reasons, other than discriminatory treatment by the ILEC,
to explain the result. In so doing, the FCC looks at trends and other explanations for the result. In some instances, the
FCC will find that statistically significant differences in measured performance may exist, but that such differences have
little or no competitive significance in the marketplace. Such differences thus do not reflect discriminatory treatment by
the ILEC. *New York Order, at ¶ 59.*

25 ⁶ Tel West alleges in its answer that Qwest “uses a subcontractor, Aegis, to handle Tel West’s account” and that
26 “unless AT&T, WorldCom, and Covad are actually doing business with Aegis, their experiences could be very
different from Tel West’s.” Tel West’s implication that Aegis serves Tel West alone is false. Aegis provides the same
customer service functions for Qwest in service of any and all CLECs.

1 **5. Tel West overplays the fact that it has not participated in the 271 process.**

2 Tel West appears to argue that the conclusions reached by the Commission in the 271 process
3 (unless favorable to Tel West) should have no bearing on the resolution of the Part B issues because Tel
4 West has not been a participant in that process. It then undermines any significance that could be given to
5 that fact by admitting that it would have had very little input into the 271 process.⁷

6 Leaving aside the obvious fact that its non-participation has been voluntary, Tel West’s comments
7 about the “extremely resource intensive” nature of the 271 process (including the OSS test process)
8 support Qwest’s point that it would remarkably burdensome to force the parties to re-litigate such a
9 broad, complex set of issues when the April-June hearings will resolve the sufficiency of Qwest’s OSS
10 and its commercial performance. To meaningfully and fairly litigate the sufficiency of Qwest’s OSS in this
11 docket, the parties would have to reinvent the wheel that has been developed in the 271 dockets for over
12 two years.

13 **6. Tel West is incorrect that Qwest’s motion would deny Tel West any
14 chance at relief or remedy.**

15 Tel West makes two revealing assertions in its answer. First, it argues that if the Commission
16 finds Qwest’s OSS to be sufficient, Tel West will “have no remedy whatsoever.” Assuming that Tel
17 West cannot demonstrate that it is being subjected to different, inferior access to Qwest’s OSS, why
18 should it have a remedy? If, after the April-June hearings, the Commission finds that Qwest is providing
19 CLECs non-discriminatory access to its OSS, Tel West’s claim that Qwest is providing discriminatory
20 access to its OSS will be without merit. Tel West’s argument can only be understood to mean that,
21 regardless of what reasoned conclusions stem from the Commission’s review of the KPMG Final Report,
22 Tel West wants its “day in court” to argue by anecdote that Qwest is not complying with Section 6.2.3.
23 For all the reasons stated above, Qwest urges the Commission not to follow Tel West’s approach.

24 Second, Tel West takes issue with Qwest’s argument that, to the extent the Commission orders
25 Qwest to improve any aspect of its OSS, Tel West will directly benefit along with all other CLECs. Tel

26 ⁷ At page 4 of its answer, Tel West states “Tel West’s anecdotal evidence would not be particularly probative on
27 the industry-wide issues in the 271 docket” and “[i]t is very doubtful that the Commission and other parties would
want to spend much time on the narrow disputes raised by Tel West.”

1 West believes that any finding in the 271 dockets that any component of Qwest's OSS is in need of
2 improvement would *ipso facto* entitle Tel West to some form of compensatory relief. Compensatory
3 relief is not available in a Section 530 proceeding. This narrow enforcement proceeding, which Tel West
4 invoked, permits only prospective relief aimed at directing the parties to comply with the provisions of
5 their interconnection agreement. It does not permit the Commission to award money damages. Any
6 modifications to Qwest's OSS ordered by the Commission in the 271 dockets would constitute the type
7 of relief potentially available to Tel West in this proceeding. Thus, it is untrue that Qwest's motion seeks
8 to deny all form of relief to Tel West.

9 **7. Tel West's claim that it will be prejudiced by a delay of a few months is**
10 **without merit.**

11 Without providing details supporting its position, Tel West implores the Commission to deny
12 Qwest's motion because Qwest's alleged non-compliance with Section 6.2.3 is discouraging it from
13 expanding its business outside the niche market of serving those members of the public with credit
14 problems. Tel West's recent acquisitions undermine its desperate call for help. Since the parties'
15 interconnection agreement went into effect on October 31, 2001, Tel West has acquired the customers of
16 at least two other CLECs, 1-800-Reconex (see Docket No. UT-011454) and MetroNet Service
17 Corporation (see Docket No. UT-020032).

18 As set out in Qwest's motion, the relief requested by Qwest would serve both parties given their
19 ability to preserve resources. Further, Tel West has received provisioning parity for OP-4C for
20 residential orders in two of the last four months and, in the other two months, received slower
21 provisioning by less than a quarter of a day on average.⁸ Given the self-described significance of those
22 orders to Tel West's business, Tel West's claims of prejudice appear highly overstated. Finally, Tel
23 West did not even attempt to rebut Qwest's argument that a few months' delay will not prejudice Tel
24 West since, by its own admission, it truly does not attempt to compete with Qwest for customers.

25 ⁸ In its motion, Qwest (based on the most recently-available data report) stated that Tel West had received
26 provisioning at parity each month since November 2001. Qwest's OP-4C data was generally revised on or about March
27 30 to reflect a different manner of counting the number of days taken to install service. The change relates specifically
to how Saturdays are counted. The revised OP-4C data for March 2001–February 2002 for Tel West is attached hereto
as Confidential Exhibit A.

1 **8. The parties' answer to Bench Request No. 4 are not relevant to resolving**
2 **this motion.**

3 Finally, Qwest believes that the Administrative Law Judge's bench request regarding the
4 mandatory nature of the QPAP and the PIDs requires brief discussion. Qwest infers that the
5 Administrative Law Judge may believe that, if the QPAP and the PIDs will not for an absolute certainty
6 be incorporated into the parties' interconnection agreement, it would not be appropriate to suspend this
7 proceeding pending issuance of a final order in the April-June hearings. With all due respect, the parties'
8 responses to Bench Request No. 4 do not bear on the outcome of Qwest's motion to suspend.

9 First, Qwest's motion does not rely on the principle that Tel West should be denied all relief in
10 Part B because the QPAP will soon be available and thus any Qwest non-performance under certain
11 PIDs will result in a payment to Tel West. As an incidental matter, Qwest agrees that the QPAP should
12 resolve some of Tel West's concerns, especially its concern that it is receiving inferior provisioning
13 performance from Qwest. However, that is not the basis of this motion. Rather, Qwest's motion is
14 simply based on the principle that the Commission should not endeavor to engage in contemporaneous
15 litigation of the identical complex issues in two proceedings, especially when the determination in the 271
16 dockets will be based on such an extensive, collaboratively-developed record.

17 Second, while Qwest does not assert that Tel West must opt into the QPAP, there is absolutely
18 no reason to believe that Tel West will not immediately do so once it is available. The QPAP is designed
19 to prevent backsliding by Qwest by requiring Qwest to make self-executing payments to CLECs (and
20 potentially the State) if it fails to meet particular performance standards. The CLEC has no burden of
21 proof and has to take no action in order to receive the payments. There is no reason to believe that Tel
22 West would choose to forego this payment opportunity. Thus, while the QPAP may be relevant to
23 ultimately resolving whether there is a need to order prospective relief to ensure that Qwest is providing
24 provisioning at parity with that it provides its own customers, this issue does not at all bear on the instant
25 motion.

26 **9. Conclusion**

27 For the above reasons, Qwest believes the Commission should grant Qwest's motion to suspend

1 the procedural schedule and to narrow the issues in Part B. Tel West has failed to rebut the central
2 premise of Qwest's motion -- that the Commission has the opportunity to preserve its own and the
3 parties' resources and to reach a more meaningful conclusion of the Part B issues if it suspends the
4 procedural schedule until the sufficiency of Qwest's OSS and its commercial performance is resolved
5 through the April-June hearings in the 271 dockets.

6 RESPECTFULLY SUBMITTED this _____ day of April, 2002.

7 QWEST

8
9
10 _____
11 Lisa Anderl, WSBA #13236
12 Adam Sherr, WSBA #25291
13 Qwest
14 1600 7th Avenue, Room 3206
15 Seattle, WA 98191
16 Phone: (206) 398-2500
17 *Attorneys for Qwest*