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**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

Docket No. UT-013097  
COMMENTS OF TEL WEST ON THE  
RECOMMENDED DECISION RE  
OS/DA AND BILLING DISPUTE  
ISSUES

For the most part, Tel West supports the Recommended Decision issued by Administrative Law Judge Lawrence Berg ("ALJ") on April 25, 2002 ("Recommended Decision"). The ALJ recognized the tremendous difficulties that Tel West has experienced and continues to experience in dealing with Qwest. While Tel West disagrees with the ALJ's interpretation of the parties' interconnection agreement ("Current Agreement"), Tel West applauds his findings to the effect that Qwest has breached the Current Agreement and Qwest's duty of good faith and fair dealing. The Recommended Decision is thoughtful and evidences a sincere effort to resolve Tel West's real problems. Thus, the outcome of the Recommended Decision goes a long way toward providing a meaningful remedy for Tel West, in spite of the finding on the OS/DA contract interpretation issue.

Although Tel West would be satisfied if the Commission simply affirmed the Recommended Order, the Commission could make it more consistent with the record by: (1) ordering Qwest to pay refunds to Tel West as a more complete remedy for Qwest's bad faith in contact negotiations and performance; and (2) approving Jeff Swickard's testimony regarding the negotiation of the Current Agreement. It is particularly important, however, that if the

1 Commission affirms the order's finding on the OS/DA contract issue that it also at a minimum it  
2 does not diminish the findings and remedies in Tel West's favor.

3 These comments only briefly describe Tel West's positions regarding the  
4 remaining issues in the Recommended Decision, since Tel West's prehearing brief fully  
5 addresses them.

6 **I. The Recommended Decision Should Have Ordered Refunds for Qwest's Bad Faith**  
7 **Negotiations**

8 The Recommended Decision correctly concluded that Qwest negotiated the  
9 Current Agreement in bad faith and ordered Qwest to allow Tel West to order CustomNet for its  
10 resold lines without paying a non-recurring charge. Recommended Decision at ¶¶ 114, 118.  
11 However, the Recommended Decision should have gone a step further by ordering Qwest to  
12 refund all the overcharges Tel West paid as a result of Qwest's errors and bad faith. As  
13 explained below, this remedy is consistent with the ALJ's findings and is necessary to put Tel  
14 West in the same position it would have been in the absence of Qwest's bad faith negotiation and  
15 performance of the Current Agreement.

16 First, Tel West agrees with the ALJ's finding that "Qwest was . . . under a duty  
17 pursuant to Section 251(c)(1) of the Telecom Act to negotiate the [Current] Agreement in good  
18 faith." Recommended Decision at ¶ 101. This is consistent with Washington law, which holds  
19 that "[t]here is in every contract an implied duty of good faith and fair dealing." *Badgett v.*  
20 *Security State Bank*, 116 Wash.2d 563, 569 (1991). The Recommended Order also correctly  
21 held that, for Qwest to meet this duty, it "must work with its wholesale customers to identify  
22 alternative retail and wholesale product options that are available," and must "make alternative  
23 less costly products/services known to its customers." Recommended Decision at ¶¶ 102, 111.

24 The ALJ's holding is consistent with the duty of good faith and fair dealing. In  
25 this case, Tel West repeatedly requested no provision of or blocking of OS and DA. In response,  
26 Qwest presented an ambiguous contract, as the ALJ found. Recommended Decision at ¶ 56.

1 Compounding the problem, Qwest repeatedly failed to explain its interpretation of the Current  
2 Agreement's provisions on OS/DA to Tel West's negotiator. *See* Ex. C-19 at 4. Even further  
3 compounding these glaring failures, Qwest had affirmatively recommended the wrong blocking  
4 service to Tel West, Dial Lock. Recommended Decision at ¶ 111. If that were not enough,  
5 Qwest failed to tell Tel West during the negotiations that it was using the wrong service to block  
6 OS/DA. Qwest kept Tel West in the dark. Qwest's failures to act in a reasonable manner, let  
7 alone exercise good faith, led directly to this proceeding. Under the circumstances, the  
8 Commission should afford Tel West a *full* remedy for Qwest's failures, in addition to the  
9 remedies in the Recommended Decision.

10 Tel West also agrees that "Qwest's conduct during negotiations breached its duty  
11 to act in good faith as contemplated by the Act." Recommended Decision at ¶ 102. This finding  
12 is consistent with the fact that Tel West for many years informed Qwest it did not want OS/DA  
13 services on its exchange lines and Qwest did nothing to assist Tel West in obtaining the best  
14 solution available. Instead, Qwest gave Tel West bad advice, recommending Dial Lock. *Id.* at  
15 ¶ 111. Qwest had every opportunity to help Tel West and failed to do so. Indeed, it  
16 compounded its failure by keeping Tel West in the dark about its own interpretation of the  
17 impact of the Current Agreement on Tel West's concerns. Again, such measures of bad faith  
18 deserve an effective remedy.

19 By improperly advising Tel West to order Dial Lock rather than CustomNet,  
20 Qwest "deprived Tel West from making an informed decision about its options to screen or block  
21 OS/DA services . . . ." Recommended Decision at ¶ 111. As a result of Qwest's bad faith  
22 negotiations, "Tel West has paid months of higher-priced recurring charges to Qwest for Dial  
23 Lock than it would have paid if Qwest's CustomNet service recommendation had been presented  
24 in good faith." *Id.* at ¶ 117.

25 Based on Qwest's actions, the Recommended Decision proposed a remedy that  
26 will undo some of the damage Qwest has caused, but it did not go far enough. Specifically, the

1 Recommended Decision directed Qwest to allow Tel West to switch its lines to CustomNet  
2 paying the same nonrecurring charge it would have paid if Qwest had originally provisioned the  
3 lines with CustomNet, rather than Dial Lock (\$0). Recommended Decision at ¶¶ 114, 118.  
4 While Tel West strongly supports this remedy, it does not fully place Tel West in the position it  
5 would have been but for Qwest's bad faith. Specifically, Tel West has been paying \$3.95 per  
6 month for Dial Lock for years when it should have been paying \$2.00 per month for CustomNet.  
7 *Id.* at ¶ 117.<sup>1</sup>

8 The only way to put Tel West in the position it would have been in without  
9 Qwest's bad faith is for the Commission also to order Qwest to credit Tel West for the  
10 overcharges that resulted from Qwest's bad faith. The refund should be \$1.95 per line, which is  
11 the difference between the \$3.95 monthly rate for Dial Lock and the \$2.00 monthly rate for  
12 CustomNet, less the applicable wholesale discount. The refund should apply for each month  
13 between the time that the parties signed the Current Agreement on August 8<sup>th</sup>, 2001 until the  
14 Commission issues its final order granting this relief. Moreover, the Commission should direct  
15 Qwest to refund the Dial Lock nonrecurring charge of \$7.00 for each line, less the wholesale  
16 discount. Tel West would not have had to pay this charge if Qwest had provided accurate advice  
17 about CustomNet, which has a nonrecurring charge of \$0 when ordered with the line.  
18 Recommended Decision at ¶ 114. This is the only remedy that will give Tel West complete  
19 relief for Qwest's bad faith negotiation strategy and deprive Qwest of the fruits of its actions.

20 **II. The Recommended Decision Should Have Approved The Testimony Of Jeff Swickard**  
21 **Regarding The Negotiation Of The Current Agreement**

22 While Tel West is pleased with the recognition of Qwest's bad faith, it is  
23 disappointed that the ALJ did not accept Mr. Swickard's testimony regarding the negotiation of  
24 the Current Agreement. Recommended Decision at ¶ 84. Mr. Swickard testified that he had no  
25 direct communication with Qwest negotiators, attended no negotiation conference calls, had no

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26 <sup>1</sup> These figures do not incorporate the wholesale discount Tel West receives.

1 active role in negotiations and did not consult closely with Don Taylor regarding the Current  
2 Agreement or the initial petition beyond the specific instances Mr. Swickard identified. *Id.*; *see*  
3 Ex. 1 at p. 4, l. 8 to p. 5, l. 11; *see* Ex. 57 at 1. As a result, he did not believe that the Current  
4 Agreement required Tel West to accept OS/DA on its resold lines. While the ALJ accepted other  
5 testimony of Mr. Swickard, he found this testimony not credible. As a result, the ALJ held that  
6 the Current Agreement requires Tel West to accept access to OS/DA.<sup>2</sup> In so doing, the ALJ did  
7 not give enough recognition to the challenges and compromises inherent in starting and  
8 operating a small business like Tel West.

9 To put this issue in perspective, Tel West is a small CLEC that operates in twenty  
10 states and does business with ten different ILECs. It has dozens of interconnection agreements,  
11 comprising thousands and thousands of pages. Mr. Swickard manages each state to the best of  
12 his ability, but in many cases he must hire a consultant to handle specific negotiations and  
13 disputes with ILECs. He did so in this case by hiring Mr. Taylor to negotiate the Current  
14 Agreement with Qwest and to file the initial petition in this proceeding. Mr. Swickard told Mr.  
15 Taylor what Tel West needed and entrusted Mr. Taylor to reach those goals to the best of his  
16 ability.

17 While the theory of *respondeat superior* may allow the Commission to impute  
18 many of the actions of Mr. Taylor to Tel West, it should not lead the Commission to draw  
19 conclusions about what Mr. Swickard *actually knew*, which was the basis of his testimony. Of  
20 course, Tel West wanted to call Mr. Taylor to testify in support of Tel West and Mr. Swickard's  
21 testimony, but Qwest would not permit Mr. Taylor to testify on Tel West's behalf. Qwest also  
22 made it impossible for Tel West to call Mr. Taylor's counterpart at Qwest, Ms. Donahue, to  
23 testify. She was not named as a witness and because she resides out of state was not amenable to  
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26 <sup>2</sup> Tel West explained in its prehearing brief why Mr. Swickard's testimony shows that Tel West should not  
have to accept OS/DA on its lines. Tel West will not reiterate those arguments here.

1 a deposition or subpoena under the Commission's rules. Ex. C-19 at 4; RCW 34.05.446(6);  
2 WAC 480-09-475.

3 In 20/20 hindsight it may have been a mistake for Mr. Swickard not to monitor  
4 the negotiations of the Current Agreement more closely and to initiate the complaint process  
5 without consulting a lawyer. The Commission should not infer from this, however, that  
6 Mr. Swickard's testimony was in any way untruthful. The Commission should accept the  
7 testimony of Mr. Swickard as credible. Tel West also believes that the Commission should  
8 reverse the finding interpreting the Current Agreement to require Tel West to accept OS/DA on  
9 its resold lines. As noted above, however, Tel West would find an extended remedy based on the  
10 bad faith finding to be sufficient even if the Commission does not reverse the OS/DA finding  
11 after accepting the credibility of Mr. Swickard's testimony.<sup>3</sup>

12 **III. Tel West's Positions Regarding The Remaining Conclusions of the Recommended Decision.**

13 This section describes the other major findings of the Recommended Decision  
14 and Tel West's position regarding them. Tel West fully explained its position regarding these  
15 issues in its prehearing brief, and it will only briefly restate them here.

16 A. Qwest should be liable for OS/DA charges that are not blocked by screening  
17 services

18 Tel West supports the Recommended Decision's finding that Qwest is liable for  
19 usage-based charges where Tel West orders blocking or screening services. Recommended  
20 Decision at ¶ 127. Tel West agrees that "Qwest must assume the risk that its blocking and  
21 screening services may not perform 100% of the time." *Id.* This is appropriate, since Qwest  
22 controls the network, not Tel West.

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25 <sup>3</sup> This concession by Tel West should be construed as a willingness to accept a reasonable middle ground.  
26 It should not in any way be construed as a waiver by Tel West of any of its legal arguments or rights,  
including its rights of review.

1 B. The Commission should require Qwest to resolve billing disputes within forty-  
2 five days after receipt

3 Tel West also agrees with the Commission's decision that both parties must  
4 submit disputes and expedite investigations in good faith.<sup>4</sup> Recommended Decision at ¶ 142.  
5 However, Tel West believes that the Commission should define what "expedite" means. While  
6 Tel West agrees that "[i]t is not reasonable that Tel West should wait indefinitely for Qwest to  
7 complete its investigations," Tel West is concerned that this standard does not provide a firm  
8 yardstick to gauge Qwest's performance. Qwest will likely use its flexibility to delay resolution  
9 of billing disputes as long as possible. So, the Commission should adopt Tel West proposal that  
10 Qwest should have 1.5 times as much time to respond to disputes as Tel West has to deliver them  
11 to Qwest, which would be 45 days.

12 C. The Recommended Decision properly denied Qwest's petition to reopen the  
13 record

14 Tel West supports the denial of Qwest's petition to reopen the record and admit  
15 certain documents and a witness declaration. Recommended Decision at ¶ 34. Qwest could  
16 have produced these documents prior to the close of evidence in this case, but did not do so  
17 either for strategic reasons or a lack of due diligence.

18 D. The ALJ should not have admitted Bench Request No. 3 responses into the record

19 The ALJ served Bench Request No. 3 ("BR-3"), which was a request for a copy  
20 of Qwest's SGAT allegedly sent to Mr. Taylor prior to May 10, 2001, after the record closed.  
21 Qwest's responses to BR-3 are self-serving hearsay evidence, and the Qwest employees that  
22 prepared the documents were unavailable for cross-examination. Recommended Decision at  
23 ¶ 20. Accordingly, this evidence is too unreliable to support the conclusions of the  
24 Recommended Decision.

25 <sup>4</sup> The Recommended Decision states that Tel West sought to remove the requirement in the Agreement  
26 that it submit its disputes to Qwest within 30 days. This was not the intent of Tel West's arguments or  
proposed remedies. Tel West is not certain how this confusion arose, but given the ALJ's disposition of  
the issue, it is a moot point.

1 **IV. Proposed Findings Of Fact And Conclusions Of Law.**

2 Tel West requests the Commission to affirm the Recommended Decision's  
3 Findings of Fact and Conclusions of Law, subject to the changes identified above. In addition,  
4 Tel West proposes adding the following sentence to the end of Conclusion of Law No. 5:

5 Qwest must pay Tel West refunds as a remedy for its negotiation of the Current  
6 Agreement in bad faith. The refund should be \$1.95 per line, which is the  
7 difference between the \$3.95 monthly rate for Dial Lock and the \$2.00 monthly  
8 rate for CustomNet, less the wholesale discount. The refund should apply for  
9 each month between the time that the parties signed the Current Agreement on  
10 August 8<sup>th</sup>, 2001 until the effective date of this order. Qwest must also refund to  
11 Tel West the Dial Lock nonrecurring charge of \$7.00 for each line, less the  
wholesale discount. Qwest must pay the refund in full within one month after the  
effective date of this order. Qwest must not require Tel West to accept the refund  
in the form of bill credits except to the extent Tel West has a past due amount for  
accounts for Washington service.

12 **V. Conclusion.**

13 Tel West proposes that the Commission either adopt the findings of the  
14 Recommended Decision in their entirety as the minimum remedy to Qwest's repeated failures or,  
15 in the alternative, adopt revised findings of fact and conclusions of law in accordance with these  
16 comments. While Tel West would be satisfied if the Commission simply affirmed the findings  
17 of the Recommended Decision, it believes that these comments will help the Commission  
18 improve upon its the findings and remedies.

19 Tel West strongly urges the Commission not to undo the limited remedies in the  
20 Recommended Decision, as Qwest will undoubtedly advocate. Doing so would seriously harm  
21 Tel West and exacerbate the problems it currently experiences with Qwest. Moreover, undoing  
22 the findings of bad faith and the remedies flowing therefrom would not be consistent with the  
23 record, which clearly shows that Qwest made it impossible for Tel West to serve its customers  
24 under reasonable terms and conditions and at a reasonable cost.



1 Respectfully submitted this 3<sup>rd</sup> day of May, 2002.

2 MILLER NASH LLP

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