

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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)	
TEL WEST COMMUNICATIONS, LLC,)	DOCKET NO. UT-013097
)	
Petitioner,)	RECOMMENDED DECISION RE
)	OS/DA AND BILLING DISPUTE
vs.)	ISSUES; SCHEDULE FOR
)	SUBMITTING WRITTEN
QWEST CORPORATION, INC.,)	COMMENTS; NOTICE OF
)	REVIEW AT OPEN MEETING
Respondent.)	(May 8, 2002 at 9:30 a.m.)
)	
.....)	

***Synopsis:** This Initial Order interprets provisions in an interconnection agreement between the parties.*

- 1 **Nature of the Proceeding.** This case is a proceeding for enforcement of an interconnection agreement between Tel West Communications, LLP (“Tel West”) and Qwest Corporation (“Qwest”) pursuant to WAC 480-09-530.
- 2 **History.** Tel West on October 31, 2001, filed a Complaint and Petition for Enforcement (“Initial Complaint”) pursuant to WAC 480-09-530. Tel West subsequently filed a First Amended Petition for Enforcement on January 11, 2002 (“Amended Complaint”). The Washington Utilities and Transportation Commission (“Commission”) conducted an evidentiary hearing on March 11, 2002. Parties presented closing arguments on March 12, 2002.
- 3 **Recommended Decision.** The presiding administrative law judge (“ALJ”) proposes to order that: 1) disputed extrinsic evidence is admitted to the record; 2) Qwest’s motion to reopen the record is denied; 3) Tel West must accept operator services and directory assistance services as part its resold local Exchange Service lines; 4) Qwest did not negotiate the Agreement in good faith; 5) Qwest must not impose usage-based charges where Tel West has ordered relevant blocking or screening services; and 6) if either party violates a duty to submit billing disputes or expedite investigations in good faith, the other party may immediately initiate other rights and remedies.
- 4 **Appearances.** Brooks Harlow and David Rice, Miller Nash, LLP, Seattle, Washington, appeared on behalf of Petitioner Tel West. Lisa Anderl and Adam Sherr, Qwest Corporation, Seattle, Washington, appeared on behalf of Respondent Qwest.

I. MEMORANDUM

A. PROCEDURAL BACKGROUND

5 Docket No. UT-013097 is a proceeding for enforcement of an interconnection
agreement between Tel West and Qwest pursuant to WAC 480-09-530.¹ Tel West
entered into an agreement for service resale with Qwest in 1998 (“1998 Resale
Agreement”). Tel West requested to negotiate a new agreement on May 1, 2001.
After negotiations concluded, Mr. Swickard, president of Tel West signed the new
agreement on August 8, 2001 (“Agreement”). The parties filed the agreement as
having been fully negotiated, and the Commission approved the Agreement at an
open public meeting on October 31, 2001.

6 Tel West filed its Initial Complaint on October 31, 2001. Tel West subsequently
amended the Initial Complaint on January 11, 2002.

7 The Second Supplemental Order in this proceeding bifurcated presentation of Tel
West’s claims. On March 8, 2002, the parties filed prehearing briefs regarding two
related issues – operator services and directory assistance (“OS/DA”) and billing
disputes. An evidentiary hearing was conducted on March 11, 2002. The parties
stipulated to the admission of all but three designated exhibits. The parties presented
closing arguments on March 12, 2002.

8 Three bench requests were issued regarding OS/DA and billing dispute issues, one of
which generated objections. The ALJ issued Bench Request No. 3 (“BR-3”) after
reviewing the exhibits that were admitted by stipulation. Qwest and Tel West filed
responses to BR-3 on March 19, 2002.

9 On March 21, 2002, the ALJ issued a Notice of Opportunity to File Objections and
Responses to the Admission of Bench Requests. On March 22, 2001, Qwest filed a
Petition to Reopen the Part A Record. On March 26, 2002, Tel West filed objections
to the admission of responses to BR-3 and an answer to Qwest’s Petition to Reopen.
On March 29, 2002, Qwest filed a response to Tel West’s objections.

B. WAC 480-09-530 PROCEEDINGS

10 The Commission adopted WAC 480-09-530 to establish an expedited process to
resolve disputes between parties to existing interconnection agreements (“Section 530

¹ WAC 480-09-530 establishes expedited procedures for resolving disputes arising under
interconnection agreements approved by the Commission pursuant to Section 252 of the Federal
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§
151 *et seq.* (1996) (the “Telecom Act” or “Act”).

Proceeding”).² The Telecom Act enables telecommunications carriers to negotiate interconnection agreements, and Section 252 of the Act establishes a process for the mediation or arbitration of agreements by the Commission.

11 WAC 480-09-530 provides for the enforcement of interconnection agreements, where one party believes that the other is failing to meet its contractual obligations. A Section 530 Proceeding allows for great flexibility to tailor the process, where the requirements of the agreement may be determined, behavior may be examined to see if it is in compliance with the terms of the agreement, and enforcement may be ordered if required by the agreement and the facts of the case.³

12 The Second Supplemental Order in this case established that a Section 530 Proceeding is appropriate to resolve the pending disputes between Qwest and Tel West regarding the enforcement of their successive agreements. However, the number of claims stated in Tel West’s Amended Petition, and their apparent complexity, presented a procedural challenge under expedited procedures. In order to efficiently manage presentation of the issues, the Section 530 Proceeding was bifurcated.

13 This Order addresses two related issues – the operator services and directory assistance (“OS/DA”) and billing disputes – that were identified by Tel West as being paramount to its interests. Three other issues regarding whether Qwest provisions telecommunications services to Tel West in a substantially equal time, manner, and quality – collectively referred to as “Provisioning Parity” – are also being addressed in this proceeding, but they are treated as a separate adjudication.

C. ADMISSION OF RESPONSES TO BENCH REQUESTS

Background

14 Bench Request No. 2 (“BR-2”) was issued to Tel West during the hearing. Tel West objected to Qwest’s motion to admit Exhibit No. C-38 (“C-38”) on the grounds that a proper foundation had not been established and that C-38 was not relevant.⁴ Qwest responded that C-38 was admissible to establish the total number of billing disputes submitted by Tel West during the month of December 2001. The ALJ found that C-38 was relevant, but did not rule whether C-38 was admitted. BR-2 was issued in order to authenticate C-38.

15 Tel West’s response to BR-2 confirmed that C-38 contained a large number of billing disputes that had not been previously identified.

² *In the Matter of the Implementation of Section 252(i) of the Telecommunications Act of 1996 Interpretive and Policy Statement (First Revision)*, Docket No. UT-990355 (April 12, 2000), at ¶ 25.

³ See Rulemaking Docket No. A-970591, Open Meeting Memorandum (August 26, 1998)

⁴ See TR at 272-75.

16 Bench Request No. 3 (“BR-3”) was served to parties on March 13, 2002, after the close of hearings. BR-3 states:

Produce a copy of the Qwest SGAT template agreement that Qwest submitted to Tel West prior to May 10, 2001, which is referred to at Exhibit 2, page 1, third paragraph. Include all documents (cover letter, exhibits, etc.) that accompanied the submission.

17 Exhibit 2 is a letter from Don Taylor, Taylor Telecom Consulting Service, to Nancy Donahue, Qwest Manager – Contract Negotiations, dated May 10, 2001 (“Tel West Letter”). Mr. Taylor and Ms. Donahue represented Tel West and Qwest, respectively, during negotiations of a new interconnection agreement. The Tel West Letter makes several references to “the Qwest SGAT.”⁵

18 Tel West and Qwest filed written responses to BR-3 on March 19, 2002. The Qwest response included six attachments.⁶ The parties were served a notice of the opportunity to file objections to the proposed admission of BR-3.⁷ Tel West filed objections to the admission of BR-3 on March 26, 2002, and Qwest filed a response on March 29, 2002.

Discussion and Decision

19 Neither party objects to the admission of Tel West’s response to BR-2. BR-2 is marked and admitted as Exhibit 56. Additionally, BR-2 authenticates C-38. Having already determined that C-38 is relevant, it also is admitted.

20 According to Tel West, bench requests are most commonly used to request specific information that is not in dispute, and there is a problem with admitting the parties’ responses to BR-3 because they are not in harmony. Tel West also argues that Qwest’s responses to BR-3 should not be admitted because they are self-serving

⁵ An “SGAT” is a statement of generally available terms, and is governed by Section 252(f) of the Act. Qwest has elected to prepare and file with the Commission a statement of the terms and conditions that the company proposes to generally offer within Washington State to comply with the requirements of Section 251, relevant federal and state regulations, and the standards applicable under Section 252. Qwest’s proposed SGAT is being considered concurrently with the Commission’s review of Qwest’s compliance with the requirements of Section 271 in consolidated Docket Nos. UT-003022 and UT-003040.

⁶ Qwest’s attachments consist of: Attach. A – handwritten notes; Attach. B and C – the Qwest SGAT template dated March 16, 2001, and its Washington-specific information; Attach. D – email from Mr. Taylor dated May 1, 2001, and two contemporaneous emails between Ms. Donahue and another Qwest employee; and Attach. E and F – email to Mr. Taylor dated May 21, 2001, and a revised version of the SGAT dated May 14, 2001, that was attached to the email.

⁷ The parties stipulated to the admission of the response to Bench Request No. 1 at the hearing. *See* Exhibit No. 7.

hearsay evidence and the authors of the attachments were not available for cross-examination during the hearing. Tel West contends that Qwest's responses are unreliable because they are ambiguous and inconclusive, and their probative value is minimal.

- 21 Qwest states that the definition of a bench request in Commission rules imposes no limitation that a request or response is only to be considered if the specific information or data is not in dispute.⁸ Qwest contends that BR-3 is consistent with WAC 480-09-530, which empowers the presiding officer to conduct the proceeding in a manner that best suits the nature of the petition. According to Qwest, the fact that the parties offer contradictory responses to BR-3 does not render the responses inherently unreliable or inadmissible; rather, it requires the finder of fact to weigh the evidence and the credibility of the respondents to determine the weight to be given to the responses. Qwest also argues that admitting its response to BR-3 would be consistent with the Washington rules of evidence.
- 22 Based on controlling case law cited in this Order regarding principles of contract interpretation, the events leading up to the execution of the Agreement and the filing of Tel West's complaint are relevant. Accordingly, documents that chronicle those events, including negotiations between the parties, are also relevant. Neither party presented testimony from the individuals who actively participated in negotiations, and there is no evidence in the record to support any inference that those witnesses were not available or otherwise unable to testify. The Commission must consider extrinsic evidence to determine the intent of the parties during negotiations, and to assess the credibility of witnesses.
- 23 Furthermore, documents referring to negotiations between the parties have been admitted as exhibits. BR-3 was based on the May 10th Letter and Mr. Taylor's notes from two negotiating sessions have been admitted. The parties responses to BR-3 are helpful to gaining a better understanding of those negotiations.
- 24 The parties disagreement regarding whether Tel West must accept OS/DA services when reselling local Exchange Service lines permeates this case. The conflicting responses submitted by the parties may raise additional issues of credibility, but those issues can be resolved in the context of the record. Bench Requests frequently issue during and after hearings. If the Commission could not consider responses to bench requests in the same manner as other evidence, then any party could frustrate the Commission's truth-seeking mission by submitting a conflicting response. When taken to that extreme, it becomes clear that all of Tel West's arguments go to the weight to be given to the responses, and not to their admissibility.

⁸ See WAC 480-09-480(3)(e).

25 Under RCW 34.05.452(1), hearsay evidence is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. WAC 480-09-750 also sets forth standards to guide the admissibility of evidence:

[A]ll 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 ... in the courts of the state of Washington.

26 Finally, under WAC 480-09-530(5), the presiding officer has broad discretion to conduct the proceeding in a manner that best suits the proceeding, including limiting the record to written submissions. The proceeding concludes when the presiding officer has sufficient information to resolve the issues.⁹

27 Qwest's response to BR-3 provides context for the attachments and establishes a foundation to adjudge their reliability. The attachments are business records made in the regular course of business, at or near the time of the relevant act, condition, or event that they describe. Copies of email messages containing time-coded information and dated drafts of agreements are the kind of evidence that reasonably prudent persons generally rely on in the conduct of their affairs. There was no reason for the parties creating the business records to have suspected that those records would later be probative to litigation regarding the agreement, otherwise other relevant electronic records no longer available would also have been retained. Further, there is no reason to suspect that these records have since been forged or revised. Qwest's records submitted in response to BR-3 must be considered and weighed with other evidence. Finally, Mr. Swickard, president of Tel West, testified that Mr. Taylor conducted negotiations with Qwest at his direction, and he acknowledged that those negotiations were conducted via letter, email, and telephone conversations. *TR at 220.*

28 Giving due regard to all factors, including the necessity, availability, and trustworthiness of the responses to BR-3, further proceedings to investigate the responses are unnecessary. The responses are the best evidence reasonably obtainable. The parties' responses and attachments are admitted as exhibits and are included in the final exhibit list for this part of the proceeding, which is attached to this recommended decision.¹⁰

⁹ Consideration of these powers and guidelines also arises regarding Qwest's motion to reopen the record, separately resolved in this Order.

¹⁰ See Exhibit Nos. 57 through 64.

D. QWEST'S PETITION TO REOPEN**Background**

29 On March 22, 2002, Qwest filed its Petition to Reopen the Part A Record to receive additional documents and a witness declaration relating to the negotiations that were conducted between the company and Tel West. On March 26, 2002, Tel West filed its answer opposing the petition.

Discussion and Decision

30 Qwest claims that the company discovered relevant internal emails from Ms. Donahue, the company's negotiator, after the hearing was closed. Qwest admits that the documents existed prior to the hearing, but explains that Qwest simply did not have the opportunity to pursue this line of investigation because of time constraints.

31 Any party to an adjudication may file a petition for reopening at any time after the close of the record and before entry of the final order. *WAC 480-09-820(2)*. A petition to reopen may be granted if the receipt of the evidence is essential to a decision and was unavailable and not reasonably discoverable with due diligence at the time of the hearing or for any other good and sufficient cause. *WAC 480-09-820(2)(b)*.

32 Tel West opposes Qwest's motion, and argues that Qwest fails to demonstrate that it could not have discovered the subject emails with due diligence at the time of the hearing.

33 Each party diligently prepared its case as reflected by the excellent presentations that were made during the hearing and closing arguments. It is not uncommon for parties to discover additional relevant documents in their possession or think of additional arguments that could have been made after a contested hearing is closed. And it is probably even more likely to occur in cases such as this where proceedings are conducted on an expedited schedule.

34 Although the expedited schedule which has been established in this case may warrant a more liberal exercise of discretion when considering petitions under *WAC 480-09-820* than in other cases, it is not necessary to do so in this instance. The additional evidence that Qwest seeks to admit to the record, as described in the company's motion, is akin to evidence that has already been admitted or submitted in response to BR-3. Accordingly, receipt of the additional evidence is not essential to a decision and Qwest's Petition to Reopen the Part A Record is denied.

E. CONTRACT INTERPRETATION UNDER WASHINGTON STATE LAW

35 Tel West and Qwest disagree regarding the interpretation of certain provisions in the Agreement. Furthermore, Tel West and Qwest disagree whether the Commission should consider extrinsic evidence to interpret the Agreement. The legal principles that control the interpretation of contracts were discussed by the Washington State Supreme Court in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). The unanimous decision of the Supreme Court, written by Justice Brachtenbach, includes an enlightening overview of the problems of interpretation of contracts and provides great guidance in this case. Numerous principles that are embraced by the Court are repeated here, but without the entirety of the supporting citations that are provided in the text of the opinion.

36 The Court in *Berg* uses the word “interpretation” in the sense described by Corbin and the Restatement of Contracts.¹¹ Corbin states: “Interpretation is the process whereby one person gives a meaning to the symbols of expression used by another person.”¹² The Restatement definition is: “Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.”¹³ The Court also observed that it is deceptively simple to state the purpose in interpreting a contract, and that problems of contract interpretation have long been a source of judicial opinion.¹⁴

37 Tel West urges the Commission to follow the “plain meaning rule” in our review of disputed language in the Agreement. The *Berg* opinion states that the Supreme Court on occasion has embraced the “plain meaning rule.”

The Plain Meaning Rule states that if a writing, or the term in question, appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any nature.¹⁵

38 Following discussion of this rule, the Supreme Court in *Berg* noted that the plain meaning rule had been criticized by leading commentators, and cited specific cases where the Supreme Court had not consistently applied the rule. A different regard for extrinsic evidence emerges in those other cases. In *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973), the Supreme Court stated:

Determination of the intent of the contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the

¹¹ *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990).

¹² 3 A. Corbin, *Contracts* § 532, at 2 (1960).

¹³ Restatement (Second) of Contracts § 200 (1981).

¹⁴ *Berg*, *ibid.*

¹⁵ *Berg*, at 666, quoting J. Calamari & J. Perillo, *Contracts* § 3-10, at 166-67 (3d ed. 1987).

subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.¹⁶

39 This particular analytic framework for interpreting written contract language has been called the “context rule.” Qwest argues that *Berg* compels application of the context rule in this case. Qwest is correct. The Supreme court made clear that it rejected the plain meaning rule in favor of the context rule, and all cases to the contrary were overruled.¹⁷

40 The Court in *Berg* adopted the Restatement (Second) of Contracts § 212 (1981). Section 212 provides, in relevant part:

- (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances ...
- (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. ...

41 The Agreement approved by the Commission on October 31, 2001, is an integrated agreement pursuant to Section 5.31.1.¹⁸ An ascertainment of the meaning of certain provisions in the Agreement – principally Section 6.2.9 – is necessary to resolve the dispute between the parties regarding whether Tel West may resell Qwest’s local Exchange Service lines without accepting access to operator services or directory assistance service. Further, the interpretation of Section 6.2.9 depends on the credibility of extrinsic evidence *and* on choices among inferences to be drawn from extrinsic evidence.

42 Relevant extrinsic evidence in this case includes documents memorializing negotiations between the parties, documents created or exchanged during negotiations, conduct of the parties before and subsequent to execution of the Agreement, testimony of witnesses, and the reasonableness of the parties’ interpretations. However, lest there be any doubt regarding the necessity to consider extrinsic evidence regarding this issue, it should be noted that key provisions in the Agreement raise ambiguity regarding the plain meaning of those terms.

43 Section 251(c)(4) of the Telecom Act states that Qwest – as an incumbent local exchange carrier (“ILEC”) – has a duty to offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are

¹⁶ *Stender*, at 254.

¹⁷ *Berg*, at 669. The Court’s holding in *Berg* favoring the admissibility of extrinsic evidence was recently repeated in *Brown v. Scott Paper*, 143 Wn.2d 349, 20 P.3d 921 (2001).

¹⁸ Section 5.31.1 states: “This Agreement constitutes the entire agreement between Qwest and [Tel West] and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.”

not telecommunications carriers. The Federal Communications Commission (“FCC”) adopted rules¹⁹ implementing §251(c)(4), including Rule 51.605, which restates an ILEC’s duty under §251(c)(4). Pursuant to FCC Rule 51.607, the wholesale rate that an ILEC may charge for a telecommunications service provided for resale to other carriers is equal to the ILEC’s existing retail rate, less the amount of retail costs that are avoided by the ILEC as described in Rule 51.609.

44 Qwest’s duty pursuant to §251(c)(4) is also restated in Section 6.1.1 of the Agreement:

Qwest shall offer for resale at wholesale rates any Telecommunications Service that it provides at retail to subscribers who are not Telecommunications Carriers, subject to the terms and conditions of this Section. All Qwest retail Telecommunications Services are available for resale from Qwest pursuant to the Act and will include terms and conditions (except prices) in Qwest’s applicable product Tariffs, Catalogs, Price Lists, or other retail Telecommunications Services offerings. To the extent, however, that a conflict arises between the terms and conditions of the Tariff, Catalog, Price List, or other retail Telecommunications Services offering and this Agreement, this Agreement shall be controlling.

45 Thus, Qwest is not required to offer any Telecommunications Service for resale that it does not provide to its retail customers, although Qwest may agree to do so. If competing carriers desire to offer services that require the unbundling or combining of existing services, then the Telecom Act requires that those carriers purchase network elements subject to a different pricing standard.

46 Extrinsic evidence first must be considered to determine whether local Exchange Service and OS/DA services are separately provisioned by Qwest to its retail customers or whether they are part of the same retail service. If OS/DA services are separately provisioned, then Tel West is not required to accept access to OS/DA as part of local Exchange Service for purposes of resale. Tel West argues that Exchange Service, operator services, and directory assistance services are separate network platforms that should not be bundled together. However, that argument is not relevant to this proceeding. This proceeding is to interpret the Agreement, and not to arbitrate its terms.

47 Qwest witness David Teitzel states in response testimony that access to OS/DA is an integral part of Qwest’s retail local Exchange Service that it provides to residential and business customers in Washington.²⁰ Thus, under the first two sentences of

¹⁹ 47 C.F.R. § 51.601, *et seq.* The FCC’s rules are also attached as Appendix B to the *First Report and Order*, 11 FCC Rcd 15499 (1996).

²⁰ See Exhibit 47, at page 2-3.

Section 6.1.1, Qwest must provide local Exchange Service that includes OS/DA services to resellers.

48 Section 6.2.9 of the Agreement states:

If Qwest provides and [Tel West] accepts Qwest's directory assistance service or operator services for [Tel West's] resold local Exchange Service lines, IntraLATA, such directory assistance and operator services may be provided with branding as provided in the Ancillary Services Section of the Agreement.

49 Tel West argues that the plain and unambiguous meaning of the Agreement is that OS/DA are optional services, and that Tel West only receives OS/DA if it "accepts" them from Qwest. Additionally, Tel West argues that Sections 10.5.4 and 10.7.4 of the Agreement require that CLECs complete the "Qwest Operator Services/Directory Assistance Questionnaire for Local Service Providers" as a condition precedent to receiving either of those services. Tel West concludes that unless it accepts OS/DA by completing Qwest's questionnaire, the Agreement entitles Tel West to resell Qwest's local Exchange Service lines without accepting access to those services.

50 Qwest contends that Sections 10.5.4 and 10.7.4 are in place in order for the company to meet its obligation to provide non-discriminatory access to Qwest's OS/DA under Section 271 of the Act. According to Qwest, these provisions are contained separately in the Ancillary Services section of the Agreement because they apply to all carriers, not just resellers.²¹ Qwest argues that it meets its obligation to provide non-discriminatory access to OS/DA to resellers by virtue of the fact that OS/DA access is included with resold lines in the same manner that Qwest provides service to its own retail customers. According to Qwest, Sections 6.2.9, 10.5.4, and 10.7.4 merely provides resellers the same opportunity to rebrand OS/DA services that it provides to facilities-based carriers and carriers purchasing UNEs.

51 If Section 6.2.9 is understood to plainly mean that Tel West may choose whether to accept OS/DA services, as argued by Tel West, then it must also be understood to plainly mean that Qwest may choose not to provide those services. However, Qwest argues that other provisions in the Agreement and the Telecom Act require that the company provide OS/DA services as part of its local Exchange Service.

52 Section 4.7 of the Agreement defines "Basic Exchange Telecommunications Service," which is synonymous with "local Exchange Service" as that term is used in Section 6.2.9:

²¹ Other carriers include facilities-based carriers, or carriers purchasing unbundled network elements ("UNEs"). The Agreement contains sections for interconnection, collocation, and access to UNEs, in addition to the resale section.

Basic Exchange Telecommunications Service” means a service offered to end users which provides the end user with a telephonic connection to, and a unique local telephone number address on, the public switched telecommunications network, and which enables such end user to generally place calls to, or receive calls from, other stations on the public switched telecommunications network. Basic residence and business line service are Basic Exchange Telecommunications Services. As used solely in the context of this Agreement and unless otherwise agreed, Basic Exchange Telecommunications Service includes access to ancillary services such as 911, directory assistance and operator services.²²

53 Tel West’s argument that the words “access to ... directory assistance and operator services” in Section 4.7 means something different than the integrated provisioning of OS/DA services and local Exchange Service is unpersuasive. Use of the term “access” signifies that these services are made available for use. If access was not part of the provisioning process, then those services would not be available as part of local Exchange Service. The definition of “Basic Exchange Telecommunications Service” in the Agreement describes the telecommunications service that Qwest provides when provisioning local Exchange Service to its retail residential and business customers, including access to OS/DA services.

54 Thus, under Section 4.7, the parties must agree to an exception to Qwest’s provisioning of “Basic Exchange Telecommunications Service” as defined, in order for Qwest to exercise its discretion regarding the provisioning of local Exchange Service without access to OS/DA. The Agreement does not confer on Tel West the ability to unilaterally decide whether Qwest may provide local Exchange Service without access to OS/DA. Qwest’s duty to provide its retail telecommunications services for resale is firmly grounded in both the Telecom Act and FCC Rules.

55 From Tel West’s perspective, the words “[i]f Qwest provides and CLEC accepts” in Section 6.2.9 would be superfluous but for an agreement that Qwest was not required to provide OS/DA as part of local Exchange Service. Section 6.2.9 infers that the parties have agreed that Basic Exchange Telecommunications Service does not include access to OS/DA, but that section alone does not constitute such an agreement. Before Qwest can choose whether or not to provide access to OS/DA services and Tel West can choose whether or not to accept access to OS/DA services for its resold local Exchange Service lines, the parties must agree to that arrangement. No terms or conditions constituting such an agreement are stated within the four corners of the Agreement.

²² This definition is consistent with RCW 80.36.600(6)(b), which defines “basic telecommunications services” in the context of an universal service program.

56 Both Qwest and Tel West make good arguments in support of their contrary interpretations of the meaning of relevant terms in the Agreement. The words that comprise those terms in the Agreement are reasonably capable of being understood in more than one sense, and, therefore, the Agreement is ambiguous.

F. TEL WEST MUST ACCEPT ACCESS TO OS/DA AS PART OF ITS RESOLD LOCAL EXCHANGE SERVICE LINES

57 Tel West's sole witness at hearing was Jeffrey Swickard. Mr. Swickard became employed by U S WEST in the same year that Congress enacted the Telecommunication Act of 1996. *Exhibit No. 1, at page 1*. Two years later, at the time of the U S WEST strike in 1998, Mr. Swickard founded Tel West and continues to serve as the company's president. *Exhibit No. 1, at page 1-2*. As Tel West's president, Mr. Swickard oversees and manages all aspects of Tel West's business, notably ordering, provisioning, and dispute resolution. *Exhibit No. 1, at page 2*. Mr. Swickard's day-to-day responsibilities include managing a variety of internal management personnel in a customer service operations group, a provisioning group, and a bill auditing group, and external consultants, lawyers, and accountants. *TR at 218-19*.

58 Tel West entered into an agreement for service resale with Qwest in 1998.²³ Under the terms and conditions of that agreement, Tel West agreed to accept access to OS/DA as part of its resold local Exchange Service lines. *Exhibit No. 7, Section IV.E.9, at page 10*. That same paragraph of the 1998 Resale Agreement also states terms regarding the branding of OS/DA services. According to Mr. Swickard, Tel West requested no changes to the 1998 Resale Agreement submitted by Qwest because Tel West was unaware that they could negotiate. *Exhibit No. 1, at page 3*. However, that representation is contradicted by recitals and terms stated in that agreement.

59 Section I of the 1998 Resale Agreement states that Tel West requested that U S WEST negotiate an agreement with Tel West pursuant to the Act and in conformance with U S WEST's duties under the Act. That section also states that the parties arrived at their agreement through voluntary negotiations undertaken pursuant to the Act. Section II.D of the 1998 Resale Agreement states that the agreement was entered into as a result of both private negotiations between the parties and incorporation of some of the results of arbitrated decisions by the Commission, acting pursuant to Section 252(b) of the Act.

60 Mr. Swickard's testimony regarding the circumstances under which the 1998 Resale Agreement was established is not credible in light of the very terms of that agreement. Furthermore, it is not reasonable that Mr. Swickard, a well-educated ex-U

²³ See Exhibit 7, the 1998 Resale Agreement.

US WEST manager, was not aware of provisions in Section 252 of the Telecom Act providing for negotiation and arbitration of unresolved disputes between parties.²⁴ During the 1996-98 time period, the implementation of the Telecom Act was an ever-present topic in the popular and trade press.

- 61 During the effective period of the 1998 Resale Agreement, Mr. Swickard repeatedly complained to U S WEST – and later Qwest after the June 2000 merger – that it was unreasonable that access to OS/DA be made part of local Exchange Service lines, but Qwest was unwilling to modify those terms of the agreement. *Exhibit No. 1, at page 4.*
- 62 Mr. Swickard directed Mr. Donald Taylor, an outside consultant, to negotiate with Qwest on a number of issues that Tel West considered important. *TR at 220.* Thus, Mr. Taylor reported directly to Mr. Swickard. The provisioning of access to OS/DA as part of local Exchange Service was a major issue in Tel West’s list of negotiating objectives. *TR at 287.*
- 63 On May 1, 2001, Mr. Taylor sent an email to Ms. Nancy Donahue at Qwest, notifying Qwest that he represented Tel West and that Tel West requested to negotiate a new interconnection agreement. *Exhibit No. 62.* Mr. Taylor also sent a copy of his email to Mr. Swickard. Qwest’s business practice at that time was to transmit an electronic version of its then-current version of an interconnection agreement to the CLEC requesting to negotiate so that the CLEC could red-line the agreement and propose changes. *See Exhibit Nos. 62 and 63.* On the same day that Qwest received Tel West’s request, Qwest sent an electronic version of its SGAT template for Washington – dated March 16, 2001 – to Mr. Taylor. *Exhibit Nos. 60, 61, and 62.*
- 64 Mr. Swickard’s testimony demonstrates that he was actively involved at the outset of negotiations with Qwest, and that Mr. Taylor was acting on behalf of Tel West. Mr. Swickard testified about negotiations between Tel West and Qwest:
- We* made it clear to Qwest that *we* wanted an agreement that did not require Tel West to order or accept OS/DA services. Attached as Exhibit A is *our* letter to Qwest requesting the new contract and explaining the needs of Tel West in the new contract. (*Emphasis added*). *Exhibit No. 1, at page 4.*
- 65 The Exhibit A mentioned above is the May 10th Letter.²⁵ Mr. Swickard’s use of the plural pronoun mixed with references to Tel West establishes that he was actively involved with Mr. Taylor in drafting the May 10th Letter and in formulating Tel

²⁴ Mr. Swickard graduated from the University of Oregon in 1994 with a degree in Business Management. *See Exhibit No. 1, at page 1.*

²⁵ *See Exhibit No. 2.*

West's negotiating positions as set forth in that letter. This finding is consistent with Mr. Swickard's duties as president of the company.

66 The May 10th Letter implicitly acknowledges receipt of the March SGAT template agreement.

Rather than sending a red-lined template of the Qwest SGAT at this time, I have decided to provide you with bullet points of Tel West's objectives for a new contract. Exhibit 2, page 1, third full paragraph.

67 Tel West argues that it did not receive a copy of the Qwest SGAT template prior to the May 10th Letter, and argues that the May 10th Letter does not refer to any particular Qwest SGAT template, whether Qwest had provided one or not. *Exhibit No. 57*. It is not reasonable that Tel West would mention "sending a red-lined template ... at this time" if it were not capable of doing so. Tel West would only be capable of doing so if it had received a version of the Qwest SGAT as indicated in Qwest's internal email. Exhibit No. 2 validates Exhibit No. 62.

68 Paragraph 6.2.9 of the March 2001 SGAT template is identical to the same numbered paragraph in the current Agreement. Tel West's May 10th Letter to Qwest states the company's objectives for a renegotiated interconnection agreement, including the objective that local Exchange Service lines be made available without access to OS/DA. The May 10th Letter also states:

If we can incorporate these objectives into the SGAT or some other contract template, Tel West is agreeable to doing that.

69 Mr. Taylor received the March 201 SGAT template from Qwest on or about May 1, 2001, and it is reasonable to conclude that Mr. Taylor read the proposed agreement before inferring that the agreement did not meet Tel West's objectives in the May 10th Letter. Furthermore, if the language in paragraph 6.2.9 did not meet Tel West's objectives in March, then it did not meet its objectives in August, because the language did not change.

70 Mr. Taylor and Ms. Donahue discussed Tel West's request for revised terms in its new interconnection agreement on May 11, 2001. Mr. Taylor's notes from that negotiating session indicate that Ms. Donahue was unsure whether Qwest would agree that Tel West could resell lines that did not include OS/DA, and his notes state that Ms. Donahue agreed to forward the request to Qwest's product management and legal divisions. *Exhibit No. 19, at page 4*. Mr. Taylor's notes reflect that Qwest did not agree that Tel West could resell local Exchange Service lines without accepting access to OS/DA. Qwest's conduct also constituted notice to Tel West that Section 6.2.9, as drafted, was not an agreement that Tel West could do so. Mr. Taylor's notes indicate that the parties agreed to speak again on May 21, 2001.

- 71 Mr. Taylor's notes from the May 21, 2001, negotiating session indicate that Ms. Donahue was joined by Qwest product management and legal personnel, including Ms. Bev Beuster. *Exhibit No. 19, page 5*. In spite of attendance by Qwest product management and legal personnel at that session, Mr. Taylor's notes indicate that there was no answer from Qwest regarding the OS/DA issue.
- 72 According to Mr. Taylor's notes, Bev Beuster mentioned that there were current agreements available for numerous states, including Washington. Later on May 21, Ms. Beuster sent email to Mr. Taylor with the subject line, "Your requests – Draft for redline to start for AZ/OR/WA." Attached to the email was an electronic version of Qwest's SGAT template dated May 14, 2001. *Exhibit Nos. 63 and 64*.
- 73 Mr. Taylor's notes establish that he understood that the May 2001 SGAT template transmitted later in the day had been drafted prior to the negotiating session. Section 6.2.9 contains the same language as that section in both the March 2001 SGAT template and Tel West's current Agreement. Again, Mr. Taylor's notes reflect that Qwest did not agree that Tel West could resell local Exchange Service lines without accepting access to OS/DA. And again, Qwest's conduct constituted notice to Tel West that Section 6.2.9, as drafted, was not an agreement that Tel West could do so.
- 74 Mr. Taylor's notes dated May 21 indicate that another session was planned for June 4, 2001, but there are no other documents regarding subsequent negotiations in the record. Qwest points out that footer information in the Agreement documents that it is based on Qwest's SGAT template that was emailed to Mr. Taylor on May 21, 2001. A side-by-side comparison of Exhibit 64 and the Agreement disclose that that they are not identical; however – as discussed above – language at Section 6.2.9 remains unchanged.
- 75 Mr. Swickard's testimony that he did not review Mr. Taylor's notes from the negotiating sessions prior to the date of the hearing in this case is contradicted by Tel West's response to the data request under which Mr. Taylor's notes were produced, which was prepared by Mr. Swickard.²⁶ Mr. Swickard infers throughout his testimony that he was not informed about the ongoing status of negotiations between Mr. Taylor and Qwest. However, that inference is not consistent with his duties and his working relationship with Mr. Taylor. Mr. Swickard's testimony regarding his understanding of Section 6.2.9, including the inference that he was uninformed about the status of negotiations, is not credible.
- 76 Mr. Swickard testified that Tel West received a copy of the Agreement in July. *TR at 284*. Mr. Swickard thereafter testified that he received a copy of the Agreement in August. *TR at 285*. However, Mr. Swickard sent a letter complaining about Qwest's

²⁶ TR at 231-32, and Exhibit No. 19.

conduct to Mr. Glenn Blackmon, Commission Staff's Assistant Director-Telecommunications, on Friday, July 27, 2001 ("July 27th Letter").²⁷ The July 27th Letter was sent after Tel West's negotiations with Qwest had concluded, but before Mr. Swickard's signed the Agreement on August 8, 2001.

- 77 The July 27th Letter appears to have been drafted after receipt and review of the Agreement, including review of the disputed Section 6.2.9. Even if this were not the case (Tel West could have been received the Agreement during the last few days of the month), Tel West had received previous versions of the agreement containing the same language at Section 6.2.9. Mr. Swickard either knew at the time that the July 27th Letter was signed that Section 6.2.9 did not allow Tel West to resell local Exchange Service lines without accepting access to OS/DA.
- 78 The July 27th Letter was subsequently reformatted with minor changes and filed as Tel West's Initial Complaint on October 31, 2001.²⁸ Mr. Swickard testified that the Initial Complaint was originally drafted by Mr. Taylor – at Mr. Swickard's request – to present Tel West's complaints against Qwest. *TR at 235-36*. Thus, Mr. Taylor was also the principal author of the July 27th Letter. At the time that Mr. Taylor drafted the July 27th Letter, he was in receipt of at least two versions of Qwest's SGAT template containing the Section 6.2.9 language that he knew did not meet Tel West's OS/DA objective. Tel West's inference that Mr. Taylor did not disclose his prior knowledge regarding the meaning of Section 6.2.9 to Mr. Swickard prior to July 27, 2001, is not credible.
- 79 Mr. Swickard repeatedly infers that Mr. Taylor's knowledge and acts should not be imputed to Tel West. Even if the record did not support the conclusion that Mr. Taylor was acting under the direction and control of Mr. Swickard – which it does – Mr. Taylor was acting on behalf of Tel West at all times pertinent to this matter. His acts and his knowledge, as established by extrinsic evidence, are imputed to Tel West.
- 80 The more reasonable conclusions to be drawn from the July 27th Letter and the events that followed are that: 1) Tel West received the Agreement prior to July 27, 2001; 2) Mr. Swickard understood that Section 6.2.9 did not allow Tel West to resell local Exchange Service lines without accepting access to OS/DA; 3) Mr. Swickard sought intervention by Commission Staff to assist Tel West's efforts to meet its OS/DA objective; 4) Mr. Swickard signed the Agreement, even though the parties did not agree that Tel West could resell local Exchange Service lines without accepting access to OS/DA (thus, preserving the status quo); and 5) Mr. Swickard continued to believe that Qwest's requirement was unfair.

²⁷ See Tel West's First Amended Petition for Enforcement ("First Amended Petition"), Exhibit C.

²⁸ See Exhibit No. 6.

81 Mr. Swickard states in the July 27th Letter, “As a general comment, Tel West is dissatisfied with Qwest as a vendor of wholesale telecommunications services, for a number of reasons.” Tel West enumerates and discusses several ongoing violations that began during the 1998 Resale Agreement. Tel West then discusses additional “noncontract [sic] related complaints against Qwest as a wholesale services provider,” including Qwest’s requirement that access to OS/DA be made part of its resold local Exchange Service lines.

In addition to violating the terms of its Agreement with Tel West, Qwest’s customer service and provision of products demonstrate clearly that it has not fully or adequately addressed the needs of the resale market. For example, much of Tel West’s customer base consists of end users that have been disconnected or denied service due to credit or payment issues with Qwest. Tel West offers an alternative means of providing basic telephone service for those customers, but blocks access to network services that incur additional charges over and above the basic line rate charged to the end user, such as toll calls and directory assistance. This arrangement benefits Qwest, as it allows Qwest to receive revenues from end users, although indirectly, from whom it would not otherwise receive revenues. It would be better and more efficient if Qwest would, upon request from Tel West, simply block access to the codes associated with these services. ***Qwest, however, requires Tel West to order separate features, with additional charges, to block access to these codes.*** Although requiring these added-cost blocking features is not a violation of its Agreement with Tel West, it demonstrates clearly that Qwest shows no interest in working with Tel West as a valued customer and co-provider of service. ... ***Tel West has repeatedly attempted to work with Qwest to resolve these problems ... but without success.*** *First Amended Petition, Exhibit C, at page 4-5.*

82 Tel West’s argument that the July 27th Letter must be read strictly within the context of the 1998 Resale Agreement, and that the letter does not reflect the status of subsequent negotiations between the parties, is unpersuasive.

83 Tel West’s reference to its repeated attempts to “work with Qwest to resolve these problems” reasonably refers to the negotiation sessions conducted by Mr. Taylor. There is no other evidence of Tel West repeatedly attempting to work with Qwest to resolve the OS/DA problem. The statement that Tel West’s negotiations with Qwest were “without success” constitutes a concession that Qwest, subsequent to concluding negotiations, did not agree that Tel West could resell local Exchange Service without accepting access to OS/DA. If Mr. Swickard believed that Tel West was not obligated to accept OS/DA services as part of its resold local Exchange Service lines, then there would be no compelling reason for him to request assistance from Commission Staff in that regard.

84 Mr. Swickard signed the Agreement on behalf of Tel West on August 8, 2001. Tel West's argument that Mr. Swickard was out of the negotiating loop and that his first exposure to the language in Section 6.2.9 was just before signing the Agreement on August 8, 2001, is unpersuasive. Mr. Swickard's testimony that he wasn't part of the negotiation between Qwest and Tel West other than signing the Agreement once it was completed is insincere and misleading at best. *TR at 25*. Although Mr. Swickard did not meet with Qwest negotiators in person, it is readily apparent from the body of extrinsic evidence in this case that he actively developed Tel West's negotiating positions and that he managed the negotiations.

85 Furthermore, Mr. Swickard's testimony that his understanding of the meaning of Section 6.2.9 is *solely* based on his reading of the Agreement before signing it, is not credible. Mr. Swickard's assertion that he did not consult with Mr. Taylor at the time that he reviewed the Agreement is so excessively imprudent that it is also unbelievable.

86 In his prefiled testimony, Mr. Swickard states:

Based on my understanding, Tel West's obligations for OS/DA changed under the Current Agreement, which was effective on October 31, 2001. Once that agreement became effective, I informed Qwest's billing account managers that Tel West will no longer accept these services from Qwest. *Exhibit No. 1, at page 4*.

87 However, Mr. Swickard knew some time before the effective date of the Agreement that Qwest's position regarding OS/DA was unchanged. On October 10, 2001, Mr. Swickard signed a "Notice to Qwest of Intent to File a Complaint" that was served to Qwest in accordance with the requirements of WAC 480-09-530. *First Amended Petition, Exhibit C*. Among the complaints against Qwest that are listed in the Notice is "Requiring added-cost toll and directory assistance blocking features." Tel West argues that this Notice is solely based on the 1998 Resale Agreement (the same that it makes regarding the July 27th Letter). However, at that point in time Mr. Swickard had already signed a new agreement that, according to his testimony, did not require added-cost toll and directory assistance blocking features. Tel West offers no reasonable explanation why it would complain about such a requirement if no such requirement existed in the Agreement that was pending approval before the Commission.

88 Significantly, Mr. Swickard characterizes the OS/DA issue as a "non-contract related" complaint, as evidence of Qwest's failure to treat Tel West as a valued wholesale customer. That complaint has substantial merit. Tel West's claim that Section 6.2.9 allows Tel West to resell local Exchange Service lines without accepting access to OS/DA services has none. Mr. Taylor, Tel West's negotiator, is

listed in the October 10th notice as the person for Qwest to contact to discuss matters prior to the formal filing of a complaint.

89 Tel West filed its Initial Complaint on October 31, 2001, the same day that the Commission considered and approved the Agreement in an open public meeting. The Initial Complaint again characterizes the OS/DA issue as a “non-contractual complaint,” and restates the concession that Qwest’s charging Tel West for blocking features is not a violation of its agreement with Tel West.

Although charging Tel West for these blocking features is not a violation of its Agreement with Tel West, it demonstrates clearly that Qwest shows no interest in working with Tel West as a valued wholesale customer and co-provider of service to end users. *Initial Complaint, at page 9.*

90 If Mr. Swickard’s testimony is accepted as truthful, then the allegation in the Complaint is false. That is, if Qwest had provided a new Agreement that did not require Tel West to accept access to OS/DA as part of its resold local Exchange Service lines prior to the Initial Complaint (as Mr. Swickard testified), then, in doing so, Qwest would have demonstrated that it *was* interested in working with Tel West as a valued wholesale customer, from Tel West’s perspective. The Initial Complaint only makes sense from the point of view that Tel West was unsuccessful in its negotiations with Qwest to change terms and conditions governing the resale of Qwest’s local Exchange Service lines.

91 Tel West argues that because the Initial Complaint is substantially similar to the July 27th Letter, because the complaint specifically refers to the 1998 Resale Agreement, and because the complaint makes no specific reference to the Agreement, it follows that the Initial Complaint does not relate to the Agreement which had not yet become effective. That argument is unpersuasive. The Commission does not consider Tel West’s conduct in a vacuum. Tel West made numerous edits to the July 27th Letter before filing the text as the Initial Complaint. If Tel West no longer considered OS/DA to be a “non-contractual complaint” based on its successful negotiations then it should have deleted that reference from the document.

92 To be clear, Tel West does not argue that the reference to OS/DA as a “non-contractual complaint” in the Initial Complaint was made in error, and that the cause of action was actually contractual in nature. To do so would constitute an admission that Tel West was aware that a contractual dispute existed prior to the Commission’s approval of the Agreement as having been fully negotiated. If Tel West had believed that there was a substantive dispute regarding the negotiated agreement prior to its approval by the Commission, then Tel West had a duty to inform the Commission.²⁹

²⁹ There was no reason for Qwest to notify the Commission because Tel West had repeatedly characterized the OS/DA issue as non-contractual in nature.

An interconnection agreement is not fully negotiated if the parties disagree regarding the terms and conditions of the agreement, which does not become effective until approved by the Commission pursuant to Section 252 of the Telecom Act.

- 93 Rather, Tel West suggests that the Commission construe the Initial Complaint in the narrowest manner imaginable. The more reasonable explanation, by far, is that Tel West meant exactly what is pled in the Initial Order. That is to say, Tel West's negotiations with Qwest to change the definition and provisioning of local Exchange Service for resale were unsuccessful, and Tel West understood that to be the case prior to the July 27th Letter.
- 94 Mr. Swickard testified that changes in language from the 1998 Resale Agreement to the current Agreement changed the meaning of terms regarding whether access to OS/DA was required as part of local Exchange Service. *Exhibit No. 1, at page 5.* Although some language change would be necessary in order to affect a change from the 1998 Resale Agreement, a change in language does not constitute a change in meaning per se.
- 95 According to Mr. Swickard, Qwest never informed Tel West during negotiations that Tel West would be required to accept access to OS/DA services as part of resold local Exchange Service lines. *Exhibit No. 1, at page 5.* However, Mr. Swickard's statement implies that he is knowledgeable regarding the full scope of negotiations between the parties, a position he also disavows. Mr. Swickard appears to be the victim of his own frustration.
- 96 At this point of conclusion, it is important to re-emphasize that this proceeding is not an arbitration. The issue to be resolved is not whether Qwest should be required to provide its local Exchange Service lines for resale without access to OS/DA services. The issue to be resolved in this proceeding is whether the Agreement allows Tel West to resell local Exchange Service lines without accepting access to OS/DA, applying the "context rule" of contract interpretation.
- 97 Based on Tel West's request to negotiate on May 1, 2001, Section 252(b)(1) of the Telecom Act authorized the parties to petition for arbitration between the dates of September 13, 2001, and October 8, 2001.³⁰ Tel West was aware of its rights to petition the Commission to arbitrate its OS/DA claim, and choose not to do so.
- 98 Qwest's interpretation of Section 6.2.9 of the Agreement is more reasonable than Tel West's interpretation, based on language in the Agreement and extrinsic evidence in the record. The Agreement requires Qwest to provide, and Tel West to accept, local Exchange Service lines for resale just as Qwest provides that service to its retail customers.

³⁰ Under that scenario, the Commission would have produced an Initial Order by February 1, 2002.

G. QWEST DID NOT NEGOTIATE THE AGREEMENT IN GOOD FAITH

- 99 Among the relief sought by Tel West is the request that the Commission find that Qwest's acts constituted "willful or intentional misconduct" under Section 5.8.4 of the Agreement, and "intentional, malicious misconduct" under Section VIII.H of Exhibit 7, the 1998 Resale Agreement.³¹ Both of those provisions are stated in limitation of liability sections in the respective agreements.³² Qwest's First Amended Answer states that the company opposes all relief requested by Tel West.
- 100 Because this Order finds that Qwest is not obligated to provide local Exchange Service without access to OS/DA services as argued by Tel West, there is no basis to conclude that Qwest's related conduct constituted willful or intentional misconduct.
- 101 However, Qwest was also under a duty pursuant to Section 251(c)(1) of the Telecom Act to negotiate the Agreement in good faith. Section 251(c)(1) states that each incumbent local exchange carrier has "[t]he duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection." Section 251(b)(1) states that each local exchange carrier has "[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services."
- 102 Qwest's position throughout negotiations and this proceeding has been that Tel West is not entitled to resale local Exchange Service lines without accepting access to OS/DA, and that Tel West must order other retail services to block or screen access. That position is upheld in this Order and is consistent with the company's duty under § 251(c)(1). However, Qwest, as a wholesale service provider, must work with its wholesale customers to identify alternative retail and wholesale product options that are available. Qwest's failure to identify available alternative products imposed an unreasonable or discriminatory condition or limitation on the resale of local Exchange Service lines by Tel West. Qwest's conduct during negotiations breached its duty to act in good faith as contemplated by the Act.
- 103 The Commission has undertaken a collective of cases to establish requirements for Qwest's conduct as a bona fide wholesale provider of retail services for resale and network elements to competitive carriers. But the very essence of the enactment of a duty of good "faith" recognizes that it is not possible to expressly catalogue all instances of permissible or impermissible conduct. While Qwest's conduct may not constitute willful or intentional misconduct under the terms of the Agreement, it is

³¹ See Tel West's First Amended Petition for Enforcement (January 11, 2002), at Para. 33(d)(2).

³² Section 5.8.4 of the Agreement states: "Nothing in this Section shall limit either Party's liability to the other for willful or intentional misconduct."

clear that Qwest did not negotiate the terms of the Agreement with Tel West in good faith. The fact that this matter comes to light many months after negotiations have concluded is of no consequence.

104 Although Mr. Swickard's testimony regarding Tel West's understanding of the meaning of Section 6.2.9 of the Agreement is not credible, his testimony regarding Qwest's lack of interest in working with Tel West as a valued customer is supported by the record. Mr. Swickard frequently complained to Qwest's account representatives that it was unreasonable for Qwest to require Tel West to accept OS/DA and order blocking services.³³

105 Tel West also informed Qwest of its need to develop an alternative to the provisioning of resold local Exchange Service supplanted by Dial Lock (for outgoing calls) and billed number screening ("BNS") (for incoming and third-party billing calls) at the outset of negotiations. In correspondence dated May 10, 2001 (Exhibit 2), Donald Taylor wrote to Qwest that it needed a new agreement for resold local Exchange Service lines that did not include access to OS/DA services, or one that provided for volume discounts for products, such as Dial Lock, that Tel West resold in quantity.³⁴ The May 10th Letter expressed the high level of frustration experienced by Tel West in its business dealings with Qwest.

106 The May 10th letter also states:

Tel West is very interested in continuing to have a good business relationship with Qwest, but in order to provide attractive telecommunications choice to the general public, Tel West needs to improve its competitive position relative to Qwest's provision of services to its own end users. This of course, is the intent of the 1996 Telecom Act under which this agreement is being negotiated.

107 A fundamental component of Tel West's retail service to its customers is the provisioning of local Exchange Service without the opportunity for customers to incur OS/DA-related charges. To that end, Tel West's standard business practice is to order Dial Lock and BNS for 100% of its resold local Exchange Service lines. In those instances where Dial Lock is unavailable, Tel West orders Qwest's less effective toll restriction service.³⁵

108 Tel West continued to reiterate its need to improve its competitive position during negotiations with Qwest.³⁶ However, Qwest did not offer or recommend alternatives to its combination of Dial Lock and BNS products until after Tel West filed its

³³ Exhibit No. 1, at page 4-5.

³⁴ Exhibit No. 2.

³⁵ Exhibit No. 12.

³⁶ Exhibit No. 19.

complaint.³⁷ One product that was subsequently identified, CustomNet, is a tariffed Qwest service that restricts certain types of calls much like Dial Lock, but which is substantially less costly on a monthly basis. CustomNet is not mentioned as an available ancillary service in the Agreement.

- 109 Another alternative service that was not disclosed until after Tel West filed its complaint is a version of a wholesale service called Custom Routing. Although a standard offering for Custom Routing is referred to in the ancillary services section of the Agreement, it is significantly different than the version that was subsequently proposed to Tel West.
- 110 Qwest has demonstrated its ability to bring the best and brightest of its personnel to the forefront and to develop creative solutions to disputes with competitive carriers after litigation is initiated, but there is no reasonable explanation as to why the company couldn't provide the same level of customer service during negotiations. As demonstrated by this case, by the time that a party is frustrated to the point of initiating litigation, the incentive to further negotiate for the sake of the business relationship is substantially impaired.
- 111 It is not reasonable that Tel West, as a purchaser of Qwest's wholesale services, should be responsible for being familiar with all of Qwest's services that are made available in tariffs, especially when the Agreement makes no mention of those services. Qwest has a duty to make alternative less costly products/services known to its customers. Qwest deprived Tel West from making an informed decision regarding its options to screen or block OS/DA services by not fully disclosing the alternative services that were available. Qwest's bad faith conduct in this case is aggravated by the fact that Qwest originally recommended Dial Lock to Tel West as a way of blocking end user access to OS/DA services, but subsequently attempted to restrict its availability to resellers.³⁸
- 112 Mr. Swickard testified that custom routing is not a viable solution for Tel West.³⁹ However, it appears that CustomNet will solve all problems associated with Dial Lock, including Qwest's problems with Dial Lock's reliability. Dial Lock carries a non-recurring charge of either \$7.00 (residential) or \$11.00 (business) and a recurring charge of \$3.95 per month.⁴⁰ In comparison, CustomNet carries a nonrecurring charge of \$24.00, which is only assessed if this service is added subsequent to the initial establishment of the customer's service, and a recurring rate of \$2.00 per month.⁴¹

³⁷ TR at 353. Exhibit No. 12.

³⁸ TR at 359-362. See Exhibit No. 43. Qwest's attempt to withdraw the Dial Lock service from Tel West as a reseller is rejected elsewhere in this Order.

³⁹ Exhibit No. 1, at page 9-10.

⁴⁰ Exhibit No. 47, at page 5.

⁴¹ Exhibit 47, page 4-5.

- 113 Qwest now recommends that Tel West order CustomNet as a less expensive alternative to Dial Lock for blocking services.⁴² According to Qwest, if CustomNet is ordered at the time that service is initially established for a residential customer, the comparable Dial Lock non-recurring charge of \$7.00 is eliminated, and the comparable monthly charge of \$3.95 is reduced to \$2.00. Although there may be some instances where CustomNet is not fully compatible with other custom features in Qwest central offices,⁴³ that incompatibility would impact a minority of Tel West customers because Tel West routinely provisions blocks for other custom calling features.⁴⁴
- 114 The major disincentive to Qwest's CustomNet service is the \$24.00 non-recurring charge that is imposed when the service is ordered subsequent to the initial installation of the access line, or when the service is changed.⁴⁵ If Tel West changes blocking service from Dial Lock to CustomNet for its existing resold local Exchange Service lines, the company would incur the \$24.00 non-recurring charge for each line. Tel West's existing resold local Exchange Service lines includes lines that have been ordered subsequent to its request to negotiate on May 1, 2001, and for which the CustomNet nonrecurring charge would have been \$0 if the service had been concurrently ordered instead of Dial Lock. However, Qwest's conduct ensured that Tel West did not consider the CustomNet service alternative.
- 115 Tel West's resold Exchange Service lines also include customers that Tel West acquired subsequent to initiating negotiations when Tel West bought the customer bases of other companies, such as Reconnex.⁴⁶ Although Tel West transferred those customers instead of disconnecting and reconnecting them the way it ordinarily orders residential lines from Qwest, Qwest's conduct precluded Tel West from considering the CustomNet service as part of its provisioning decision.
- 116 Qwest, as a direct consequence of its breach of duty to negotiate in good faith, must allow Tel West to change blocking services from Dial Lock to CustomNet on any or all of Tel West's resold local Exchange Service lines, and to pay non-recurring charges as if Tel West was requesting CustomNet at the time of initially establishing service.
- 117 If the number of eligible Tel West resold lines were limited only to those lines for which service was actually initiated or acquired since negotiations began, then Qwest

⁴² TR at 301, 323-24.

⁴³ Qwest witness Teitzel testified that CustomNet is not available with Call Waiting in smaller central offices where DMS-10 switches are deployed. TR at 328-29, 334-35.

⁴⁴ TR at 296-97.

⁴⁵ See Exhibit No. 48, at page 3; Qwest Tariff WN U-40, Section 10, Original Sheets 2-4, CUSTOMNET Service.

⁴⁶ TR at 293.

would be left in no worse position for having breached its duty to negotiate in good faith, and there would be no incentive for Qwest to comply with its duty in future negotiations. Furthermore, if the number of Tel West's resold lines eligible for change at \$0 non-recurring charge were limited to service initially established or acquired since negotiations began, then Tel West would incur additional operational costs to identify and document those lines which would be eligible. Tel West has paid months of higher priced recurring charges to Qwest for Dial Lock than it would have paid if Qwest's CustomNet service recommendation had been presented in good faith. Finally, CustomNet service changes would benefit Qwest due to the unreliability of the Dial Lock service and the ongoing credits for which Qwest is liable.

118 Qwest must implement qualified CustomNet service change requests from Tel West within the standard time allowed for such changes under Qwest's tariffs or the Agreement. If no time is established by tariff or agreement, then the time to process changes must be no later than the time allowed for processing orders to initially establish local Exchange Service, including allowances for the receipt of a large number of service orders at one time. Tel West must submit its Dial Lock to CustomNet service change requests to Qwest within 60 days after a Commission final order is entered in order to qualify its resold lines for payment of non-recurring charges as if Tel West was requesting CustomNet at the time of initiating local Exchange Service.

H. QWEST IS LIABLE FOR USAGE-BASED CHARGES WHERE BLOCKING OR SCREENING SERVICES HAVE BEEN ORDERED

119 A substantial portion of the record concerns the issue of which party should assume liability for certain "pay-per-use" calls – regardless of how that term is defined – that are made in spite of blocking or screening services that have been activated to prevent those calls from occurring. Tel West argues that Qwest should be liable for those charges. *TR at 395-96*. Tel West orders Dial Lock to block certain outgoing pay-per-use calls on all lines that it orders, where available. Where Dial Lock is not available, Tel West orders toll restriction service. *Exhibit No. 12*. However, toll restriction does not block access to directory assistance calls. *TR at 323-24*. Tel West also orders billed number screening ("BNS") to block certain incoming pay per use calls on all lines that it orders, where available. *Exhibit No. 12*.

120 Other pay per use features exist, such as continuous redial, three-way calling, call back calling, and last call return. *TR at 262-63, 287-88*.⁴⁷ According to Mr. Swickard, blocking services are currently available for these features and are available at no charge when Tel West orders them when service is initiated. *TR at 287-88*.

⁴⁷ See also Section 6.3.5 of the Agreement.

- 121 Tel West contends that its customers are also Qwest's customers where Tel West orders blocking and screening services, but Qwest allows charges to be incurred. Hence, Tel West argues that Qwest should collect those charges directly from those end users, and not from Tel West.
- 122 Qwest argues that Tel West should be responsible for charges that are incurred by its customers pursuant to Section 6.3.5 of the Agreement. According to Qwest, Section 6.3.5 of the Agreement obligates Tel West to pay Qwest whenever Tel West customers activate any services or features that are billed on a per use or per activation basis, regardless whether a blocking or screening service has also been ordered. Qwest argues that Tel West does not make a sufficient effort to discourage its customers from making calls or accessing services that incur additional charges. Qwest attempted to show through evidence that Tel West attempts to collect usage-based charges from its customers at the same time that Tel West disputes those charges with Qwest. Qwest also contends that Dial Lock is not an appropriate service for purposes of resale. *TR at 359-61.*
- 123 Qwest also attaches a copy of an order by the Oregon Public Utilities Commission to its Prehearing Brief that addresses similar issues and supports some of the arguments made by Tel West.⁴⁸ Although Qwest does not overtly recommend that the Commission adopt the Oregon Commission's findings, the attached inference is that Qwest does not object to similar outcomes in this proceeding.
- 124 Based on the record, it appears that the only categories of usage-based charges that are at issue relate to operator services and directory assistance calls. Additionally, there is no dispute regarding the fact that Tel West is Qwest's end user of record. At the outset, it is necessary to address arguments that Tel West has misrepresented its billing and collection practices regarding usage-based charges, and that Tel West acts improperly by billing its customers and submitting disputes to Qwest at the same time.
- 125 Tel West has been placed in the untenable position of either attempting to pass these charges on to its customers or to risk liability with no reasonable means of reimbursement due to Qwest's ongoing attempts to collect these charges from Tel West, and Qwest's lethargy in processing billing disputes. Whatever discrepancies may exist between Tel West's billing and collection policies and its actual practices are directly related to Qwest's own unreasonable practices. While there are reasons to believe that these issues will not recur, it should be made clear that the

⁴⁸ Oregon Public Utility Commission, *In the Matter of an Investigation of Toll restriction Service, Billed Number Screening, Local Exchange Carrier Billing and Collection Practices, and Related Issue*, Order, UM 775 Order No. 97-165, PUR 4th Slip Opinion (entered May 5, 1997).

Commission finds no misrepresentation or misconduct on Tel West's part in this regard.

- 126 Qwest requires that Tel West, as a resellers of its local Exchange Service lines, also purchase retail blocking and screening services to compensate Qwest for its product costs. In that situation, Tel West has no technical control over essential network facilities and operations that are essential to block and screen usage-based charges, and is totally reliant on Qwest.
- 127 Qwest must assume the risk that its blocking and screening services may not perform 100% of the time. If Qwest's service does not consistently perform up to acceptable standards, then Qwest must take steps to either improve service performance or to develop alternative products that are economically viable and attractive to its wholesale customers.
- 128 If Tel West orders blocking or screening services to avoid incurring OS/DA charges, then Qwest must either remove those charges from Tel West's account or not bill them in the first instance. Qwest must also either remove charges from Tel West's account or not bill Tel West where Tel West has ordered BNS, and Qwest does not check for or honor a BNS indicator. Qwest is also responsible for ensuring that its relevant databases are up-to-date.
- 129 If certain Qwest blocking or screening services are not available due to technical feasibility, such as those instances where Dial Lock is not available and Tel West orders toll restriction, then Tel West must take other measures to protect itself from liability for usage-based charges that may be incurred by its customers.

I. TEL WEST AND QWEST MUST SUBMIT DISPUTES AND EXPEDITE INVESTIGATIONS IN GOOD FAITH

Background

- 130 During the effective term of the 1998 Resale Agreement, Tel West submitted billing disputes to Qwest on a monthly basis which were not processed by Qwest or jointly resolved by the parties in accordance with that agreement.⁴⁹ These billing disputes remained unprocessed and unresolved when the current Agreement became effective.
- 131 Section 5.4.4 of the Agreement states:

Should [Tel West] or Qwest dispute, in good faith, any portion of the monthly billing under this Agreement, the Parties will notify each other in writing

⁴⁹ The 1998 Resale Agreement, Section VII.C.2 states, "Billing disputes will be processed and jointly resolved."

within thirty (30) calendar days of the receipt of such billing, identifying the amount, reason and rationale of such dispute. At a minimum, [Tel West] and Qwest shall pay all undisputed amounts due. Both CLEC and Qwest agree to expedite the investigation of any disputed amounts in an effort to resolve and settle the dispute prior to initiating any other rights or remedies.

132 Subsequent to the effective date of the Agreement, the number of unprocessed and unresolved billing disputes continued to grow.

Discussion and Decision

133 Qwest witness Larry Brotherson, when questioned about the backlog of billing disputes, stated, “Certainly they were not handled as promptly as I would like to have seen.” *TR at 368*. Mr. Brotherson also testified that the backlog has been cleared up and should not reoccur. In December, the Qwest business office implemented a tracking system for all pending complaints for all accounts, including Tel West. *TR at 368-69*.

134 Tel West states that the timeliness issue regarding billing disputes is largely behind the parties, and the company appreciates the work that Qwest has performed to get caught up with processing those disputes. *TR at 392-93*. However, the delay was a frustrating experience for Tel West, and the company believes that the term “expedite,” as used in Section 5.4.4, must be defined in order to avoid similar problems from occurring. *TR at 394*. Tel West proposes that all billing disputes that Qwest has not resolved within the thirty days after presentation by Tel West should be deemed resolved in Tel West’s favor, unless Tel West is responsible for the delay. Alternatively, Tel West proposes that all billing disputes that are not resolved within 1.5 times the number of days it took Tel West to present them to Qwest should be deemed resolved in Tel West’s favor.

135 Qwest agrees that the billing dispute is largely behind the parties, but disagrees that the terms proposed by Tel West are necessary or justified. *TR at 422-24*.

136 Section 5.4.4 establishes a definite time period, thirty (30) calendar days from the date a monthly bill is received, within which the disputing party must notify the billing party that a dispute exists and provide the billing party with information to identify and support the dispute. Subsequently, the billing party must expedite an investigation regarding the disputed amounts. The Agreement does not explicitly state the consequences if the disputing party does not provide notice within thirty days, and the Agreement does not define the term “expedite.” Both of Tel West’s proposals are predicated on extrinsic evidence regarding Qwest’s poor past performance to investigate disputed amounts, and one of Tel West’s alternative proposals suggests that the thirty-day requirement be eliminated.

137 The Washington Supreme Court, in *Marriage of Schweitzer*, 132 Wn.2d 318, 937 P.2d 1062, discussed the application the Court’s findings in *Berg v. Hudesman*. In *Marriage of Schweitzer*, the Court upheld a Court of Appeals decision that extrinsic evidence cannot be used to delete or contradict the written terms of an agreement. The Court of Appeals concluded that the trial court had “used parole evidence impermissibly to subtract an entire paragraph from the agreement and give it no effect whatsoever.”⁵⁰ Regarding its prior decision in *Berg*, the Court in *Schweitzer* stated:

We emphasized [in *Berg*], “[i]t is the duty of the court to declare the meaning of what is written, and not what was intended to be written. [Citations omitted]. We accordingly held in *Berg* that [extrinsic] evidence cannot be used to “add[] to, modify[], or contradict[] the terms of a written contract, in the absence of fraud, accident, or mistake.” [Citations omitted].⁵¹

138 Likewise, principles of contract interpretation do not permit the Commission to eliminate the thirty-day requirement for a disputing party to provide notice to a billing party. However, the consequence of untimely notice can be found elsewhere in Section 5.4.4.

139 Section 5.4.4 does *not* require that the billing party *resolve or settle* any disputed amounts on an expedited basis, as argued by Tel West. Under Section 5.4.4, a billing party has a duty to *expedite an investigation* of any disputed amounts, and no more. Both the requirement that the disputing party provide timely notice and that the billing party expedite an investigation are steps that must be taken prior to either party initiating any other rights or remedies. Thus, the meaning of Section 5.4.4 is that both parties support efforts to resolve and settle disputes, but if either party violates Section 5.4.4, or if their efforts to resolve and settle the dispute are unsuccessful, then the proper recourse is to initiate other rights or remedies.

140 The process for pursuing those other rights and remedies include terms set forth in Section 5.18 of the Agreement, entitled “Dispute Resolution.” Additionally, the Commission has previously held that parties may seek recourse under Commission rules in addition to arrangements in interconnection agreements, including an action under WAC 480-09-530 to enforce rights or remedies. The billing dispute issues raised in this case are more broad, and, as reflected by the record, the parties are not seeking relief for specific disputed charges in this proceeding.

141 The good faith requirement regarding the submission of billing disputes also extends to the duty to expedite an investigation of disputed amounts. An investigation conducted in good faith requires that the billing party provide the same type of information to the disputing party, that the disputing party is required to provide to

⁵⁰ *Schweitzer*, 132 Wn.2d at 326, quoting *Schweitzer*, 81 Wn. App. At 595.

⁵¹ *Schweitzer*, 132 Wn.2d at 327.

the billing party as part of the initial notice. Thus, an investigation under Section 5.4.4 requires that the billing party provide a reason or rationale for granting or refusing to provide a credit for the disputed amount.

- 142 If either party fails to act in good faith in submitting a dispute or expediting an investigation under Section 5.4.4, then that failure may constitute an additional cause of action for which a party may initiate other rights or remedies. However, the Commission can not establish a contractual right of forfeiture that would attach to either party's violation of Section 5.4.4 as suggested by Tel West. In other words, the Commission can no more impose a term providing that disputes are resolved in Tel West's favor if Qwest does not expedite an investigation, than the Commission can impose a term that Tel West waives its rights or remedies if the company does not present its claims within the thirty-day period.
- 143 Qwest argues that Tel West's failure to check whether blocking or screening services have been ordered regarding specific local Exchange Service lines before submitting billing disputes also places an unfair burden on Qwest. *Exhibit No. 39, page 9-10*. Qwest argues that Tel West – as part of its duty to submit claims in good faith under Section 5.4.4 – should be required to check its own billing records to confirm that blocking or screening services have been ordered before submitting a billing dispute to Qwest. *TR at 421-22*.
- 144 The record evidences that Tel West – despite its assertion that it orders blocking and screening services on 100% of all resold lines where available – does not always order those services. *Exhibit No. 39, page 9*. It is reasonable that Tel West maintain and check its own records before submitting a billing dispute to Qwest.
- 145 When Tel West submits an OS/DA billing dispute in good faith, it implicitly represents that a blocking or screening service has been ordered on that particular local Exchange service line. The requirement that Tel West first check its own records before submitting a dispute to Qwest does not shift the burden to perform an investigation of disputed amounts to Tel West. Rather, the requirement that Tel West first check its own records is necessary in order for Tel West to comply with the requirement that it identify the reason or rationale for submitting a dispute, and is part of its duty to act in good faith.
- 146 An issue remains as to what the term “expedited” means. Although the Commission generally favors terms in agreements that establish the obligations of parties by well-defined standards, the parties did not expressly define the term “expedited” in the Agreement. Tel West argues that there must be some standard, such as 1.5 times the days required to submit disputes, in order for the term to have any meaning.
- 147 Qwest argues that the term “expedited” is relative, and must be ascertained from the totality of circumstances. Thus, according to Qwest, a single billing dispute on a

single account may require a number of days to conduct an expedited investigation, whereas many disputes on many accounts may take a longer period of time to complete an expedited investigation. Mr. Swickard agreed that the time to reasonably expedite an investigation depends on the nature and number of billing disputes, but he also stated that it also depends on the amount of resources that Qwest dedicates to the task. *TR at 247-48.*

148 The record demonstrates that the process for Qwest to conduct an investigation is more involved than the process for Tel West to prepare a notice of disputed amounts. *Exhibit No. 39, page 7-8, cf. TR at 265.* Therefore, Qwest is minimally entitled to the same number of days to expedite its investigation – thirty days – that Tel West is entitled to for submitting its notice of disputed amounts. Thereafter, the record does not support any specific time interval for Qwest to complete an expedited investigation. It is clear that the reasonable amount of time to complete a record will depend on the nature and number of billing disputes, but is also dependent on Qwest allocating a reasonable amount of resources to the task.

149 It is not reasonable that Tel West should wait indefinitely for Qwest to complete its investigations. Accordingly, as part of Qwest's good faith duty to expedite investigations, Qwest must notify Tel West as soon as possible if Qwest is unable to complete its investigation within thirty days, including notice of when its expedited investigation will be completed. Qwest's notice to Tel West does not – in and of itself – comply with its good faith duty to expedite an investigation. However, such notice will enable Tel West to make an informed decision whether to pursue its other rights and remedies prior to completion.

150 The record in this case reveals that expense incurred to resolve billing disputes is often disproportionate to the actual amount in controversy. The parties suggest that some of these problems may be resolved based on the Commission's other decisions in this proceeding. That may or may not be the case. In any event, both parties would benefit from a review of the dispute resolution process in the Agreement, and from the development of a more efficient and effective process than that which currently exists.

II. ADDITIONAL PROCESS PURSUANT TO WAC 480-09-530

151 Pursuant to WAC 480-09-530(6), the Commission will hear the arguments or comments of the parties regarding the Initial Order at a regular or special open public meeting within ten (10) days of the Initial Order, or as soon thereafter as the Commissioner's schedules permit. Parties must review the NOTICE TO PARTIES that is stated at the conclusion of this Order.

152 Parties may submit written comments to the Commission no later than **May 2, 2002.**

III. FINDINGS OF FACT

- 153 Having discussed above all matters material to our decision, and having stated
general findings and conclusions, the Commission now makes the following
summary findings of fact. Those portions of the preceding discussion that include
undisputed facts and other findings pertaining to the ultimate decisions of the
Commission are incorporated by this reference.
- 154 (1) The Washington Utilities and Transportation Commission is an agency of the
state of Washington, vested by statute with authority to regulate rates, rules,
regulations, practices, accounts, securities, and transfers of public service
companies, including telecommunications companies.
- 155 (2) Tel West Communications, LLP (“Tel West”) and Qwest Corporation
 (“Qwest”), are each engaged in the business of furnishing telecommunications
service within the state of Washington as public service companies.
- 156 (3) Tel West entered into an agreement for service resale with Qwest in 1998
 (“1998 Resale Agreement”). Tel West requested negotiations with Qwest for
a new interconnection agreement on May 1, 2001, under the federal
Telecommunications Act of 1996 (“Telecom Act” or “Act”). Mr. Swickard,
president of Tel West, signed an interconnection agreement on August 8, 2001
 (“Agreement”). The Commission approved the Agreement on October 31,
2001.
- 157 (4) Under the Telecom Act and FCC Rules implementing the Act, Qwest must
offer any Telecommunications Service that it provides to its retail customers
for resale. Section 6.1.1 of the Agreement restates Qwest’s duty to offer retail
services for resale. Access to OS/DA services are an integral part of Qwest’s
retail local Exchange Service to residential and business customers in
Washington.
- 158 (5) Section 4.7 of the Agreement defines “Basic Exchange Telecommunications
Service,” which is synonymous with “local Exchange Service” as that term is
used in Section 6.2.9. Section 4.7 states that, unless otherwise agreed, Basic
Exchange Telecommunications Service includes access to directory assistance
and operator services. Section 6.2.9, alone, does not constitute an agreement
that Basic Exchange Telecommunications Service does not include access to
OS/DA services. No terms or conditions constituting such an agreement are
stated within the four corners of the Agreement.
- 159 (6) Mr. Swickard oversees and manages all aspects of Tel West’s business,
notably ordering, provisioning, and dispute resolution. Mr. Swickard’s day-
to-day responsibilities as president of Tel West include managing a variety of

internal management personnel in a customer service operations group, a provisioning group, and a bill auditing group, and external consultants, lawyers, and accountants.

- 160 (7) During the effective period of the 1998 Resale Agreement, Mr. Swickard repeatedly complained that it was unreasonable that access to OS/DA services was made part of resold lines, but Qwest was unwilling to modify relevant terms in that agreement.
- 161 (8) Mr. Swickard directed Mr. Donald Taylor, an outside consultant, to negotiate with Qwest on a number of issues that Tel West considered important. Mr. Taylor reported directly to Mr. Swickard. The provisioning of access to OS/DA as part of local Exchange Service was a major point in Tel West's negotiating objectives.
- 162 (9) Mr. Taylor represented Tel West during negotiations with Qwest. Mr. Taylor made successive requests that Qwest agree that local Exchange Service lines be made available without access to OS/DA. Qwest presented at least two drafts of a proposed interconnection agreement to Tel West during negotiations. Qwest did not agree to provide local Exchange Service lines without access to OS/DA during negotiations.
- 163 (10) Tel West received draft versions of the agreement on May 1, 2001, and May 21, 2001. Contemporaneously, Qwest refused to agree that Tel West could resell local Exchange Service lines without accepting access to OS/DA. The language of Section 6.2.9 did not change between draft versions of the agreement and the Agreement. Qwest's conduct constituted notice to Tel West that Section 6.2.9 did not constitute an agreement that Tel West could resell local Exchange Service lines without accepting access to OS/DA.
- 164 (11) Section 6.2.9 of the Agreement does not allow Qwest to provide, nor Tel West to accept, local Exchange Service lines for resale without access to OS/DA. Section 6.2.9 merely provides resellers with the same opportunity to rebrand OS/DA services that is provided to facilities-based carriers and carriers purchasing UNEs.
- 165 (12) Qwest was under a duty pursuant to the Telecom Act to negotiate the Agreement in good faith. Qwest recommended the Dial Lock blocking service to Tel West. Qwest did not inform Tel West regarding CustomNet, a less costly and more efficient alternative blocking and screening service, during negotiations. Qwest now contends that Dial Lock is not designed for resold lines and recommends its CustomNet blocking service. Qwest did not negotiate the Agreement in good faith. Tel West incurred unnecessary

expense, and will continue to incur unnecessary expense, as a direct consequence of Qwest's failure to negotiate in good faith.

- 166 (13) Tel West orders blocking and screening services from Qwest to prevent its customers from incurring usage-based OS/DA charges on its resold local Exchange Service lines. Tel West has no technical control over network facilities and operations that are essential to block and screen usage-based calls, and is totally reliant on Qwest.
- 167 (14) Under Section 5.4.4 of the Agreement, a billing party has a duty to expedite an investigation of any disputed amounts. There is no duty that a billing party resolve or settle disputed amounts on an expedited basis. Section 5.4.4 means that both parties support efforts to resolve and settle disputes, but if either party violates Section 5.4.4, or if their efforts to resolve and settle the dispute are unsuccessful, then the proper recourse is to initiate other rights or remedies.
- 168 (15) The good faith requirement regarding the submission of billing disputes also extends to the duty to expedite an investigation of disputed charges. An investigation under Section 5.4.4 requires that the billing party provide a reason or rationale for granting or refusing to provide a credit for the disputed amount.
- 169 (16) When Tel West submits an OS/DA billing dispute in good faith, it implicitly represents that a blocking or screening service has been ordered on that particular local Exchange Service line.
- 170 (17) The process for Qwest to conduct an investigation is more involved than the process for Tel West to prepare a notice of disputed amounts.
- 171 (18) The reasonable amount of time to complete an expedited investigation will depend on the nature and number of billing disputes, but is also dependent on Qwest allocating a reasonable amount of resources to the task. It is not reasonable that Tel West should wait past thirty days to learn when Qwest will complete its investigations.

IV. CONCLUSIONS OF LAW

- 172 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 173 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and all parties to, these proceedings.
- 174 (2) Determination of the intent of contracting parties is to be accomplished by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.
- 175 (3) Tel West should not be allowed to resell Qwest's local Exchange Service lines without accepting access to OS/DA.
- 176 (4) Qwest did not negotiate the Agreement in good faith as required by Section 251(c)(1) of the Telecom Act.
- 177 (5) Qwest, as a direct consequence of its breach of duty to negotiate in good faith, should be required to allow Tel West to change blocking services from Dial Lock to CustomNet on any or all of Tel West's resold local Exchange Service lines, and to pay non-recurring charges as if Tel West was requesting CustomNet at the time of initially establishing service. Tel West should be required to submit its CustomNet service change requests within 60 days after a final order is entered.
- 178 (6) If Tel West orders blocking or screening services to avoid incurring OS/DA charges, then Qwest should be required to either remove those charges from Tel West's account or not bill them in the first instance. Qwest should also be required to either remove charges or not bill Tel West where Tel West has ordered BNS, and Qwest does not check for or honor a BNS indicator. Qwest should be responsible for ensuring that its relevant databases are up-to-date.
- 179 (7) If either party violates Section 5.4.4 of the Agreement, or if the parties' efforts to resolve and settle billing disputes are unsuccessful, then the other party should be allowed to immediately initiate other rights or remedies.
- 180 (8) Qwest should be required to notify Tel West as soon as possible if Qwest is unable to complete its expedited investigations of billing disputes within thirty days of submission, including notice of when its expedited investigations will be completed.

V. ORDER

IT IS ORDERED That:

- 181 (1) Qwest must provide, and Tel West must accept, for resale at wholesale rates, local Exchange Service lines, including access to operator services and directory assistance services, just as Qwest provides Exchange Service to its own retail customers.
- 182 (2) Qwest must allow Tel West to change blocking services from Dial Lock to CustomNet on any or all of Tel West's resold local Exchange Service lines, and to pay non-recurring charges as if Tel West was requesting CustomNet at the time of initially establishing service. Tel West must submit its Dial Lock to CustomNet service change requests within 60 days after a final order is entered to qualify for non-recurring charges as if initially establishing service.
- 183 (3) If Tel West orders blocking or screening services to avoid incurring OS/DA charges, then Qwest must either remove those charges from Tel West's account or not bill them in the first instance. Qwest also must either remove relevant charges or not bill Tel West where Tel West has ordered BNS, and Qwest does not check for or honor a BNS indicator. Qwest is responsible for ensuring that its relevant databases are up-to-date.
- 184 (4) If either party violates Section 5.4.4 of the Agreement, or if the parties' efforts to resolve and settle billing disputes are unsuccessful, then the other party may immediately initiate other rights or remedies.
- 185 (5) Qwest must notify Tel West as soon as possible if Qwest is unable to complete its expedited investigations of billing disputes within thirty days of submission, including notice of when its expedited investigations will be completed.

Dated at Olympia, Washington and effective this 25th day of April, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

LAWRENCE J. BERG
Administrative Law Judge

NOTICE TO PARTIES PURSUANT TO WAC 480-09-530(6): NOTICE IS HEREBY GIVEN That the Commission will hear the arguments or comments of the parties regarding the Recommended Decision at its regular open public meeting on Wednesday, May 8, 2002, at 9:30 a.m., in Room 206, Commission Headquarters, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.

ATTACHMENT A

DOCKET NO. UT-013097
OS/DA BILLING DISPUTE ISSUES
FINAL EXHIBIT LIST

EXHIBIT #	A/R	DATE ADM.	REFERENCE	DESCRIPTION
1	<u>A</u>	3/11/02	Exhibit JS-T	Direct Testimony of Jeff Swickard
2	A	“	Exhibit A to Direct Test.	May 10, 2001 Letter from Tel West to Qwest
<u>C-3</u>	A	“	Exhibit B to Direct Test.	Tel West’s Billing Disputes with Qwest; <i>Confidential</i>
<u>4, C-4</u>	A	“	Exhibit JS-ST	Supplemental Testimony of Jeff Swickard; <i>Includes Confidential</i>
<u>C-5</u>	A	“	Exhibit JS-ST-A	Qwest’s Response to Tel West Data Request No. 11; <i>Confidential</i>
6	A	“		Tel West’s Complaint and Petition for Enforcement
7	A	“		Tel West’s Response to Bench Request No. 1
<u>8, C-8</u>	A	“		Tel West’s Response to Qwest Data Request 001; <i>Confidential</i>
9	A	“		Tel West’s Response to Qwest Data Request 002
<u>10, C-10</u>	A	“		Tel West’s Response to Qwest Data Request 004; <i>Confidential</i>
11	A	“		Tel West’s Response to Qwest Data Request 005
12	A	“		Tel West’s Response to Qwest Data Request 006
13	A	“		Tel West’s Response to Qwest Data Request 008
<u>14, C-14</u>	A	“		Tel West’s Response to Qwest Data Request 010; <i>Confidential</i>
15	A	“		Tel West’s Response to Qwest Data Request 012
16	A	“		Tel West’s Response to Qwest Data Request 013
17	A	“		Tel West’s Response to Qwest Data Request 019

EXHIBIT #	A/R	DATE ADM.	REFERENCE	DESCRIPTION
<u>18, C-18</u>	Pages 1-11, only, A	“		Tel West’s Response to Qwest Data Request 020; <i>Confidential</i>
<u>19, C-19</u>	A	“		Tel West’s Response to Qwest Data Request 022; <i>Confidential</i>
20	A	“		Tel West’s Response to Qwest Data Request 026
21	A	“		Tel West’s Response to Qwest Data Request 029
22	A	“		Tel West’s Response to Qwest Data Request 032
23	A	“		Tel West’s Response to Qwest Data Request 034
24	A	“		Tel West’s Response to Qwest Data Request 047
25	A	“		Tel West’s Response to Qwest Data Request 048
26	A	“		Tel West’s Response to Qwest Data Request 049
27	A	“		Tel West’s Response to Qwest Data Request 050
<u>28, C-28</u>	A	“		Tel West’s Response to Qwest Data Request 051; <i>Confidential</i>
29	A	“		Tel West’s Response to Qwest Data Request 053
30	A	“		Tel West’s Response to Qwest Data Request 055
31	A	“		Tel West’s Response to Qwest Data Request 056
32	<u>A</u>	“		Tel West’s Response to Qwest Data Request 059
<u>33, C-33</u>	<u>W/D</u>			Tel West’s Response to Qwest Data Request 061; <i>Confidential</i>
34	<u>A</u>	3/11/02		Tel West’s Response to Qwest Data Request 062
35	<u>A</u>	“		Tel West’s Response to Qwest Data Request 068
36	<u>A</u>	“		Tel West’s Response to Qwest Data Request 069
37	<u>A</u>	“		Tel West’s Response to Qwest Data Request 070

EXHIBIT #	A/R	DATE ADM.	REFERENCE	DESCRIPTION
<u>38, C-38</u>	<u>A</u>			03/07/02 E-Mail from Pamela Johnson; <i>Confidential</i>
39	<u>A</u>	3/11/02	LBB-T1	Response Testimony of Larry B. Brotherson
C-40	<u>A</u>	“	LBB-C2	Qwest’s Billing Dispute Worksheet; <i>Confidential</i>
41	<u>A</u>	“	KM-T1	Response Testimony of Kathy Malone
42	<u>A</u>	“	KM-2	WN U-43, Qwest’s Resale of Regulated Telecommunication Services Tariff, Section 2.1.A and B
43	<u>A</u>	“	KM-3	11/29/01 Qwest Internal Notification re Updated Information Re Resale
44	<u>A</u>	“	KM-4	Tel West’s Responses to Qwest’s First Set of Data Requests, Nos. -003, -005, -006, -008, -009, -010, and -012
45	<u>A</u>	“	KM-5	Exhibit B to Qwest’s Second Set of Data Requests to Tel West and Tel West’s Responses to Qwest’s Second Set of Data Requests Nos. -021, -027, -029, -033, -034, -043, -045, -046, -047, -048, -049, -050, -053, -055, -056, -057, -058, and -059.
46	<u>A</u>	“	KM-6	Customized Routing Service Request for Line Class Code, completed by Tel West
47	<u>A</u>	“	DLT-T1	Response Testimony of David L. Teitzel
48	<u>A</u>	“	DLT-2	WN U-40, Qwest’s Exchange and Network Services Tariff, Section 10.4.1.A, B and C
49	<u>A</u>	“	DLT-3	WN U-40, Qwest’s Exchange and Network Services Tariff, Section 5.4.3.B and D
50	<u>A</u>	“	DLT-4	WN U-40, Qwest’s Exchange and Network Services Tariff, Section 10.4.3.A, B and C
51	<u>A</u>	“		Tel West’s Responses to Qwest Data Requests, No. –003 (Minimal)
52	<u>A</u>	“		Qwest’s Response to Tel West Data Request 02-021

EXHIBIT #	A/R	DATE ADM.	REFERENCE	DESCRIPTION
53	<u>A</u>	“		Qwest Online CustomNet Product Description
54	<u>A</u>	“		Qwest’s Response to Tel West Data Request 02-034
55	<u>A</u>	“		Errata to Exhibit No. 39; Brotherson Response Testimony
56	<u>A</u>			Te West response to Bench Request No. 2, re C-38
57	<u>A</u>			Tel West response to Bench Request No. 3
58	<u>A</u>			Qwest response to Bench Request No. 3
59	<u>A</u>			Qwest response to Bench Request No. 3, Attachment A
60	<u>A</u>			Qwest response to Bench Request No. 3, Attachment B
61	<u>A</u>			Qwest response to Bench Request No. 3, Attachment C
62	<u>A</u>			Qwest response to Bench Request No. 3, Attachment D
63	<u>A</u>			Qwest response to Bench Request No. 3, Attachment E
64	<u>A</u>			Qwest response to Bench Request No. 3, Attachment F