

1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION

3	TEL WEST COMMUNICATIONS, LLC,	)	Docket No. UT-013097
		)	
4	Petitioner,	)	Volume VI
		)	Pages 446 to 494
5	vs.	)	
		)	
6	QWEST CORPORATION,	)	
		)	
7	Respondent.	)	
	_____	)	

8  
9  
10                   A hearing in the above matter was held on  
11 May 8, 2002, at 10:15 a.m., at 1300 South Evergreen Park  
12 Drive Southwest, Room 206, Olympia, Washington, before  
13 Administrative Law Judge ROBERT WALLIS and Chairwoman  
14 MARILYN SHOWALTER and Commissioner RICHARD HEMSTAD and  
15 Commissioner PATRICK J. OSHIE

16  
17                   The parties were present as follows:  
18                   QWEST CORPORATION, by ADAM SHERR and LISA  
19                   ANDERL, Attorneys at Law, 1600 Seventh Avenue, Suite  
20                   3206, Seattle, Washington 98191, Telephone (206)  
21                   345-1574, Fax (206) 343-4040, E-mail landerl@qwest.com.

22                   TEL WEST COMMUNICATIONS, LLC, by BROOKS E.  
23                   HARLOW, Attorney at Law, Miller Nash LLP, 601 Union  
24                   Street, Suite 4400, Seattle, Washington 98101, Telephone  
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                  harlow@millernash.com.

Joan E. Kinn, CCR, RPR  
Court Reporter

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1 P R O C E E D I N G S

2 CHAIRWOMAN SHOWALTER: We will resume our  
3 open meeting now for the purpose of hearing an  
4 adjudication in the Tel West matter. So I am going to  
5 turn this over now to Administrative Law Judge Bob  
6 Wallis to conduct the proceeding.

7 JUDGE WALLIS: Thank you Chairwoman  
8 Showalter.

9 The adjudication will please come to order.  
10 This matter is an adjudication in Docket Number  
11 UT-013097, which is a proceeding by Tel West against a  
12 complaint arising under WAC 480-09-530. This proceeding  
13 is being held at Olympia, Washington on May 8 of the  
14 year 2002 before Chairwoman Marilyn Showalter,  
15 Commissioner Richard Hemstad, and Commissioner Patrick  
16 Oshie of the Washington Utilities and Transportation  
17 Commission. My name is Bob Wallis, and I am the  
18 presiding Administrative Law Judge.

19 The purpose for today's session is to hear  
20 oral argument in the referenced matter. Before we  
21 begin, I would like to take appearances for our record  
22 and then discuss time limits and the manner of  
23 proceeding.

24 Let's begin with the Petitioner.

25 MR. HARLOW: Thank you, Your Honor, good

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1 morning. Is the microphone working?

2 Brooks Harlow.

3 Is the microphone on?

4 JUDGE WALLIS: Yes, it is.

5 MR. HARLOW: Okay. Brooks Harlow, attorney  
6 for Petitioner Tel West. And sitting right behind me in  
7 the audience but not formally appearing today is Mr.  
8 Swickard, the President of Tel West Communications.

9 JUDGE WALLIS: Is your office address and  
10 other information on the record in an earlier volume of  
11 the proceeding?

12 MR. HARLOW: Yes, Your Honor, we have managed  
13 to avoid eviction for another year.

14 JUDGE WALLIS: Thank you.

15 For the company.

16 MR. SHERR: Good morning, Adam Sherr,  
17 in-house counsel for Qwest. My address information is  
18 on the record as well. With me today is Lisa Anderl,  
19 attorney for Qwest as well.

20 JUDGE WALLIS: Thank you very much.

21 The commissioners have reviewed carefully the  
22 presentations that the parties have made and would like  
23 to assign time limits for the argument. Would 30  
24 minutes per side be adequate for your purposes?

25 MR. HARLOW: Yes, Your Honor.

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1                   JUDGE WALLIS: Very well. We will watch our  
2 clock as the argument proceeds.

3                   We would like to begin with the legal  
4 arguments posed by Qwest, and especially we would like  
5 to focus on the arguments relating to lack of notice and  
6 opportunity to litigate. Now I would like to repeat  
7 that the Commission has read the presentations of the  
8 parties, the initial order, and the associated materials  
9 and asks you not to repeat anything that you have  
10 presented in your materials. However, if there is  
11 something you would like to add, you may do so at this  
12 time, and we will pass it to Mr. Harlow to respond.

13                   MR. SHERR: Thank you, Judge. Just a  
14 clarification, would you like me to simply address that  
15 issue, because I -- certainly that is going to be the  
16 focus of Qwest's presentation. If you would like, I can  
17 simply focus on that issue and hand it off to Mr.  
18 Harlow to respond, and we can talk about other issues  
19 separately, or if you want me to do my entire  
20 presentation at once.

21                   JUDGE WALLIS: What we would prefer at this  
22 point, the area on which the Commission would like to  
23 hear argument in Qwest's comments is the issue of lack  
24 of notice. And at this juncture, we would ask you not  
25 to repeat anything that you have already said, but give

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1 you the opportunity to add anything that you would like  
2 to add to your presentation that does not already  
3 appear.

4 MR. SHERR: Very well, I will do my best not  
5 to repeat myself.

6 Good morning Chairwoman and Commissioners.  
7 As per the Judge's request, I will focus my comments  
8 today on the issue of notice and due process, basic  
9 fairness in litigation. That is the first and foremost  
10 concern of Qwest. When reading the recommended  
11 decision, Qwest very much appreciates the Administrative  
12 Law Judge's efforts and analysis and dedication to this  
13 case, which has been very contentious and very complex  
14 and very truncated, and I don't think I will find any  
15 disagreement in the room with regard to that  
16 characterization.

17 But the one section of this, of the  
18 recommended decision, that is so concerning to Qwest is  
19 the Judge's findings that Qwest violated Section  
20 251(c)(1) of the Telecommunications Act for failure to  
21 negotiate the agreement, the interconnection agreement  
22 that's the subject of this case, in good faith by  
23 failing to identify affirmatively for Tel West  
24 alternatives to the dial lock product, a product they  
25 use for blocking their customers' use of OS, operator

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1 services, and DA, directory assistance services. The  
2 Administrative Law Judge found affirmatively and on his  
3 own that we had violated the -- our obligation to  
4 negotiate in good faith by not affirmatively suggesting  
5 to Tel West an alternate product.

6 JUDGE WALLIS: Mr. Sherr.

7 MR. SHERR: Yes.

8 JUDGE WALLIS: I don't want to throw off your  
9 presentation, but I do note that what you stated so far  
10 you have already told us in your written materials, and  
11 what we're asking for is anything in addition to those  
12 that you would like to add.

13 MR. SHERR: Very well.

14 What I'm not sure I said specifically that,  
15 now that I have had some more time to think about it I  
16 wish I would have very specifically up front, is that  
17 Tel West is the petitioner in this action. Tel West not  
18 only has the burden of proof, but has the burdon to  
19 articulate its causes of actions and theories of  
20 recovery and to join all claims that are necessary. Tel  
21 West articulated for this phase of the docket as this  
22 case was bifurcated two causes of action, found two  
23 violations of -- alleged that Qwest was violating two  
24 sections of the interconnection agreement, Section 6.2.9  
25 and Section 5.4.4, and the parties litigated this case

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1 based on Tel West's allegations. Nowhere in its  
2 informal complaint, its original complaint, its amended  
3 petition, its discovery responses, its discovery  
4 requests, its direct testimony, its pre-hearing brief,  
5 its testimony at hearing, its cross-examination at  
6 hearing, or at post hearing argument did, in my  
7 recollection and my review of the records of this case,  
8 Tel West utter the words that Qwest failed to negotiate  
9 the interconnection agreement in good faith. It was  
10 literally for the first time brought to the attention of  
11 Qwest that this was an issue in this case when we  
12 received the recommended decision.

13           As a result, Qwest had no opportunity to  
14 investigate the matter internally, to plead defenses, to  
15 do discovery of Tel West, to develop the facts of the  
16 case that would rebut those assertions, to file  
17 testimony, to brief the issue, to argue the issue. The  
18 only opportunity we have to argue this issue is before  
19 you today, but we don't have a record that supports --  
20 we don't have a record that supports these kinds of  
21 findings at all. We don't have a record that includes  
22 Qwest's rebuttal to these types of allegations. I'm  
23 sitting before you arguing based on a record that was  
24 not developed with this theory in mind.

25           And it's important to note, and this may

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1 sound as if it's going off of the issue of due process  
2 and notice of an opportunity to litigate a little bit  
3 but I don't think it does, the second legal basis that  
4 Qwest gives in its comments before you today for why the  
5 251(c)(1) finding should be reversed is that it's  
6 outside the scope of this proceeding. This proceeding  
7 is limited to, and I will read from the rule, it is a  
8 proceeding for enforcement of the agreement, the terms  
9 of the agreement. Not to too artificially try to favor  
10 curry with the Presiding Judge, but I can point you to a  
11 footnote in Qwest's pre-hearing brief, footnote 7,  
12 excuse me for just one moment, footnote 7 which is on  
13 page 15 of Qwest's pre-hearing brief, and I will quote  
14 you, these are the comments of Administrative Law Judge  
15 Robert Wallis on behalf of Commission Staff articulating  
16 the scope and purpose of Rule 480-09-530 at the time  
17 that the rule was adopted, this, and I will quote just a  
18 small portion of it:

19           This proposal would provide a specific  
20           process for companies who have entered  
21           interconnection agreements to secure  
22           enforcement of those agreements.

23           Moving down a little bit:

24           This rule would apply after an  
25           interconnection agreement becomes



1           effective when one party believes the  
2           other is failing to meet its commitments  
3           under an agreement. It would provide a  
4           process tailored to the setting in which  
5           the requirements of the agreement may be  
6           determined. Behavior may be examined to  
7           see if it is in compliance with the  
8           terms of the agreement, and enforcement  
9           may be ordered if required by the  
10          agreement and the facts of this case.

11          That's the scope of a 530 proceeding, which  
12          is a very burdensome proceeding for both parties, but  
13          especially the responding party, because it doesn't know  
14          that it's about to litigate until it receives the notice  
15          just prior to the litigation being initiated.

16          It is outside the scope of a 530 proceeding  
17          to litigate issues that occurred prior to execution of  
18          the agreement. If Tel West was concerned about this, it  
19          could have arbitrated it prior to execution of the  
20          agreement, it could have brought a -- possibly brought a  
21          general complaint, which is something that Qwest and Tel  
22          West argued about at the beginning of this case. It  
23          didn't choose to do so. It chose to follow this  
24          process, which is so truncated and so expedited, in  
25          order to get quick resolution. And we had quick

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1 resolution. The date of the amended petition I believe  
2 was January 11, and the date of the trial was March 11.  
3 And in the middle, I think Mr. Harlow can agree, we did  
4 quite a bit of work, quite a bit of discovery, quite a  
5 bit of motion hearing and bugging the Judge and briefs.

6           It's not a lack of diligence that didn't lead  
7 Qwest to develop a record about what happened prior to  
8 execution of the agreement with regard to alternatives  
9 to the dial lock product. It was not an issue in the  
10 case. It was not an issue framed by the pleadings, the  
11 discovery, the briefs, the testimony. It was just not  
12 an issue. To find this decision, to find a ruling that  
13 we violated a section of the law not mentioned until the  
14 recommended decision is the clearest example of a lack  
15 of due process that I can think of. We had no  
16 opportunity to defend ourselves, and we could defend  
17 ourselves well, but we had no opportunity to do so.

18           I don't want to keep repeating myself,  
19 although it's fun to hear myself talk. I can limit my  
20 comments to that issue if you would like, and I'm happy  
21 to address anything else.

22           JUDGE WALLIS: That's the issue that the  
23 Commission is most concerned with in terms of Qwest's  
24 comments, so let's turn to opposing counsel.

25           And having both the written comments and

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1 Qwest's oral comments at this point, Mr. Harlow, what is  
2 your response?

3 MR. HARLOW: Thank you, Your Honor, and  
4 forgive me, there's some overlap here necessitated by  
5 kind of the general theory of our approach to this order  
6 as well as by Mr. Sherr's argument. Mr. Sherr is  
7 incorrect, I would take issue with whether or not this  
8 was a truncated proceeding. It was certainly done on an  
9 aggressive schedule. We did not follow the strict  
10 dictates of Section 530 or Rule 530 schedule. We took a  
11 little longer than that. We took certainly --

12 CHAIRWOMAN SHOWALTER: Mr. Harlow, really,  
13 you need to focus on here's the issue. The issue is,  
14 first, under WAC 530, is there any way that the ALJ was  
15 justified in finding that the agreement was negotiated  
16 in bad faith? That is, is that set of facts and finding  
17 within 530? That's number one.

18 More deeply, more fundamentally is how can we  
19 approve an order by the ALJ that there was a violation  
20 of the requirement of negotiated good faith when the  
21 company was not on notice that that was an issue? This  
22 is a little bit like saying, you know, the Judge saying,  
23 I find you're not guilty of robbery, but by the way, I  
24 determine that you're guilty of burglary when you were a  
25 juvenile. So you need --

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1 MR. HARLOW: Well, that's --

2 CHAIRWOMAN SHOWALTER: -- we recognize this  
3 was not your proposition originally, but you're at the  
4 point that you're in the role of defending it, and  
5 that's what you need to focus on. Because if we can't  
6 get past that issue, as I see it, all of the other  
7 comments save the one on the 45 days would fall by the  
8 wayside.

9 MR. HARLOW: Yes, Your Honor, absolutely, the  
10 answer to the first question is absolutely yes, I can  
11 defend that, I will.

12 The answer to the second question is your  
13 question presumed that Qwest was not on notice, and, in  
14 fact, I will demonstrate that Qwest was indeed on notice  
15 had they been alert and taken a different strategy to  
16 litigating this case than the one they chose.

17 CHAIRWOMAN SHOWALTER: Can you focus first on  
18 530 and why this is within the scope of the WAC.

19 MR. HARLOW: Certainly.

20 Your Honor, some of this is addressed in our  
21 written comments, recognizing that Judge Berg directed  
22 the parties not to brief in support of the order but  
23 really simply to brief their positions in opposition to  
24 it and save the balance for oral argument, but we did  
25 touch on it. And part of the problem with Qwest's

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1 argument is simply they're taking a myopic view of the  
2 case, of the law, and of the critical facts, and they're  
3 trying to focus a dispute that was brewing for three  
4 years, continued up to and through the commencement of  
5 this litigation, and they're trying to say that the  
6 whole duty of good faith and fair dealing boils down to  
7 a window in time surrounding May 21st of 2001. And that  
8 really in a nutshell is the basis for the motion to  
9 reopen, and that is the basis for their claim that they  
10 acted in good faith or that there's evidence that they  
11 did. But, in fact, in so doing, they ignore the big  
12 picture and the fact that Tel West was crying for help,  
13 solve our problem, help us, work together with us, do  
14 something, educate us, tell us what your position is,  
15 and Tel West for three years was left in the dark until,  
16 as the ALJ notes, finally when the litigation is  
17 commenced, the best and brightest are brought to the  
18 table.

19 In terms of -- but I do want to get back to  
20 this truncated, because Qwest is trying to paint this as  
21 though, oh, we got surprised because we were in the  
22 wrong proceeding, we were under 530 and we should have  
23 been under 110. The point I simply wanted to make is  
24 that we had a 110 proceeding effectively. Qwest had got  
25 all the discovery it needed. It served well over 100

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1 data requests including sub parts just in Part 1 alone.  
2 They have depositions available to them in Part 2. We  
3 had a full hearing. There were no time limits. Nobody  
4 was cut off. We had briefing, we had oral argument.

5           And more importantly in terms of due process,  
6 and I will come back to this in a minute, but notice  
7 does not require notice of legal theories, all right.  
8 There's some modification of that by Commission ruling  
9 that you have to mention the statutes, but general rules  
10 of pleading which would be applicable in court only  
11 require pleading of the facts. And a lawyer for a very  
12 good reason, doesn't always come up, but the last  
13 request for relief in any complaint, and I will just  
14 read ours in this petition, the Commission should also  
15 impose any other relief justified by the evidence  
16 produced in this proceeding. And there's a very good  
17 reason for that, and that is because litigation is a  
18 rough and tumble sport, if you will. You don't know how  
19 things are going to come out.

20           We came into this hearing with one legal  
21 theory only to find out that Qwest had documents  
22 squirreled away that it produced in response to a bench  
23 request that we had no idea were going to come out.  
24 Those came in after the hearings, and those changed the  
25 factual findings. In our view, those led to a different

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1 factual finding than we thought was supported by the  
2 evidence produced at the hearing on our contractual  
3 claim. But by the same token, the Judge found that we  
4 had a serious problem and fashioned a relief in  
5 accordance with our final request for relief that was  
6 justified by the evidence that was produced in the  
7 proceeding.

8 COMMISSIONER HEMSTAD: How was Qwest put on  
9 notice that it would have to present evidence of its  
10 good faith bargaining?

11 MR. HARLOW: All right, let me just -- I'm  
12 ready to move into that, Commissioner Hemstad.

13 And I'm reading from our petition, request  
14 for relief, it's paragraph 33(d)(2) on page 11:

15 We sought finding that Qwest's  
16 violations constitute a willful or  
17 intentional misconduct or intentional  
18 malicious misconduct.

19 All right, I can not think of a --

20 COMMISSIONER HEMSTAD: But is that -- does  
21 that go to the front end negotiations, or is it in the  
22 after the fact administration of the agreement?

23 MR. HARLOW: Well, again, this is kind of the  
24 big picture. The duty of good faith and fair dealing  
25 does not go away, clearly under state law it doesn't go

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1 away once the contract is signed. It continues and  
2 covers the performance, and the Badgette case discusses  
3 that, and that's just one example of dozens or perhaps  
4 hundreds of cases under Washington law.

5 CHAIRWOMAN SHOWALTER: But, Mr. Harlow, your  
6 complaint, I'm reading your complaint, on the first page  
7 says it is filed under the provisions of WAC 480-09-530.  
8 It's not filed under anything else. So I think you're  
9 going to have to show why the subject area of bad faith  
10 negotiations in the forming of the agreement falls  
11 within the WAC 530 that relates to enforcement of the  
12 agreement. Because what I heard you say earlier is,  
13 well, we did a lot more than 530 would have limited us  
14 to, and so really we weren't, I heard you say in  
15 essence, we weren't doing a 530, but that is what the  
16 whole proceeding is under.

17 MR. HARLOW: Well, Your Honor, okay, we're  
18 jumping a little bit, but that's fine, because now we're  
19 getting to the technical question of the scope of a 530  
20 proceeding, and that's fine, I will jump ahead, if I can  
21 find my notes.

22 First of all, I think this is hair splitting  
23 in the extreme. 530 was intended to provide a more  
24 expedited method to resolve certain kinds of disputes.  
25 But let's just assume for the sake of argument that the



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1 Commission agreed with Qwest that this wasn't within the  
2 scope of Section 530. Does that mean the appropriate  
3 remedy is to reject the preliminary order, the  
4 recommended decision, and start over even though the  
5 evidence is in, the hearings are done, all the discovery  
6 is completed, the witnesses have come and flown home? I  
7 think that's hair splitting in the extreme.

8           Now in a minute I'm going to get to why I  
9 think 530 covers this, but even if you were again for  
10 the sake of argument to agree with Qwest, I think it  
11 would be extremely inefficient, not to mention a huge  
12 burden on a small company like Tel West, to say, all  
13 right, you have to relitigate it now under your theory  
14 because you brought it under 530, and based on evidence  
15 that came up after the hearing was concluded, the  
16 hearing -- the nature of the relief changed somewhat.  
17 The Commission, if it feels that that argument has any  
18 validity at all, the Commission has within the bounds of  
19 530 itself the remedy to that, which is you can convert  
20 Part 1 of our proceeding to a 110 complaint and use that  
21 to enter your final order.

22           CHAIRWOMAN SHOWALTER: But let's take that  
23 theory. In litigation, I think as you pointed out, lots  
24 of facts and issues and other events are flushed out  
25 either in the discovery process or bench requests or the

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1 hearing itself, and those other facts may lead to some  
2 other action. But if there is to be another action,  
3 doesn't due process require that the entity subject to  
4 sanctions or actions be given an opportunity to litigate  
5 that issue?

6 MR. HARLOW: No. The party -- Qwest is --  
7 yes and no. What Qwest is entitled to is notice of the  
8 facts and which we pleaded extensively which became even  
9 more evident as the evidence came in. In terms of legal  
10 theories, typically legal theories are finalized post  
11 hearing. Now in this case, we had a pre-hearing brief,  
12 and the pre-hearing briefs did not address Section  
13 251(c) whatever it is (1). But instead we have another  
14 procedure which affords Qwest due process, which is the  
15 argument that we have right now and the comments that we  
16 filed last Friday. Those are Qwest's opportunity,  
17 notice and opportunity to be heard on the legal issues  
18 raised by the bad faith finding under Section 251.

19 CHAIRWOMAN SHOWALTER: But what about their  
20 opportunity to present evidence? If they didn't know  
21 that they were on the hook for a potential violation of  
22 251, how were they given the opportunity to present  
23 evidence or cross examine that evidence or your evidence  
24 on that subject?

25 MR. HARLOW: They had our testimony

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1 expressing the frustration of three years of trying to  
2 get a straight answer, which continues to this day. I  
3 mean if we're going to reopen, you know, I've got an  
4 E-Mail from Qwest that's only a couple of weeks old that  
5 says, no, we can't do customnet after all, which they  
6 said they could do in their hearing. I mean we could go  
7 on forever and reopen this proceeding, as you could in  
8 any. But they had notice of the facts. We alleged  
9 willful or intentional or intentional or malicious  
10 misconduct by Qwest in relation to performance of both  
11 the old and the current agreement.

12 CHAIRWOMAN SHOWALTER: But wasn't that -- I  
13 understood that in the record to be that you were making  
14 a claim that Qwest had not performed under the agreement  
15 and under the agreement had exhibited bad faith, and  
16 that is -- that's the subject of the rest of the order,  
17 isn't it?

18 MR. HARLOW: Two answers to that. I mean  
19 first of all, we think that the obligation under Section  
20 251 to negotiate in good faith, that that obligation is  
21 enforceable as enforcement of the agreement if it has  
22 consequences to the performance of the agreement. In  
23 other words, it survives. Because otherwise, if there  
24 were a breach of the obligation of the duty of good  
25 faith under 251, once the parties signed the agreement

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1 under Qwest's approach, the ability to enforce a breach  
2 of the duty of good faith would go away, okay. And  
3 clearly the FCC didn't contemplate that, because some of  
4 the elements of bad faith are the withholding of  
5 information or misleading the party into executing the  
6 agreement based on misrepresentation or fraud. And  
7 clearly those are of a nature that would be discovered  
8 after the agreement were signed, so we don't think that  
9 the duty -- that the ability to enforce the duty of good  
10 faith goes away upon execution of the agreement under  
11 Section 251.

12           And in addition, we have a state law claim  
13 which clearly can be enforced under Section 530 if  
14 there's a breach of the duty of good faith and fair  
15 dealing in the performance that constitutes a breach of  
16 the interconnection agreement, and that comes under 530  
17 clearly.

18           CHAIRWOMAN SHOWALTER: Okay, let's put those  
19 two things together, the question is how do you -- how  
20 does the one, the first, let's assume that there is a  
21 duty to negotiate in good faith and failure to do so is  
22 a violation of Section 251 and that there is in general  
23 a remedy for that violation, how do you knit that  
24 together with Section 530, which is for enforcement of  
25 the terms of the agreement?

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1                   MR. HARLOW: Well, a breach of the duty of  
2 good faith is a breach of the performance of the  
3 agreement, and you're entitled to an order enforcing the  
4 agreement, enforcing proper and good faith performance,  
5 and that's what we have here. But Qwest was clearly on  
6 notice of the facts. Again, bad faith is a subset of  
7 willful or intentional or malicious conduct. To go back  
8 to your criminal example, I can't remember which crimes  
9 you used, but --

10                   CHAIRWOMAN SHOWALTER: I think I used the --

11                   MR. HARLOW: -- unrelated crimes.

12                   CHAIRWOMAN SHOWALTER: -- analogy that the  
13 judge finds someone not guilty of robbery --

14                   MR. HARLOW: Right.

15                   CHAIRWOMAN SHOWALTER: -- but finds that he  
16 learned that they were guilty of burglary when a  
17 juvenile.

18                   MR. HARLOW: Well, I think the analogous  
19 situation here is when you have a lesser included  
20 offense. For example, the accused might be accused of  
21 murder in the first degree and is found guilty of murder  
22 in the second degree or of manslaughter. It's the same  
23 facts but based on the level of proof that is shown and  
24 what is accepted by the trier of fact, that there can  
25 indeed be a conviction on the lesser included offense,

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1 not on an unrelated offense.

2 CHAIRWOMAN SHOWALTER: A lesser included  
3 offense would be the same time period. The issue here  
4 is that the case seems to be brought under failure to  
5 perform under the conditions of the terms of the  
6 agreement, which can't date earlier than the agreement.  
7 Meanwhile, there's another set of facts that has to do  
8 with events prior to the formation of the agreement, and  
9 so it's a separate time period. You're arguing that  
10 under 530 you can reach back in time and talk about the  
11 formation of the agreement as well as what the agreement  
12 is, but that's a theory being propounded really right  
13 now and wasn't even discussed as far as I could tell in  
14 the record. So you get back to this it's a dual issue,  
15 could this subject be litigated at all under 530, but  
16 even if it could, has due process been afforded the  
17 entity that stands to be sanctioned?

18 MR. HARLOW: Well, Congress, you know,  
19 Congress gave us a right to have Qwest negotiate in good  
20 faith but gave little or no guidance on when and how you  
21 enforce that right. And I think that 530 ought to be  
22 construed broadly, particularly where as here the very  
23 problem that we are asserting which both predated and  
24 postdated the negotiations of a question, that very  
25 problem arose in large part but not totally out of the

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1 negotiations. And I think 530 should be interpreted,  
2 it's your own rule, you can interpret it however you  
3 want, but I think it should be interpreted to encompass  
4 a bad faith claim which becomes evident after the  
5 execution of the contract. Not clearly if it's a moot  
6 point, but this wasn't a moot point. This was a problem  
7 that started in 1998 and continues to this day. We're  
8 still trying to work with Qwest to find an acceptable  
9 blocking solution, there's still goings on at a business  
10 level between the parties to try and work these issues  
11 out.

12 JUDGE WALLIS: Mr. Harlow --

13 MR. HARLOW: But again, you said how do you  
14 knit, one more point, how do you knit, I don't think you  
15 need to knit. I think you've got a situation where you  
16 can either -- you can either knit the 251 remedy with  
17 the state -- with the state remedy for good faith and  
18 fair dealing, which clearly falls within 530, or you can  
19 find -- you can uphold the order under 251, or you can  
20 uphold the order under state law. So I think you have  
21 three options there. You don't have to knit them. I  
22 would prefer that. I think that's -- I think that's  
23 more helpful to resolving disputes of this nature if you  
24 don't get hung up on technicalities.

25 Yes.

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1                   JUDGE WALLIS: Mr. Harlow, is there anything  
2 specifically in your complaint that indicates that you  
3 are pursuing the complaint in part on the basis of bad  
4 faith in the inducement for the agreement?

5                   MR. HARLOW: I confess I haven't read the  
6 whole petition in preparation for this.

7                   This kind of comes back to my main argument.  
8 We allege in the petition that:

9                   Qwest has failed under the terms of the  
10 agreement to provide services to Tel  
11 West in the same time and in the same  
12 manner and with the same quality as  
13 Qwest provides these same services to  
14 its own retail personnel.

15                   Qwest's kind of approach to this litigation  
16 has been that they made a conscious choice not to talk  
17 about the negotiations. You know, we teed up the  
18 negotiations. We said we think the contract is  
19 unambiguous, but if you find it's ambiguous, here's how  
20 the course of negotiations went. And we had a witness,  
21 Mr. Swickard, who addressed as best he could those  
22 negotiations. We had initially selected another  
23 witness, the actual negotiator, Mr. Don Taylor, to  
24 testify further about those negotiations. I don't want  
25 to get into this too deeply, but I think it's important



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1 for the Commission to know that Mr. Taylor was  
2 unavailable to Tel West at the hearing by reason of a  
3 request made by Qwest, so we were unable to use him as a  
4 witness.

5 COMMISSIONER HEMSTAD: Well, I noticed that  
6 in your comments. I didn't understand that. What was  
7 the point of Qwest blocking access to Mr. Taylor as a  
8 witness?

9 MR. HARLOW: Does Qwest wish to address that?

10 JUDGE WALLIS: Mr. Harlow, what's your point  
11 in bringing that up?

12 MR. HARLOW: Qwest made a conscious decision  
13 to avoid -- they brought witnesses who knew absolutely  
14 nothing about the negotiations. They weren't involved  
15 firsthand, they weren't involved secondhand. You know,  
16 we teed up the negotiations, and they ducked it, I  
17 assume for strategic reasons.

18 COMMISSIONER HEMSTAD: But Mr. Taylor would  
19 be your witness.

20 MR. HARLOW: Mr. Taylor would have been our  
21 witness had we been able to use him.

22 COMMISSIONER HEMSTAD: And why couldn't you  
23 use him?

24 MR. HARLOW: Can I answer that?

25 MR. SHERR: You can certainly give your side

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1 of the story.

2 MR. HARLOW: I guess Qwest's position was  
3 that Mr. Taylor still had certain obligations to Qwest  
4 and that it would be a conflict of interest for him to  
5 participate actively in this proceeding.

6 COMMISSIONER HEMSTAD: But didn't he have a  
7 conflict of interest at the time of the negotiations?

8 MR. HARLOW: That would be up to Qwest to  
9 answer that. We didn't -- we weren't aware that he did,  
10 and we don't know that he did. It's an odd situation.

11 JUDGE WALLIS: Are there further questions  
12 for Mr. Harlow?

13 Mr. Harlow, you have ten minutes remaining.

14 Mr. Sherr, do you want to respond to  
15 Mr. Harlow?

16 MR. SHERR: I do, and I will only comment on  
17 a few of the statements made by Mr. Harlow, because I  
18 don't think I can do better than the Commission has done  
19 with its questions.

20 Kind of going backwards, I think the issue of  
21 Mr. Taylor does need to be brought up because, you know,  
22 I was quite shocked to see for the first time in Mr.  
23 Harlow's comments this statement that we would not  
24 permit Mr. Taylor to testify. The background on that is  
25 as follows. Mr. Taylor was negotiating on behalf of Tel

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1 West as its consultant. This, of course, is long before  
2 it comes to the law office, to our department.  
3 Mr. Taylor filed as a representative of Tel West the  
4 initial complaint. I believe it was the end of October,  
5 beginning of November. I looked, I can attest that I  
6 looked Mr. Taylor up to find out if he was an attorney,  
7 because I didn't know who he was, and the pleadings were  
8 identified as being filed by a consulting company, and  
9 he wasn't, so we moved to disqualify him.

10 As soon as Mr. Harlow -- and Mr. Harlow was  
11 very soon thereafter retained by Tel West, and very soon  
12 thereafter Qwest learned -- I think Qwest I should say  
13 was under the impression that Mr. Taylor was a former U  
14 S West employee. Qwest then found out that Mr. Taylor  
15 is a current Qwest employee on leave, so I think that  
16 you can understand that we were a little concerned that  
17 our current employee was the consultant representative  
18 and perhaps witness for a party that had just brought an  
19 action against us.

20 We immediately telephoned Mr. Harlow to  
21 advise him, because we assumed because of Mr. Harlow's  
22 good standing that he did not know that Mr. Taylor --  
23 that he was talking to an employee of Qwest. There's  
24 certainly ethical considerations that are involved, and  
25 we assumed that Mr. Harlow did not know that he was an

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1 employee of Qwest. And we stated in that conversation,  
2 I don't remember the exact words, that if Mr. Taylor  
3 were not involved in the litigation, that would  
4 certainly satisfy us. There are code of conduct,  
5 internal code of conduct, serious code of conduct  
6 problems for a current Qwest employee to be representing  
7 another party in litigation against Qwest.

8           Mr. Harlow capitulated immediately. He did  
9 not force us, and again, this is a very contentious  
10 case, so Mr. Harlow is not shy from going to the  
11 Administrative Law Judge, and quite frankly, neither are  
12 we, and I'm sure Judge Berg could attest to that  
13 unfortunately, Mr. Harlow didn't bat an eyelash, and  
14 immediately Mr. Taylor was no longer in the case. The  
15 exhibit to the protective order was withdrawn that he  
16 had signed. Mr. Harlow did not force us to go to the  
17 Administrative Law Judge, he did not himself go to the  
18 Administrative Law Judge, again, until we get these  
19 comments, was not an issue in this case.

20           So that's why -- that's why Mr. Taylor -- I  
21 think it is a grand overstatement that we would not  
22 permit Mr. Taylor to testify. We certainly didn't  
23 shackle him, but we were not very pleased to find out  
24 that he was an employee of the company and testifying  
25 and representing another company against us. Working

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1 backwards, I think it's -- I think this is a peripheral  
2 issue, but it's one that needs to be responded to, that  
3 Qwest consciously decided, this is Mr. Harlow's words,  
4 Qwest consciously decided probably for strategic reasons  
5 not to address the negotiations. That's not really  
6 true. We did discovery. There's a data request that's  
7 in the record if you happen to have the exhibits. It  
8 was a Qwest Data Request 22 that --

9 CHAIRWOMAN SHOWALTER: What exhibit is it?

10 MR. SHERR: I'm sorry, that would have been  
11 helpful, it's Exhibit 19, excuse me.

12 And sub Part B, we asked Tel West to:  
13 Fully describe all facts and produce all  
14 documents supporting your contention  
15 that Tel West and Qwest specifically  
16 negotiated the issue of Tel West's  
17 customers' access to pay per use  
18 services.

19 They alleged in their -- they alleged in  
20 their petition that we had promised to provide them a  
21 basic local exchange line without access to OS and DA  
22 and without having to procure blocking services. I  
23 wanted to know what evidence there was that we actually  
24 negotiated that. The only response we got was that they  
25 appended meeting notes from Mr. Taylor, which are

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1 confidential exhibits to that -- confidential pages to  
2 that particular exhibit. And those meeting notes, which  
3 are at page 4 and 5, certainly indicate that Mr. Taylor  
4 brought the issue up and indicated that -- indicated  
5 nowhere that Qwest agreed to provide or to capitulate to  
6 that demand.

7           This was the entirety of Tel West's proof  
8 that we had promised to provide them a basic local  
9 exchange line for resale that didn't have access to OS  
10 and DA. They're the party with the burden of proof,  
11 there was really no further reason to go any further on  
12 the issue of what the parties had negotiated. Tel West  
13 has the obligation to supplement these data request  
14 responses. I don't believe they -- they did not  
15 supplement this particular response, and that's why we  
16 didn't go any further.

17           And I would ask you to keep in mind, while  
18 Mr. Harlow may disagree, this was extremely truncated  
19 given the complexity of the issues, and I did my best,  
20 we did our best to be as diligent as possible and go  
21 down every avenue there was to go down, as Mr. Harlow  
22 will attest to given the number of data requests. There  
23 was no need, there was nothing negative or implicating  
24 about the response, and so we moved on, and we didn't go  
25 any further.

1                   And in response to Bench Request Number 3,  
2     the Administrative Law Judge's bench request that was  
3     after the hearing, that is when it occurred to me to go  
4     ask for that information from the people who negotiated  
5     the agreement, and that is why -- that is when I found  
6     the May 29 E-mail that was the subject of our petition  
7     to reopen and so on. But that is literally the first  
8     time that we pursued that. So I think that background  
9     is important, to know that we did not make any conscious  
10    effort to hide anything or to hide anyone.

11                   With regard to the criminal example, given  
12    that my knowledge of criminal law is limited to what I  
13    learned on practice, I'm not going to go there. This  
14    certainly seems to me to be an unrelated offense. I  
15    mean I think that -- I think that the Chairwoman nailed  
16    that one. This is a claim that we didn't know was a  
17    claim until we got the decision.

18                   Regarding Mr. Harlow's argument that the 251  
19    claim survives the execution of the agreement, Qwest  
20    isn't taking a position on that. I'm not disagreeing,  
21    I'm not agreeing, but the point is we didn't know it was  
22    a claim, and that's why we didn't address it.

23                   One factual matter that I have to clarify,  
24    Mr. Harlow said, and perhaps he just misspoke, he said,  
25    a couple of weeks ago I got an E-mail that customnet was

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1 not available at all, and then he proceeded. That's  
2 untrue for at least two reasons that I can think of.  
3 Number one, the E-mail that he was referring to was  
4 about customized routing, which is a different --

5 MR. HARLOW: That's right.

6 MR. SHERR: -- a different solution all  
7 together. And the next day when I was advised that an  
8 E-mail had been provided to Mr. Swickard regarding that  
9 product not being appropriate, a retraction was  
10 immediately forwarded to Mr. Swickard, and I forwarded  
11 it to Mr. Harlow, which he acknowledged. So that's not  
12 an issue, and it's not true.

13 If I could have just one moment to look and  
14 see if there's anything else.

15 COMMISSIONER HEMSTAD: Mr. Harlow raised a  
16 point, what is your response to his assertion that the  
17 breach of a duty to negotiate in good faith "goes away"  
18 if discovered after execution of the agreement?

19 MR. SHERR: Could you repeat that,  
20 Commissioner?

21 COMMISSIONER HEMSTAD: Well, I believe Mr.  
22 Harlow's argument was that the statutory requirement on  
23 the company to negotiate in good faith would go away if  
24 it is only discovered after the execution of the  
25 agreement.



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1                   MR. SHERR: I'm not sure that I understood  
2 Mr. Harlow to argue that.

3                   CHAIRWOMAN SHOWALTER: I think he was saying  
4 an inference to be drawn should we grant Qwest's request  
5 would be that by not giving relief under 530, we would  
6 be saying that once the agreement is signed, that's it,  
7 there's no more possible remedy. So I think the  
8 question is, what's your view of whether there is or  
9 isn't --

10                  COMMISSIONER HEMSTAD: Is there a remedy?

11                  CHAIRWOMAN SHOWALTER: -- a possible remedy  
12 for bad faith negotiations once the agreement is signed.

13                  MR. SHERR: Well, I was trying not to take a  
14 position on that, but, you know, what I would say is  
15 that's not -- that's not at all our comments here. Our  
16 comments are we didn't know it was a claim so that's not  
17 what we're talking about, and even if it were a claim  
18 and let's just assume, for the sake of the record I'm  
19 assuming, that it is -- it does survive the execution of  
20 the agreement, a 530 proceeding is an inappropriate  
21 mechanism for discussing it, and that was the second  
22 point of our comments, so that's my response.

23                  CHAIRWOMAN SHOWALTER: I just have a  
24 procedural question to ask you before we go back to  
25 Mr. Harlow, which is am I correct that if we find that

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1 the issue of good faith negotiations is not properly  
2 before the Commission, are there any other comments or  
3 suggestions of changes to the ALJ's order that you would  
4 make, or are they -- are all the ones that you have  
5 subsidiary to that basic question? And then there's the  
6 other issue on the other side of the 45 day time line,  
7 which I think stands aside from that issue. We just  
8 want to make sure we hear all the issues.

9 MR. SHERR: Sure. With regard -- if you  
10 determine -- well, let me try to characterize what I  
11 think you asked me. If you decide that the 251(c)(1)  
12 allegations or findings should be reversed, is there  
13 anything else Qwest wants done to the recommended  
14 decision. Is that -- did I hear it correctly?

15 CHAIRWOMAN SHOWALTER: That's basically  
16 right.

17 MR. SHERR: I would say if the finding is  
18 based on a lack of due process or the fact that it's  
19 outside of the scope of the proceeding or both, then  
20 certainly there's no real reason to reach the issue of  
21 whether the petition to reopen should have been granted,  
22 because I think it's moot at that point. If you get to  
23 that point of -- if you get -- and I, you know, very  
24 much hope you don't, but if you get to the point where  
25 you're reviewing the record and trying to determine if

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1 there's a basis for the cause of action that wasn't  
2 alleged, then I think that that still remains a viable  
3 request on Qwest's part.

4 The only other issue I think would need to be  
5 resolved regardless is, excuse me just one moment, the  
6 relief granted in Paragraph 183 of the recommended  
7 decision, which relates to, and I will try to paraphrase  
8 and hopefully I will do it correctly, that if Tel West  
9 orders a blocking product, and presumably if a charge  
10 that should be blocked --

11 MR. HARLOW: Mr. Sherr, we're amenable to the  
12 suggested language on the last three lines of page 12 of  
13 your brief.

14 MR. SHERR: Okey-dokey, well I would say that  
15 it's -- if -- and that's our --

16 CHAIRWOMAN SHOWALTER: We will issue an order  
17 with that effect.

18 MR. SHERR: All right, well, that's the only  
19 concern we still would have is that we would want it  
20 reasonably limited.

21 Thank you.

22 JUDGE WALLIS: Mr. Harlow.

23 MR. HARLOW: Thank you, Your Honor, if I may  
24 just step back a little bit, kind of take a bigger  
25 picture look at this. This was really a cry out for

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1 help from a small CLEC that was having enormous  
2 problems, as the evidence supported. We have asked for  
3 an extension of the order, of course, but in reality, as  
4 the order has merely affirmed, that this will make it --  
5 this will be a big help. I mean we didn't get what we  
6 asked for, but we got what we needed, to quote Mick  
7 Jager. Tel West is --

8 CHAIRWOMAN SHOWALTER: I think that's the  
9 obverse of the case.

10 MR. HARLOW: You can't always get what you  
11 want, but sometimes if you try you get what you need.

12 MR. SHERR: That makes me feel better about  
13 saying okey-dokey on the record.

14 MR. HARLOW: Tel West is preparing to file  
15 rate reductions, significant rate reductions, in the  
16 range of \$6 to \$8 a line, which were made possible by  
17 this order. Needless to say, if the order is reversed,  
18 that won't happen.

19 Let me just step back, give you a kind of a  
20 view, because I represent a number of CLECs, and I have  
21 been involved in negotiations. I wish I had been  
22 involved in these, I wasn't, but there's a term that's  
23 very familiar to the CLEC community, Qwest cringes and  
24 then bites back every time they hear it, I don't know if  
25 the Commission has heard it or not, but the term is

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1 strategic incompetence. Every CLEC, when you mention  
2 that, it strikes a very resonant cord with them. It's  
3 difficult, if not impossible, to prove, and based on the  
4 Judge's findings, no willful or wanton or malicious  
5 action, we did not prove strategic here, but I believe  
6 we did prove incompetence.

7           And the point about customized routing was  
8 not that Qwest is -- the point about customized routing  
9 was simply we're still getting different stories and  
10 conflicting stories. As Mr. Sherr pointed out, two days  
11 after the E-mail I mentioned, they retracted it. But  
12 what happens is it's simply not in Qwest's best  
13 interests to treat CLECs competently, and that's what we  
14 face every single day. The record reflects a letter, I  
15 think it's Exhibit 2 or Exhibit 3, with an itemized list  
16 of 12 things that Tel West wanted out of the  
17 "negotiations". And in response to either before or  
18 after, depending on whether you accept the Judge's  
19 findings, Qwest punches a button and sends out their  
20 standard SGAT. A trained chimpanzee could serve CLECs  
21 better than this kind of approach.

22           In two negotiation sessions which were  
23 reflected by documents Qwest submitted as cross  
24 exhibits, it reflects that the key issue of what's going  
25 to happen with OS/DA, Tel West had no satisfactory

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1 answer as of May 21st, the last evidence we have of a  
2 negotiating session that the question is still open. So  
3 whether you admit the E-mail that Qwest wants to have  
4 admitted or not, the fact is you lacked a meeting of the  
5 minds as of May 21st, and then you get a contract that  
6 Qwest -- that the Judge found was ambiguous. We thought  
7 it was unambiguous in our favor, Qwest thought it was  
8 unambiguous in their favor, the Judge finds an ambiguous  
9 contract. And clearly that was the case, because as of  
10 the fall you have Tel West threatening to and then in  
11 fact filing a petition for enforcement to finally  
12 resolve this problem.

13           And Qwest comes up with evidence not of how  
14 it tried to help Tel West in response to this evidence  
15 of the nightmare Tel West had been going through for  
16 three years, instead Qwest comes in with evidence that  
17 basically trash talks Tel West, oh, you did this wrong  
18 and you did that wrong, you don't know what you're  
19 doing. That was Qwest's decision as to how to respond  
20 to this petition. And in hindsight given the order, it  
21 was clearly the wrong approach to take. But I can't  
22 think of a more egregious example of bad faith than the  
23 intentional malicious conduct that we alleged in our  
24 petition.

25           The relief itself that the Judge afforded us

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1 was specifically requested in Paragraph 33(d)(4). We  
2 asked that the Commission direct Qwest to issue such  
3 credits or make such payment to Tel West or to pay such  
4 fines as are within the jurisdiction of the Commission  
5 and supported by the evidence in this proceeding. I  
6 also commend that you look at subsection 7 on page 12  
7 directing Qwest to credit or refund to Tel West all  
8 charges Qwest has imposed for blocking OS and DA. And  
9 Qwest was on notice as to what we wanted.

10           Neither of the parties clearly knew the exact  
11 route that the Judge would take, but I commend you to  
12 reread the decision. I can't make a better argument  
13 frankly than Judge Berg did in his decision. He was  
14 like a brick layer, and he just put them together, and  
15 the wall is there, and the evidence supports this  
16 outcome. And while we wanted a little different  
17 outcome, this is something we can live with. This will  
18 take care of our problem.

19           And I think it would be ridiculous to  
20 interpret the Commission's rules to go back and start  
21 over. This was a huge piece of litigation. You know,  
22 we started in October and we're just wrapping up now.  
23 Qwest has now had an opportunity to look at the facts in  
24 light of the particular legal theory, have done a  
25 terrific job of arguing them, but clearly the factual

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1 evidence support the Judge's findings under Section 251,  
2 and we add to that Washington's state law, duty of good  
3 faith.

4 I just briefly want to mention the argument  
5 that we're seeking damages and that we have to go under  
6 440. This is a jurisdictional argument by Qwest, and it  
7 holds absolutely no water. 440 is another alternative  
8 that litigants may take and go directly to court, but  
9 the Commission's jurisdiction is not found in 440, it's  
10 found in -- generally in RCW 80.01.40 regulating the  
11 public interest, the rates, services, facilities, and  
12 practices of all telecommunications company.

13 And the specific relief that we asked for and  
14 we got and that we're asking for in our comments are  
15 exactly covered by 80.04.220. I won't read it all, but  
16 the Commission may order or shall order that the public  
17 service company pay to the complainant the excess amount  
18 found that have been charged, and it's entitled to  
19 reparations. And it specifically says that any party  
20 complainant, that the Commission may find that any party  
21 complainant is entitled to an award of damages. So this  
22 Commission clearly has jurisdiction to award damages.  
23 Now that statute is not specific, of course, to a 110  
24 complaint proceeding, it also would be covered by the  
25 530 rule since it's within the Commission's



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1 jurisdiction.

2 How am I doing on time?

3 JUDGE WALLIS: You have 3 or 4 minutes  
4 remaining, Mr. Harlow.

5 MR. HARLOW: You know --

6 JUDGE WALLIS: Do you still wish to argue  
7 your 45 day issue?

8 MR. HARLOW: No, Your Honor, I think that's  
9 adequately covered in our comments.

10 JUDGE WALLIS: Very well.

11 MR. HARLOW: The real -- the heart and sole  
12 of this case because of the way this company does  
13 business and the thing that has -- that's been their  
14 nightmare for three years is this problem of OS/DA, and  
15 the Commission has had a full hearing on it, both  
16 parties have had opportunity to do extensive discovery,  
17 although we only asked 2 questions and they asked over  
18 100, but we're not complaining about that, because we  
19 have something that works, and it's well within the  
20 jurisdiction of the Commission. The Commission if it  
21 needs to convert this from a 530 to a 110 today, that's  
22 something you can do. Qwest was on notice as to what we  
23 were seeking, and although we didn't take the same  
24 avenue, we got exactly what we were seeking. It's set  
25 forth exactly in our requested relief in the petition.

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1                   CHAIRWOMAN SHOWALTER: Mr. Harlow, you have  
2 not asked this Commission to reverse the ALJ on the  
3 ruling that because Qwest does not offer OS/DA on a  
4 stand alone basis without the blocking retail, it does  
5 not have to offer it to you. Isn't -- am I right that  
6 that is also one of the findings -- one of the orders  
7 here, and you have not requested us to change that?

8                   MR. HARLOW: The Judge I believe took great  
9 pains to say that that's not what he was saying, that  
10 this was strictly interpretation of this contract, and I  
11 believe that we're --

12                   CHAIRWOMAN SHOWALTER: That's what I meant,  
13 within the terms of the agreement.

14                   MR. HARLOW: We're asking you to reverse  
15 that, but we're not --

16                   CHAIRWOMAN SHOWALTER: Well, where do you ask  
17 us to reverse that?

18                   MR. HARLOW: In our comments in a footnote.  
19 I mean we're happy with the order the way it is, but  
20 we're clearly reserving our rights of reconsideration or  
21 appeal if the order gets upset, the way it was written  
22 gets upset. And the reason is that we just feel  
23 factually there is support for the conclusion that the  
24 parties had a meeting of the minds or even negotiated  
25 over the OS/DA question. It's not, you know, Mr. -- we

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1 did consult Mr. Taylor finally on Bench Request Number 3  
2 after talking to Qwest, and they acknowledged, yeah, you  
3 probably need to talk to him. And as our Bench Request  
4 response reflects, Mr. Taylor's recollection is  
5 completely different. He does not recall having  
6 received the template with the same language of Section  
7 6.2.9 prior to the start of negotiations, and the whole  
8 decision seems to have turned on that factual question.

9 CHAIRWOMAN SHOWALTER: Mr. Harlow, maybe  
10 you're referring to footnote number 3. Well, no, I  
11 don't know what footnote you're referring to.

12 MR. HARLOW: Maybe.

13 CHAIRWOMAN SHOWALTER: I guess the question I  
14 have is that since it doesn't appear to me anyway that  
15 at this moment you're asking us to change really any of  
16 the ALJ's orders if we -- I'm wondering, are you  
17 implying that if we come out with an order that removes  
18 the bad faith negotiation section, that then you would  
19 petition for us to reconsider on the other parts of the  
20 order?

21 MR. HARLOW: Well, I would have to consult  
22 with Mr. Swickard, but that would be a possibility.  
23 Again, we feel this is not the best decision, it's not  
24 our ideal, but it's adequate, and so we're reserving  
25 that. I guess I mean from a strategic standpoint, why

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1 do we want to fight an order that gives us what we need,  
2 and that was our decision.

3 CHAIRWOMAN SHOWALTER: Can I hear from Qwest  
4 for, you know, 30 seconds on the 45 day requirement.

5 MR. SHERR: I think I need clarification as  
6 to what the 45 day requirement we're talking about is.

7 CHAIRWOMAN SHOWALTER: Well, it's found on  
8 page 7 of Mr. Harlow's comments, line 1, it says, the  
9 Commission should require Qwest to resolve billing  
10 disputes within 45 days after receipt, and the ALJ said  
11 disputes should be handled on an expedited basis and in  
12 the comments suggests that we should be specific about  
13 what is meant by expedited, and Qwest should be required  
14 to respond to a dispute within 45 days.

15 MR. SHERR: Sure, I would be happy to  
16 respond, although 30 seconds is pretty difficult for me.

17 CHAIRWOMAN SHOWALTER: Well, it can be more  
18 than 30 seconds.

19 JUDGE WALLIS: 45.

20 CHAIRWOMAN SHOWALTER: 45 days.

21 MR. SHERR: All right. The ALJ found it  
22 exactly correctly. There's no difference between the  
23 analysis of whether the 30 day requirement or the 45 day  
24 requirement. And actually to be more clear, it's not  
25 really 45 days is what they asked for. Again, it was

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1 brought up in their pre-hearing brief. They asked for 1  
2 1/2 times the amount of time it takes Tel West to  
3 produce its spreadsheet of disputes. So if they do it  
4 in 10 days, then we get 15. I don't think I'm  
5 mischaracterizing that, but I'm sure Mr. Harlow will let  
6 me know. The analysis is exactly the same. There's no  
7 basis under the agreement, expedited -- let me start  
8 again. There's no basis under the agreement for  
9 imposing on Qwest a hard and fast deadline for  
10 responding to billing disputes. The word expedite is  
11 relative. It takes a lot more time to respond to  
12 something in an expedited fashion if there are 1,000  
13 disputes than if there are 1. It's a relative term.

14           The ALJ found Qwest's process to be much more  
15 complex than Tel West's and also found that Tel West is  
16 required to audit its own records, which it's not doing.  
17 Every piece of the analysis we agree with. We are  
18 willing to give, although technically since the Judge  
19 didn't find that Qwest violated the agreement, his  
20 relief that we be required to notify Tel West within 30  
21 days is not really justified since there was no  
22 violation of the agreement, we're willing to do that.  
23 So the analysis is exactly the same for the 45 days, if  
24 that's how you want to refer to it, as it is for 30  
25 days.

0491

1                   May I respond to one or two other things that  
2 Mr. Harlow said in his final comments? I will do this  
3 in 25 seconds. With regard to Mr. Harlow's statement  
4 that Judge Berg went to great lengths not to say that  
5 Qwest can only provide at resale what it provides at  
6 retail, he says the exact opposite, and I would point  
7 you to paragraphs 44, 45, and 54 of the recommended  
8 decision. I don't know that we need to talk about it  
9 now. I can read it into the record if you would like,  
10 but I think it's part of the record.

11                   CHAIRWOMAN SHOWALTER: That's sufficient just  
12 to give us the paragraphs.

13                   MR. SHERR: Okay. Excuse me for just one  
14 moment while I look at my notes.

15                   The only other issue is, and again, this is a  
16 new issue, the idea of RCW 80.04.220 being controlling,  
17 I think by it's terms it's not. It's regarding a very  
18 different context about an action involving the  
19 reasonableness of a particular rate that requires an  
20 investigation by the Commission and a finding by the  
21 Commission that the public service company has charged  
22 an excessive or exorbitant amount for a service. Those  
23 are not again issues in this case. So I believe that  
24 pretty much does away with that argument.

25                   And that's all I have, thank you.

0492

1                   MR. HARLOW: Your Honor, if I may just very  
2 briefly. I love a Bench that's well prepared with lots  
3 of questions because it enables us to focus, but in the  
4 process of all the questions, I didn't really get to the  
5 substance, substantial argument, and I think it may be  
6 helpful to the Commission's decision. And that is this  
7 question of whether Qwest acted in good faith and fair  
8 dealing, and I won't go through the Nordstrom or the  
9 Target analogy, let's just go right down to the Costco  
10 analogy, which is kind of Qwest's theory of this  
11 basically is, CLECs, you're on your own, here's the  
12 warehouse, here's all our products and services, you  
13 figure it out. Okay, but even at Costco, if you get --  
14 if you grab the wrong product, you get 30 days to bring  
15 it back, and Qwest won't even do that. Now I'm not  
16 asking you to decide that we get a Nordstrom level of  
17 service, but good faith means more in this instance and  
18 particularly under this contract than simply you go  
19 figure it out. And here's why.

20                   Again, it comes back to the language that  
21 requires Qwest to provide services in the same time and  
22 in the same quality and in the same manner as it does to  
23 its own retail. And you know that if Qwest retail had a  
24 customer coming to it for three years and saying, we've  
25 got this problem, please help us solve it, we've got

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1 leakage through dial lock, we need a blocking product  
2 that works, we need to take care of this OS and DA  
3 problem, and pleading for three years and threatening  
4 and cajoling and trying to negotiate a new agreement,  
5 you know that if that Qwest retail representative ran up  
6 against the brick wall and they couldn't figure it out  
7 on their own, guess what they would get to do, they  
8 would get to call in some help, and they would call  
9 their superiors, their supervisors, they would call in  
10 the experts that Qwest made available to us after the  
11 litigation was started. Qwest would not -- retail would  
12 not have to wait three years for support. Qwest retail  
13 gets support, and they get it when they need it. They  
14 don't have to commence litigation.

15           It was not good faith to simply leave Tel  
16 West on their own to figure out that the advice they got  
17 in 1998 to use dial lock was bad advice and figure out  
18 what the correct advice was. We did not get parity as  
19 required by the contract, and this was bad faith as well  
20 as a specific breach of the contract. The facts bear  
21 that out, and we urge the Commission to affirm the  
22 order, perhaps with the logical extensions we have  
23 suggested.

24           JUDGE WALLIS: Any further questions from the  
25 Commission?



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1                   Very well, I want to thank you both for your  
2 focused arguments, it's been very helpful, and this  
3 session is adjourned.

4                   We'll turn the gavel back to Chairwoman  
5 Showalter to conclude the open meeting.

6                   CHAIRWOMAN SHOWALTER: Yes, this open meeting  
7 will now be recessed until May 10th at 9:30, I believe.

8                   (Hearing adjourned at 11:20 a.m.)

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