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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	Docket No. <u>UT- 063021</u>
	)	
TSS DIGITAL SERVICES, INC.,	)	TSS DIGITAL'S PETITION FOR
	)	ENFORCEMENT OF INTER-
Petition For Enforcement of its Inter-	)	CONNECTION AGREEMENT
Connection Agreement with Qwest	)	
Corporation (f/k/a U.S. WEST	)	
COMMUNICATIONS, INC.,)	)	
Pursuant to WAC 48-07-650	)	
_____	)	

THIS Petition is brought by TSS Digital Services, Inc., P.O. Box 69, Olympia, Washington 97507 ("TSS") pursuant to WAC 480-07-650.

**I. RELIEF SOUGHT**

This is a dispute over invoices for services governed by an Interconnection Agreement. TSS requests that the Washington Utilities & Transportation Commission ("Commission" or "WUTC") enforce the Dispute Resolution provisions of the Interconnection Agreement ("ICA") between TSS and Qwest Communications (f/k/a US West Communications, Inc. ("Qwest")). Qwest has violated the Dispute Resolution provisions of its ICA with TSS by refusing to submit a billing dispute to arbitration as required by the ICA. Instead, Qwest has filed a suit against TSS and others in the

Superior Court of the State of Washington for Thurston County (Cause No. 4-2-00324-2) as a means of resolving this billing dispute. The dispute concerns two circuits ordered by TSS pursuant to the ICA. The ICA allowed access to Qwest's high-capacity circuits. TSS requests the Commission to order Qwest to dismiss its Complaint against TSS and resolve this billing dispute as required by dispute resolution process in the ICA.

## **II. TSS REPRESENTATIVES**

TSS'S name and address is: TSS Digital Service, Inc.  
Attn: Thomas D. Ellis  
P.O. Box 69  
Olympia, WA 98507

Counsel for TSS: James P. Richmond  
Richmond Law Group, PLLC  
525 Columbia Street NW, Suite 202  
Olympia, WA 98501  
Telephone: (360) 754-1581

## **III. BACKGROUND**

The factual allegations in the background section are set forth in the attached Declaration of Thomas D. Ellis. Mr. Ellis is the Chief Technical Operator and Chairman of TSS.

TSS is party to an ICA with Qwest dated May 26, 2000. The original ICA was adopted from the Covad Communications Company/US West Communications, Inc., ICA, which was approved by this Commission on April 22, 1998. The original ICA also contained two amendments both signed by TSS on May 26, 2000, and signed by US West, now Qwest, on May 30, 2000. Pursuant to the parties' agreement, TSS was authorized to order from Qwest transport services, such as DS1 Circuits. These circuits were available either pursuant to an applicable discount based on the ICA or at retail tariff rates.

In September of 2001, TSS ordered two DS1 circuits from Qwest under the ICA and pursuant to a Qwest Network Service Agreement (“Agreement”) for circuit numbers 206-T42-3616-736 and 206-T31-7757-561. TSS ordered these circuits through Qwest’s agent, Pentastar Communications, Inc., (“Pentastar”). On December 30, 2001, TSS notified TSS that it wished to cancel this Agreement within 30 days after the end of the Agreement (which had a 12-month term). TSS paid all Qwest charges properly assessed pursuant to the Agreement. Nonetheless, Qwest failed to discontinue the services and in spite of written notice to cancel the circuits, Qwest continued to bill TSS for the two circuits. Ultimately the circuits were disconnected in May of 2003. Qwest contends that TSS owes it \$10,914.54 for the provision of those circuits through the service disconnection date.

The parties to the ICA agreed to submit any disputes to arbitration. Section 26.17 of the original ICA and the Second Amendment to the ICA requires Qwest to present any disputes to arbitration. (See Exhibit 4 attached to the Declaration of Thomas D. Ellis) Those provisions expressly excluded litigation in state court as a means of resolving disputed between the parties.

Rather than follow the dispute resolution provisions of the original ICA and the Second Amendment, Qwest included a claim for the amount it contends is owed for the two circuits in litigation commenced in the Thurston County Superior Court (Cause No. 04-2-00324-2).

On August 18, 2005, TSS wrote to counsel for Qwest and asked for arbitration, which Qwest has refused to engage in.

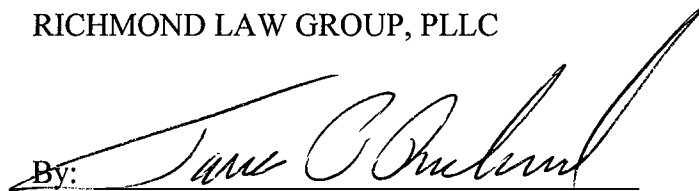
Qwest's refusal to engage in arbitration over the billing dispute regarding the two circuits constitutes a violation of the ICA. WAC 480-07-650 establishes a mechanism to provide a speedy and enforceable means to resolve disputes when one party to an interconnection agreement contends the other party is violating the terms of that agreement. TSS requests the Commission to enforce the dispute resolution provisions and require Qwest to submit this billing dispute over the two circuits to arbitration.

#### IV. CONCLUSION

TSS respectfully requests the Commission to enter an order requiring Qwest to dismiss its claim for \$10,914.54 submitted against TSS in litigation in the State of Washington, Thurston County Superior Court Cause No. 04-2-00324-2 and to submit this dispute to arbitration pursuant to Section 26.17 of the original ICA and Second Amendment.

RESPECTFULLY SUBMITTED this 16th day of March, 2006.

RICHMOND LAW GROUP, PLLC

By: 

JAMES P. RICHMOND, WSBA #15865  
Attorney for Petitioner  
525 Columbia Street NW, Suite 202  
Olympia, WA 98501  
(360) 754-1581

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STATE OF WASH.  
UTIL. AND TRANSP.  
COMMISSION

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of	)	Docket No. _____
	)	
TSS DIGITAL SERVICES, INC.,	)	DECLARATION OF THOMAS
	)	D. ELLIS IN SUPPORT OF TSS
Petition For Enforcement of its Inter-	)	DIGITAL SERVICES INC.'S
Connection Agreement with Qwest	)	PETITION FOR ENFORCEMENT
Corporation (f/k/a U.S. WEST	)	OF INTERCONNECTION
COMMUNICATIONS, INC.),	)	AGREEMENT
Pursuant to WAC 48-07-650	)	
_____	)	

I, THOMAS D. ELLIS, hereby declare and state as follows:

1. I am the Chief Technical Operator and Chairman of the Board of TSS Digital Services, Inc., the Petition in this Docket. My address is P.O. Box 69, Olympia, Washington, 98507. I make this Declaration based upon my personal knowledge.

2. TSS Digital Services, Inc. ("TSS") is a party to an Interconnection Agreement ("ICA") dated May 29, 2000 with Qwest Communications (f/k/a US WEST Communications, Inc.). There are two amendments to the ICA.

3. The original ICA authorized the use of transport services, such as DS1 circuits from Qwest.

ORIGINAL

4. In September of 2001, I ordered for TSS two DS1 circuits from Qwest pursuant to the ICA and an additional Qwest Network Service Agreement. I ordered these circuits through Qwest's agent, Pentastar Communications, Inc. The account numbers assigned to these circuits were as follows:

(a) 206-T42-3616-736

(b) 206-T31-7757-564

5. Attached hereto as Exhibit 1 is a true and correct copy of the Qwest Network Service Agreement for the purchased DS1 service.

6. Attached hereto as Exhibit 2 is a notice I sent to Pentastar on December 30, 2001, requesting removal of the above-ordered circuits within 30 days after the end of the contract. These circuits should have been disconnected by the end of October in 2002.

7. TSS paid the charges associated with the two circuits through the date I indicated for termination.

8. Contrary to written direction, Qwest did not disconnect the above circuits and continued to bill until May of 2003.

9. Qwest then filed a complaint against TSS and others in the Thurston County Superior Court for the State of Washington demanding payment of \$10,914.54 for billing associated with the above circuits from TSS. Attached hereto as Exhibit 3 is a copy of this Complaint.

10. Attached hereto as Exhibit 4 is a copy of the dispute resolution provisions of the Interconnection Agreement between TSS and Qwest. Those provisions require that this dispute be resolved by arbitration.

11. Attached hereto as Exhibit 5 is a letter dated August 18, 2005 sent on behalf of TSS to Qwest, asking for arbitration pursuant to the dispute resolution provisions of the ICA.

12. To date, Qwest has refused to remove its billing dispute from the Thurston County litigation and to engage in arbitration.

13. At no time did I waive the ability to demand arbitration to resolve billing disputes between TSS and Qwest.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 10 day of March, 2006.



THOMAS D. ELLIS

# **EXHIBIT 1**



PENTASTAR  
IN5542

Agreement Number WA 38217  
Billing Number

206-T42-3616

4. UH1A. 169381..AN

**QWEST NETWORK SERVICE AGREEMENT  
QWEST DS1 SERVICE  
Intrastate**

This is an agreement between T.S.S. Digital Services ("Customer") and Qwest Corporation ("Qwest") for the provision of Qwest DS1 Service ("Service" or "DS1") as defined herein ("Agreement"). Throughout this Agreement, Customer or Qwest may individually be referred to as "Party" and/or collectively as "Parties".

**1. SCOPE**

1.1 Under this Agreement, Qwest shall furnish and Customer shall pay for Service as defined herein. Qwest shall provide Service up to the Standard Network Interface ("SNI") at Customer's premises. The SNI is that location where Qwest's protected network facilities end and Customer's inside wire or network begins. Qwest will provide Service in accordance with the applicable Qwest Tariff, Price List, Price Schedule, Administrative Guidelines, and/or Catalog in the state in which Service is provided ("Tariff"), incorporated herein. In the event of a conflict between the terms and conditions of this Agreement and the Tariff, the then current Tariff will prevail.

1.2 Service provides for the two-way transmission of 1.544 Mbit/s digital signals, on a point-to-point basis only. Service can be provisioned on copper, fiber, or other suitable facilities, at Qwest's discretion. Service may be used for the transmission of voice, data, and video signals, or any combination thereof. Service is provided between two customer designated premises, between a customer designated premises and a Qwest serving wire center, or between Qwest serving wire centers. When Service is requested between two Qwest serving wire centers, Central Office Multiplexers must also be ordered on each end (i.e., each service wire center) of the DS1 circuit, and a Private Line Transport service must be ordered from each Central Office Multiplexer to the customer premises.

**2. TERM**

2.1 This Agreement is effective on the latest signature date and expires Twelve (12) months from the date Service is available to Customer under this Agreement, as evidenced by Qwest records ("Term").

2.2 If Qwest continues to provide Service after this term without a further Agreement, the provisions for month-to-month service in the Tariff will apply.

**3. SERVICE ORDERED:** Customer orders and Qwest shall supply Service as follows.

<u>Number of Circuits</u>	<u>Bandwidth Ordered</u>	<u>Address(es)</u>	<u>Address(es)</u>
One	1.544	19 <sup>th</sup> Floor "Meet Me" Room; Westin Bldg.; Seattle, WA	

**4. CHARGES AND BILLING.** Charges for Service shall be those specified herein. Customer shall pay each bill in full by the payment due date stated on each bill. Customer shall pay Qwest all applicable taxes, usual and customary surcharges and all government imposed fees and charges that relate to the Service or installation rendered hereunder. Where permitted by law, late payment charges shall be assessed according to Tariff or law. The charges for Services under this Agreement, including any and all discounts to which Customer may be entitled, will be offered and charged to Customer independently from and regardless of the Customer's purchase of any customer premises equipment or enhanced services from Qwest.

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Page 1 of 4

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18-02-2001 11:06:01 FROM  
004-08-01 11:54:00 FROM U.S. WEST AYS

EXPIRED 10-18-02

Current Total Monthly Rate is:	\$141.00
Current Nonrecurring Charge is:	\$340.00

5. **CHANGES TO SERVICE.** Customer may move the physical location of all or part of Service to another location within the same Qwest intrastate intrALATA serving area provided the terms and conditions of the Tariff are met or, where there is no Tariff, the applicable conditions from 6.4 herein apply.

**B. TERMINATION.**

6.1. Either Party may terminate this Agreement for cause provided written notice specifying the cause for termination and requesting correction within thirty (30) days is given the other Party and such cause is not corrected within such thirty (30) day period. Cause is any material breach of the terms of this Agreement. If Qwest terminates this Agreement for cause, or if Customer terminates this Agreement in whole or in part WITHOUT cause, Customer shall pay termination liability charges. If termination is prior to installation of Service, discontinuance charges shall be those reasonable costs incurred by Qwest through the date of termination. Termination Charges for Service discontinued after installation are defined below.

6.2. If termination is after installation but during the Minimum Service Period of 12 months, termination charges shall be calculated by taking the total monthly recurring charges at the time of termination, multiplied by the number of months (or fraction thereof) remaining in the Minimum Service Period, multiplied by one hundred percent (100%) of the monthly rate for Service terminated (or fraction thereof), plus any due but unpaid recurring, and all unpaid nonrecurring charges. The termination charges stated in 6.3 shall also apply for that portion of service being terminated beyond the 12 month Minimum Service Period.

6.3. If termination of Service is after the 12 month Minimum Service Period, termination charges shall be calculated by taking the total monthly recurring charges at the time of termination, multiplied by the number of months (or fraction thereof) remaining in term, multiplied by forty percent (40%) of the monthly rate for Service terminated (or fraction thereof), plus any due but unpaid recurring, and all unpaid nonrecurring charges.

6.4. A termination charge will be waived when all of the following conditions are met: 1) the customer discontinues their contracted service(s) and signs a new service agreement(s) for any other Company provided service(s), 2) the new service agreement(s) have a total value equal to or greater than 115% of the remaining prorated value of the existing agreement(s) (excluding any special construction charges, applicable nonrecurring charges, or previously billed but unpaid recurring and/or nonrecurring charges), 3) the Customer places the orders to discontinue the service and establish new service at the same time, and 4) a new minimum service period goes into effect when the new service agreement term begins. New service is defined as a newly installed service placed under a new service agreement(s), or newly installed additions to an existing service agreement(s), but does not include renewals of existing service agreement(s), renegotiations of existing service agreement(s) and conversions from month-to-month service to contracted service. The waiver does not apply to changes between regulated and unregulated products and services, nor to changes between enhanced and non-enhanced services.

6.5. New service is defined as a newly installed service placed under a new service agreement(s), or newly installed additions to an existing service agreement(s), but does not include renewals of existing service agreement(s), renegotiations of existing service agreement(s) and conversions from month-to-month service to contracted service.

7. **INTERRUPTIONS TO SERVICE.** Tariff specifies the credit allowance due Customer, if any, for interruptions to Service which are not caused by Customer's negligence. In the event Service is provided where there is no Tariff, the provisions of the F.C.C. Access Tariff No. 1 shall apply with respect to credit allowance due Customer.

**B. PERSONAL INJURY; PROPERTY DAMAGE.** Each Party shall be responsible for any actual physical damages it directly causes to the other in the course of its performance under this Agreement, limited to damages resulting from personal injuries, death, or property damage arising from negligent acts or omissions; PROVIDED HOWEVER, THAT NEITHER PARTY SHALL BE LIABLE TO THE

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Page 2 of 7

TO: 1803572254 P. 03/08 T-053

TO

FROM: 18-02-2921 11:54AM

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OTHER FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT.

9. **LIMITATION OF LIABILITY.** Qwest shall not be liable to customer for any incidental, indirect, special or consequential damages of any kind including but not limited to any loss of use, loss of business, or loss of profit. Except as provided under "PERSONAL INJURY; PROPERTY DAMAGE" ABOVE, ANY QWEST LIABILITY TO CUSTOMER FOR ANY DAMAGES OF ANY KIND UNDER THIS AGREEMENT SHALL NOT EXCEED, IN AMOUNT, A SUM EQUIVALENT TO THE APPLICABLE CREDIT FOR INTERRUPTIONS TO SERVICE UNDER THIS AGREEMENT. REMEDIES UNDER THIS AGREEMENT ARE EXCLUSIVE AND LIMITED TO THOSE EXPRESSLY DESCRIBED IN THIS AGREEMENT.

10. **NO WARRANTIES.** THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11. **UNCONTROLLABLE CIRCUMSTANCES.** Neither Party shall be deemed in violation of this Agreement if it is prevented from performing any of the obligations under this Agreement by reason of severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; power failures; nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances which are not within its reasonable control.

12. **DISPUTE RESOLUTION.** Any claim, controversy or dispute between the parties shall be resolved by binding arbitration in accordance with the Federal Arbitration Act, 9 U.S.C. 1-16, not state law.

13. **LAWFULNESS.** This Agreement and the Parties actions under this Agreement shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. Any change in rates, charges or regulations mandated by the legally constituted authorities will act as a modification of any contract to that extent without further notice. This Agreement shall be governed by the laws of the state where Service is provided.

14. **SEVERABILITY.** In the event that a court, governmental agency, or regulatory agency with proper jurisdiction determines that this Agreement or a provision of this Agreement is unlawful, this Agreement, or that provision of the Agreement to the extent it is unlawful, shall terminate. If a provision of this Agreement is terminated but the Parties can legally, commercially and practically continue without the terminated provision, the remainder of this Agreement shall continue in effect.

15. **GENERAL PROVISIONS.**

15.1. Failure or delay by either Party to exercise any right, power, or privilege hereunder, shall not operate as a waiver hereto.

15.2. This is a retail end user contract. It may be assigned only with the consent of Qwest. Customer may not assign to a reseller or a telecommunications carrier under any circumstances.

15.3. This Agreement benefits Customer and Qwest. There are no third party beneficiaries.

15.4. If a Party returns this Agreement by facsimile machine, the signing Party intends the copy of this authorized signature printed by the receiving facsimile machine to be its original signature.

15.5. Notwithstanding anything to the contrary, Customer may not make any disclosure to any other person or any public announcement regarding this Agreement or any relation between Customer and Qwest without Qwest's prior written approval of the Senior Vice President of Corporate Communications.

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R301-0143\*



Page 3 of 4

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FROM FROM 14-02-2003 11:09AM

04-08-01 11:54am FROM U S WEST AVS

Qwest shall have the right to terminate this Agreement and any other agreements between the parties if Customer violates this provision.

15.5. This Agreement constitutes the entire understanding between Customer and Qwest with respect to Services provided herein and supersedes any prior agreements or understandings.

16. EXECUTION. The Parties hereby execute and authorize this Agreement as of the latest date shown below. Notices concerning this Agreement may be sent to Qwest's Customer billing address of record or to Customer's Address for Notices specified herein, if any.

CUSTOMER	Qwest Corporation
	
Authorized Signature THOMAS D ELLU	Authorized Signature KELLY KARMEN
Name Typed or Printed CEO	Name Typed or Printed MGM
Title 9/25/01	Title 10-8-2001
Date	Date
Address for Notices: 525 Columbia Street NW; Suite 205 Olympia, WA 98501	Address for Notices:

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04-2001-DS1NTRA  
R001-0142F

Page 4 of 4

1-508 P.05/05 T-058  
18022572264 P.05

TO

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FROM 10-02-2001 11:18AM

10-08-01 11:55am From U.S. WEST AVS

Pentastar

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CONSUMER AFFAIRS

Agreement Number  
Billing Number

206 - ~~742~~ - ~~760~~

T31-7757

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QWEST NETWORK SERVICE AGREEMENT  
QWEST DS1 SERVICE  
Intrastate

This is an agreement between T.S.S. Digital Services ("Customer") and Qwest Corporation ("Qwest") for the provision of Qwest DS1 Service ("Service" or "DS1") as defined herein ("Agreement"). Throughout this Agreement, Customer or Qwest may individually be referred to as "Party" and/or collectively as "Parties".

1. SCOPE.

1.1. Under this Agreement, Qwest shall furnish and Customer shall pay for Service as defined herein. Qwest shall provide Service up to the Standard Network Interface ("SNI") at Customer's premises. The SNI is that location where Qwest's protected network facilities end and Customer's inside wire or network begins. Qwest will provide Service in accordance with the applicable Qwest Tariff, Price List, Price Schedule, Administrative Guideline, and/or Catalog in the state in which Service is provided ("Tariff"), incorporated herein. In the event of a conflict between the terms and conditions of this Agreement and the Tariff, the then current Tariff will prevail.

1.2. Service provides for the two-way transmission of 1.544 Mbit/s digital signals, on a point-to-point basis only. Service can be provisioned on copper, fiber, or other suitable facilities, at Qwest's discretion. Service may be used for the transmission of voice, data, and video signals, or any combination thereof. Service is provided between two customer designated premises, between a customer designated premises and a Qwest serving wire center, or between Qwest serving wire centers. When Service is requested between two Qwest serving wire centers, Central Office Multiplexers must also be ordered on each end (i.e., each service wire center) of the DS1 circuit, and a Private Line Transport service must be ordered from each Central Office Multiplexer to the customer premises.

2. TERM.

2.1. This Agreement is effective on the latest signature date and expires Twelve (12) months from the date Service is available to Customer under this Agreement, as evidenced by Qwest records ("Term").

2.2. If Qwest continues to provide Service after this term without a further Agreement, the provisions for month-to-month service in the Tariff will apply.

3. SERVICE ORDERED. Customer orders and Qwest shall supply Service as follows.

Number of Circuits	Bandwidth Ordered	Address(es)	Address(es)
1	1.544	525 Columbia Street NW; Olympia	Seattle Westin

4. CHARGES AND BILLING. Charges for Service shall be those specified herein. Customer shall pay each bill in full by the payment due date stated on each bill. Customer shall pay Qwest all applicable taxes, usual and customary surcharges and all government imposed fees and charges that relate to the Service or installation rendered hereunder. Where permitted by law, late payment charges shall be assessed according to Tariff or law. The charges for Services under this Agreement, including any and all discounts to which Customer may be entitled, will be offered and charged to Customer independently from and regardless of the Customer's purchase of any customer premises equipment or enhanced services from Qwest.

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Page 1 of 4

EXPIRED 10-29-02

Current Total Monthly Rate is:	\$484.01
Current Nonrecurring Charge is:	\$856.00

5. **CHANGES TO SERVICE.** Customer may move the physical location of all or part of Service to another location within the same Qwest intrastate IntraLATA serving area provided the terms and conditions of the Tariff are met, or, where there is no Tariff, the applicable conditions from 6.4 herein apply.

6. **TERMINATION.**

6.1. Either Party may terminate this Agreement for cause provided written notice specifying the cause for termination and requesting correction within thirty (30) days is given the other Party and such cause is not corrected within such thirty (30) day period. Cause is any material breach of the terms of this Agreement. If Qwest terminates this Agreement for cause, or if Customer terminates this Agreement in whole or in part WITHOUT cause, Customer shall pay termination liability charges. If termination is prior to installation of Service, discontinuance charges shall be those reasonable costs incurred by Qwest through the date of termination. Termination Charges for Service discontinued after installation are defined below.

6.2. If termination is after installation but during the Minimum Service Period of 12 months, termination charges shall be calculated by taking the total monthly recurring charges at the time of termination, multiplied by the number of months (or fraction thereof) remaining in the Minimum Service Period, multiplied by one hundred percent (100%) of the monthly rate for Service terminated (or fraction thereof), plus any due but unpaid recurring, and all unpaid nonrecurring charges. The termination charges stated in 6.3 shall also apply for that portion of service being terminated beyond the 12 month Minimum Service Period.

6.3. If termination of Service is after the 12 month Minimum Service Period, termination charges shall be calculated by taking the total monthly recurring charges at the time of termination, multiplied by the number of months (or fraction thereof) remaining in term, multiplied by forty percent (40%) of the monthly rate for Service terminated (or fraction thereof), plus any due but unpaid recurring, and all unpaid nonrecurring charges.

6.4. A termination charge will be waived when all of the following conditions are met: 1) the customer discontinues their contracted service(s) and signs a new service agreement(s) for any other Company provided service(s), 2) the new service agreement(s) have a total value equal to or greater than 115% of the remaining prorated value of the existing agreement(s) (excluding any special construction charges, applicable nonrecurring charges, or previously billed but unpaid recurring and/or nonrecurring charges), 3) the Customer places the orders to discontinue the service and establish new service at the same time, and 4) a new minimum service period goes into effect when the new service agreement term begins. New service is defined as a newly installed service placed under a new service agreement(s), or newly installed additions to an existing service agreement(s), but does not include renewals of expiring service agreement(s), renegotiations of existing service agreement(s) and conversions from month-to-month service to contracted service. The waiver does not apply to changes between regulated and unregulated products and services, nor to changes between enhanced and non-enhanced services.

6.5. New service is defined as a newly installed service placed under a new service agreement(s), or newly installed additions to an existing service agreement(s), but does not include renewals of expiring service agreement(s), renegotiations of existing service agreement(s) and conversions from month-to-month service to contracted service.

7. **INTERRUPTIONS TO SERVICE.** Tariff specifies the credit allowance due Customer, if any, for interruptions to Service which are not caused by Customer's negligence. In the event Service is provided where there is no Tariff, the provisions of the F.C.C. Access Tariff No. 1 shall apply with respect to credit allowance due Customer.

8. **PERSONAL INJURY; PROPERTY DAMAGE.** Each Party shall be responsible for any actual physical damages it directly causes to the other in the course of its performance under this Agreement, limited to damages resulting from personal injuries, death, or property damage arising from negligent acts or omissions; PROVIDED HOWEVER, THAT NEITHER PARTY SHALL BE LIABLE TO THE OTHER

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*TS*  
*10/22/01*

**CONFIDENTIAL**

FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, OR SPECIAL DAMAGES OF ANY KIND, INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT.

9. **LIMITATION OF LIABILITY.** QWEST SHALL NOT BE LIABLE TO CUSTOMER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, OR CONSEQUENTIAL DAMAGES OF ANY KIND INCLUDING BUT NOT LIMITED TO ANY LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT. EXCEPT AS PROVIDED UNDER "PERSONAL INJURY; PROPERTY DAMAGE" ABOVE, ANY QWEST LIABILITY TO CUSTOMER FOR ANY DAMAGES OF ANY KIND UNDER THIS AGREEMENT SHALL NOT EXCEED, IN AMOUNT, A SUM EQUIVALENT TO THE APPLICABLE CREDIT FOR INTERRUPTIONS TO SERVICE UNDER THIS AGREEMENT. REMEDIES UNDER THIS AGREEMENT ARE EXCLUSIVE AND LIMITED TO THOSE EXPRESSLY DESCRIBED IN THIS AGREEMENT.

10. **NO WARRANTIES.** THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

11. **UNCONTROLLABLE CIRCUMSTANCES.** Neither Party shall be deemed in violation of this Agreement if it is prevented from performing any of the obligations under this Agreement by reason of severe weather and storms; earthquakes or other natural occurrences; strikes or other labor unrest; power failures; nuclear or other civil or military emergencies; acts of legislative, judicial, executive or administrative authorities; or any other circumstances which are not within its reasonable control.

12. **DISPUTE RESOLUTION.** Any claim, controversy or dispute between the parties shall be resolved by binding arbitration in accordance with the Federal Arbitration Act, 9 U.S.C. 1-16, not state law.

13. **LAWFULNESS.** This Agreement and the Parties' actions under this Agreement shall comply with all applicable federal, state, and local laws, rules, regulations, court orders, and governmental agency orders. Any change in rates, charges or regulations mandated by the legally constituted authorities will act as a modification of any contract to that extent without further notice. This Agreement shall be governed by the laws of the state where Service is provided.

14. **SEVERABILITY.** In the event that a court, governmental agency, or regulatory agency with proper jurisdiction determines that this Agreement or a provision of this Agreement is unlawful, this Agreement, or that provision of the Agreement to the extent it is unlawful, shall terminate. If a provision of this Agreement is terminated but the Parties can legally, commercially and practicably continue without the terminated provision, the remainder of this Agreement shall continue in effect.

15. **GENERAL PROVISIONS.**

15.1. Failure or delay by either Party to exercise any right, power, or privilege hereunder, shall not operate as a waiver hereto.

15.2. This is a retail end user contract. It may be assigned only with the consent of Qwest. Customer may not assign to a reseller or a telecommunications carrier under any circumstances.

15.3. This Agreement benefits Customer and Qwest. There are no third party beneficiaries.

15.4. If a Party returns this Agreement by facsimile machine, the signing Party intends the copy of this authorized signature printed by the receiving facsimile machine to be its original signature.

15.5. Notwithstanding anything to the contrary, Customer may not make any disclosure to any other person or any public announcement regarding this Agreement or any relation between Customer and Qwest, without Qwest's prior written approval of the Senior Vice President of Corporate Communications. Qwest shall have the right to terminate this Agreement and any other agreements between the parties if Customer violates this provision.

04-2001-DS11NTRA  
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*[Handwritten signature]*  
10/22/01

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TOTL P.03

15.6. This Agreement constitutes the entire understanding between Customer and Qwest with respect to Service provided herein and supersedes any prior agreements or understandings.

16. EXECUTION. The Parties hereby execute and authorize this Agreement as of the latest date shown below. Notices concerning this Agreement may be sent to Qwest's Customer billing address of record or to Customer's Address for Notices specified herein, if any.

CUSTOMER

[Signature]  
 Authorized Signature  
THOMAS D. ELLIS  
 Name Typed or Printed  
CTO  
 Title  
10/22/01  
 Date

Address for Notices:  
525 Columbia Street NW, Suite 205  
Olympia, WA 98501

Qwest Corporation  
[Signature]  
 Authorized Signature  
KIMBERLY MILLER  
 Name Typed or Printed  
AC-QBPP  
 Title  
11/9/2001  
 Date

Address for Notices:

CONFIDENTIAL



# **EXHIBIT 2**



TSS Digital Service  
252 Columbia St NW  
Suite 205  
Olympia, WA 98501  
360-943-0605

December 30, 2001

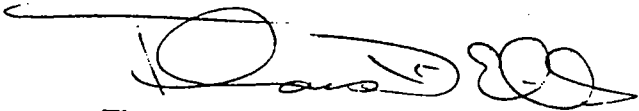
Susan Warner  
Pentastar Communications Inc  
4122 Factoria Blvd Suite 300  
Bellevue, WA 98006

RE: Qwest Accounts 206-T42-3616-736 and 206-T31-7757-564

Dear Susan:

This letter is a follow up our conversation and the E-mail to you on November 19, 2001 and December 15, 2001. To confirm the removal of the following Circuits 206-T42-3616-736 and 206-T31-7757-564. As I stated in the E-Mail I would like the two Circuits taken out within 30 days after the end of the contract. Let me know if you need any more info.

Very truly yours  
TSS Digital Services



Thomas D Ellis  
CTO

# **EXHIBIT 3**

**FILED**  
FEB 19 2004  
SUPERIOR COURT  
L. J. GOULD  
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

QWEST CORPORATION, INC.,

Plaintiff,

v.

TSS COMMUNICATIONS CORPORATION, an inactive Washington corporation; TSS SYSTEMS CORPORATION, an inactive Washington corporation; TSS SYSTEMS, LLC, a Washington limited liability company; TSS DIGITAL SERVICES, INC., a Washington corporation; and THOMAS D. ELLIS, an individual registered agent, and owner of the foregoing corporations,

Defendants.

NO 04 - 2 - 00324 - 2

COMPLAINT

COMES NOW Plaintiff Qwest Corporation, Inc., through its undersigned attorneys, Williams, Kastner & Gibbs PLLC, and states the following claims for relief against TSS Communications Corporation, an inactive Washington corporation; TSS Systems Corporation, an inactive Washington Corporation, TSS Systems, LLC, a Washington limited liability company; TSS Digital Services, Inc., a Washington corporation; and THOMAS D. ELLIS, an individual, the registered agent, and owner of each of the foregoing corporations:

COMPLAINT - 1

**Williams, Kastner & Gibbs PLLC**  
Two Union Square, Suite 4100 (98101-2380)  
Mail Address: P.O. Box 21926  
Seattle, Washington 98111-3926  
(206) 628-6600

**COPY**

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**I. PARTIES**

1. Qwest Corporation, Inc. ("QCI") is a Colorado for-profit corporation in good standing. It is qualified to do business in the State of Washington as a foreign corporation and has its principal place of business therein at 1600 7<sup>th</sup> Avenue, Suite 3800, Seattle, Washington. All of Qwest's applicable corporate registration fees for doing business in the State of Washington have been paid. QCI is in the business of providing telecommunications services for compensation to the public, and is subject to regulation as to such services in the State of Washington by the Washington Utilities and Transportation Commission and as to interstate services by the Federal Communications Commission.

2. Defendant TSS Communications Corporation is an inactive Washington corporation ("Communications"). Its authorization to act as a corporation under Washington law expired February 28, 2002. Its principal place of business at all times relevant hereto was 525 Columbia Street, Suite 205, Olympia, Washington 98501, and its owner, incorporator, and Registered Agent was Defendant Thomas D. Ellis. On information and belief, substantially all stock of the said corporation was owned by Defendant Thomas D. Ellis.

3. Defendant TSS Systems Corporation is an inactive Washington corporation ("Systems Corp."). Its authorization to act as a corporation under Washington law expired January 31, 2000. On information and belief, its principal place of business at all times relevant hereto was 525 Columbia Street, Suite 205, Olympia, Washington 98501, and its owner, incorporator, and Registered Agent was Defendant Thomas D. Ellis. On information and belief, substantially all stock of the said corporation was owned by Defendant Thomas D. Ellis.

4. Defendant TSS Systems, LLC is an active Washington limited liability company having its principal place of business at 525 Columbia Street, Suite 205, Olympia,

1 Washington 98501 ("Systems LLC"). Its owner, sole member, and Registered Agent is  
2 Defendant Thomas D. Ellis.

3 5. Defendant TSS Digital Services, Inc. is a Washington state corporation in good  
4 standing having its principal place of business at 525 Columbia Street, Suite 205, Olympia,  
5 Washington 98501 ("Digital"). Its owner, incorporator, and Registered Agent is Defendant  
6 Thomas D. Ellis.

7 6. Defendant Thomas D. Ellis ("Ellis") is an individual citizen and resident of the  
8 City of Olympia, State of Washington. In addition to his activities described in paragraphs 2,  
9 3, 4 and 5 above, he is a controlling person of Systems, and Digital and was a controlling  
10 person of Communications. His principal place of business is 525 Columbia Street, Suite 205,  
11 Olympia, Washington 98501, the location from which all three corporations have conducted  
12 business.

13 7. Upon information and belief, Defendant Ellis has controlled and directed the  
14 affairs of Communications, Systems, and Digital as alter egos of himself and for his personal  
15 use and benefit. Defendant Ellis was President of Defendant Communications.

16 8. This court has jurisdiction over the parties and the subject matter of this action.

17 9. Venue is proper in Thurston County, Washington pursuant to RCW 4.12.025  
18 because the telecommunications and other services rendered by QCI to one or more of the  
19 defendants pursuant to contract or tariff, which gave rise to the dispute in this action, were  
20 performed therein, defendant Ellis resides in Thurston County, Washington and all of the  
21 corporate or LLC defendants have or had during times material to this action offices in  
22 Thurston County, Washington.

## 23 **II. FACTS**

24 10. At various dates on and after January, 1998, Defendant Communications  
25 demanded from QCI, and its predecessor, US West Communications, Inc. ("USWC"), certain

1 telecommunications and other services provided pursuant to state tariffs then and thereafter on  
 2 file with the Washington Utilities and Transportation Commission ("WUTC") and under  
 3 federal tariffs or schedules then and thereafter on file with the Federal Communications  
 4 Commission ("FCC") or obtained such services by contract. Defendant Communications was  
 5 in the business of providing Internet access to members of the public for compensation, in the  
 6 course of which business Defendant Communications used telecommunications services  
 7 obtained from QCI and its predecessor USWC. After receiving the requests from Defendant  
 8 Communications, QCI, and its predecessor USWC, supplied such telecommunications and  
 9 other services to Defendant Communications under the following listed account numbers, and  
 10 rendered monthly invoices which created accounts receivable in the ordinary course of QCI's  
 11 business:

Telephone Number	Date Services Rendered & Invoiced	Balance (excluding late charges)	Charges Incurred post-2/28/02
360-D08-5010-425	11/99 – 05/03	\$87,737.20	\$43,521.75
360-D08-5016-016	06/02 – 04/03	\$8,738.03	\$8,738.03
360-D08-7816-816	02/98 – 10/01	\$22,101.37	
360-D08-8130-130	02/99 – 09/01	\$11,396.35	
360-D08-6440-440	written off	\$1,782.47	
		\$131,755.42	\$52,334.03

18 On February 28, 2002 Communications was dissolved by the Washington Secretary of State  
 19 for failure to file annual renewal documentation and pay the annual corporate fee. Neither  
 20 Communications nor any other Defendant notified QCI or its predecessor that Communications  
 21 would cease to exist or had ceased to exist on February 28, 2002. Communications and/or  
 22 other defendants received and used in their for-profit businesses, telecommunications services  
 23 provided by QCI after February 28, 2002 ostensibly to Communications based on QCI's belief  
 24 that Communications was still an active corporation.  
 25

11. At various dates on and after January, 1998, Defendants Systems LLC and Systems Corp. demanded from QCI, and its predecessor USWC, certain telecommunications and other services provided pursuant to the aforesaid state and federal tariffs or schedules or obtained such services by contract. Defendants Systems LLC and Systems Corp. are in the business of providing Internet access to members of the public for compensation, in the course of which business Defendants Systems LLC and Systems Corp. use telecommunications services obtained from QCI and its predecessor USWC. After receiving the requests from Defendants Systems LLC and Systems Corp., QCI, and its predecessor USWC, supplied such telecommunications and other services to Defendants Systems LLC and Systems Corp. under the following listed account numbers, and rendered monthly invoices which created accounts receivable in the ordinary course of QCI's business:

Telephone Number	Date Service Disconnected	Balance (excluding late charges)
360-705-8785-109	07/24/03	\$2,096.62
206-T30-8897-112	07/24/03	\$20,153.89
206-T82-1285-449	06/30/03	\$18,199.05
360-943-5423-113	06/20/03	\$984.28
360-705-8790-719	04/25/03	\$9,652.74
		\$51,086.58

12. At various dates on and after January, 1998, Defendant Ellis individually, for his own ultimate use and benefit, and as agent for Defendant Digital for its use and benefit, demanded from QCI, and its predecessor USWC, certain telecommunications and other services provided pursuant to State and federal tariffs or schedules then and thereafter on file with the WUTC and with the FCC or obtained such services by contract. Defendant Digital is in the business of providing Internet access to members of the public for compensation, in the course of which business Defendant Digital uses telecommunications services obtained from



1 QCI and its predecessor USWC. After receiving the requests from Defendant Digital, QCI,  
2 and its predecessor USWC, supplied such telecommunications and other services to Defendant  
3 Digital under the following listed account numbers and rendered monthly invoices which  
4 created accounts receivable in the ordinary course of QCI's business:

Telephone Number	Date Service Disconnected	Balance (excluding late charges)
206-T42-3616-736	05/01/03	\$2,357.36
206-T31-7757-564	05/20/03	\$8,557.18
		\$10,914.54

5  
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10 13. QCI provided telecommunications and other services to each corporate  
11 Defendant through the above-referenced termination dates.

12 14. QCI fully performed all terms and provisions required of it under and pursuant  
13 to the aforesaid state and federal tariffs and/or schedules and/or contracts, pursuant to which  
14 such telecommunications and other services were provided to each of the corporate  
15 Defendants.

16 15. After each Defendant ordered service from QCI or its predecessor USWC, as  
17 alleged above, and those telecommunications and other services were initiated and provided to  
18 Defendants, QCI submitted invoices to Defendants periodically, all of which were required to  
19 be paid in full without discount within thirty (30) days.

20 16. None of the Defendants properly objected to or disputed any invoice in the time  
21 or manner required by applicable contract or pursuant to requirements of any Federal or State  
22 tariffs and/or schedules applicable to the telecommunications or other services provided.

23 17. Upon information and belief, Defendant Ellis controlled, directed, utilized, and  
24 employed Defendants Communications, Systems LLC, Systems Corp., and Digital to obtain  
25 control over telecommunication services provided by QCI and its predecessor and the value of

COMPLAINT - 6

Williams, Kastner & Gibbs PLLC  
Two Union Square, Suite 4100 (98101-2380)  
Mail Address: P.O. Box 21926  
Seattle, Washington 98111-3926  
(206) 628-6600

1 such telecommunications services for his own ultimate use and benefit, and such control over  
2 the services was obtained wrongfully and/or by use of deception and with intent to deprive QCI  
3 of the value of such services.

4 18. Despite having no legitimate dispute with or complaint about the character,  
5 quality, or timeliness of telecommunications or other services provided to them, each of the  
6 corporate Defendants has failed, neglected, and refused to pay invoices rendered from QCI to  
7 them in total amount of \$193,756.54, exclusive of interest or appropriate late or other charges  
8 due under tariff and/or schedules or pursuant to contract.

9 19. Tariffs and/or schedules applicable to the telecommunications and other  
10 services provided to Defendants provide that QCI is entitled to recover interest or late charges  
11 from and after its due date of each invoice that is unpaid in the approximate amount of one  
12 percent (1%) per month, and its reasonable attorneys' fees incurred in effectuating collection,  
13 and costs.

14 20. QCI has demanded payment of all of the foregoing sums from Defendants  
15 jointly and severally, and each of the Defendants has failed, neglected, and refused to pay all or  
16 any portion of the aforesaid sums.

17 21. On information and belief, Defendants Systems LLC and Digital are the  
18 successors-in-interest to Defendants Communications and Systems Corp.

19 22. On information and belief, Defendant Ellis improperly caused to be transferred  
20 to Defendants Systems and Digital all tangible and intangible business assets, property, and  
21 corporate opportunities of Defendants Communications and Systems Corp. without fair,  
22 contemporaneous consideration and without making provision to pay the debts of Defendants  
23 Communications and Systems Corp.

24 23. Defendant Ellis continued to receive and use for his benefit, directly or  
25 indirectly through one or more other defendants, telecommunications services provided by QCI

1 or its predecessor, which generated indebtedness incurred nominally by Defendants  
2 Communications and Systems Corp. after it became inactive on February 28, 2002.

3 24. As the person responsible for causing the transfer of Defendants  
4 Communications' and Systems Corp's assets to Defendant Systems LLC and Defendant  
5 Digital without proper compensation, as aforesaid, Defendant Ellis engaged in a fraudulent  
6 conveyance of said assets, property, and opportunities of Defendants Communications and  
7 Systems Corp., leaving them without the ability to pay their lawful indebtedness, including that  
8 to QCI, as it matured.

9 25. As owner and controlling person of all four corporate Defendants, Defendant  
10 Ellis personally benefited from creation of Defendants Systems LLC and Digital to receive  
11 said assets, property, and opportunities of Defendants Communications and Systems Corp.

12 26. All telecommunications and other services provided by QCI or its predecessor  
13 USWC ultimately benefited Defendant Ellis individually, as the owner and controlling person  
14 of each corporate Defendant.

### 15 **III. FIRST CLAIM FOR RELIEF**

#### 16 **(Breach of Contract against All Defendants)**

17 27. QCI incorporates by reference herein paragraphs 1-26 above as though fully set  
18 forth herein.

19 28. Defendants have breached oral and/or written express and/or implied contracts  
20 with QCI for purchase of telecommunications and other services from QCI which QCI  
21 performed fully but the purchase prices for which Defendants have failed and refused to pay.  
22 QCI has been damaged by these breaches in the amount of \$193,756.54, exclusive of interest  
23 or late or other charges, reasonable attorneys' fees as permitted at law, and costs.

### 24 **IV. SECOND CLAIM FOR RELIEF**

#### 25 **(Account Stated Against All Defendants)**

1 29. QCI incorporates by reference herein paragraphs 1-28 above as though fully set  
2 forth herein.

3 30. The invoices sent by QCI to Defendants for telecommunications and other  
4 services rendered pursuant to oral or written contracts represented accounts stated by QCI to  
5 Defendants for their use and benefit in the total unpaid sum of \$193,756.47, exclusive of  
6 interest or late or other charges or interest, attorneys' fees as permitted at law, and costs.

7 **V. THIRD CLAIM FOR RELIEF**

8 **(Quantum Meruit – Against All Defendants)**

9 31. QCI incorporates by reference herein paragraphs 1-30 above as though fully set  
10 forth herein.

11 32. Telecommunications and other services provided to Defendants on and after  
12 January 1, 1998 had a reasonable total value to Defendants in the amount of \$193,756.54,  
13 exclusive of interest at the statutory rate, recoverable from the date any and all such  
14 telecommunications and other services were rendered to the Defendants or any of them, plus  
15 costs. Defendants' failure and refusal to pay for such services as they were received and used  
16 in their various businesses as alleged above has damaged QCI in an amount of \$193,756.54,  
17 plus interest, costs and reasonable attorneys' fees.

18 **VI. FOURTH CLAIM FOR RELIEF**

19 **(Tariffs – Against All Defendants)**

20 33. QCI incorporates by reference herein paragraphs 1-32 above as though fully set  
21 forth herein.

22 34. Telecommunications and other services provided to Defendants had a value  
23 established by tariffs and/or schedules and/or price lists filed and effective in the State of  
24 Washington for intrastate telecommunications services and with the Federal Communications  
25 Commission for interstate services, as contained in Tariff FCC Nos. 2 and 3, or the Rates and

1 Services Schedule which replaced them on July 1, 2001, in the total amount of \$193,756.54.  
2 Pursuant to tariff and/or schedules, QCI is entitled to payment in full of that amount and  
3 Defendants are jointly and severally responsible to QCI for the amount of \$193,756.54. In  
4 addition thereto, QCI is entitled to recover late or other charges, reasonable attorneys' fees as  
5 permitted thereunder, and costs. Defendants' failure to pay the tariffed and/or scheduled  
6 amounts for the services they obtained from QCI and used in their businesses has damaged  
7 QCI in the amount of \$193,756.54, plus interest, costs and reasonable attorneys' fees.

8 **VII. FIFTH CLAIM FOR RELIEF**

9 **(Fraudulent Conveyance)**

10 35. QCI incorporates by reference herein paragraphs 1-34 above as though fully set  
11 forth herein.

12 36. Upon information and belief, when Defendant Ellis caused Defendant  
13 Communications to transfer its assets to Defendants Systems and Digital without fair  
14 equivalent consideration, he knew or reasonably should have known that Defendant  
15 Communications retained insufficient property or assets with which to pay its indebtedness to  
16 creditors, including QCI, as it became due, and that such transfer was a fraud on creditors. As  
17 a result, said transfer was a fraudulent conveyance, and QCI was damaged by such conveyance  
18 in the amount of \$131,755.42, representing sums owed to QCI or its predecessor by Defendant  
19 Communications at the time of the fraudulent conveyance.

20 WHEREFORE, Plaintiff Qwest Communications, Inc. prays for entry of judgment in its  
21 favor and orders as follows:

22 A. Alternatively, on its First through Fourth Claims for Relief against Defendants,  
23 jointly and severally, as liability is found, in the amount of \$193,756.54, plus appropriate  
24 interest or late or other charges;  
25

1 B. On its Fifth Claim for Relief, independently of its First through Fourth Claims  
2 for Relief, for judgment against Defendants Digital and Systems LLC and Systems Corp.,  
3 voiding the conveyance of assets from Defendant Communications to the extent necessary to  
4 satisfy QCI's claim against Defendant Communications in the amount of \$131,755.42 and  
5 judgment against Defendant Communications in said amount;

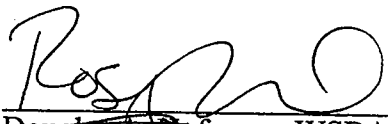
6 C. For attorneys' fees on each claim as permitted by law;

7 D. For all recoverable costs of instituting or maintaining this action; and

8 E. For all other appropriate relief.

9 RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of February, 2004.

11 WILLIAMS, KASTNER & GIBBS PLLC

12  
13 By   
14 Douglas A. Hofmann, WSBA #06393  
15 RoseMary Reed, WSBA # 34497

16 Attorneys for Plaintiff.

18 CAMPBELL BOHN KILLIN BRITTAN &  
19 RAY, LLC

20 Russell P. Rowe, CSBA # 2443  
21 4725 S. Monaco Street  
22 Suite 210  
23 Denver, CO 80237  
24 (303)322-3400  
25 Fax (303)770-4838

Attorneys for Plaintiff.

# **EXHIBIT 4**

## **26.17 Dispute Resolution**

If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents related solely to and arising directly from a breach of this Agreement ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"). The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. In all such proceedings each Party shall have reasonable discovery rights. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration shall occur in Seattle, Washington. Nothing in this Section shall be construed to waive or limit either Party's right to seek relief from the Commission, or the Federal Communications Commission, or Federal Court (including equitable or injunctive relief), as provided by state or federal law.

No Dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues.

## **26.18 Controlling Law**

This Agreement was negotiated by the Parties in accordance with the terms of the Act and the laws of the state where service is provided hereunder. It shall be interpreted solely in accordance with the terms of the Act and other applicable state and federal law.

## **26.19 Joint Work Product**

This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

## **26.20 Responsibility for Environmental Contamination**

Neither Party shall be liable to the other for any costs whatsoever resulting from the presence or release of any environmental hazard that either Party did not introduce to the affected work location. Both Parties shall defend and hold harmless the other, its officers, directors and employees from and against any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including reasonable attorneys' fees) that arise out of or result from (i)



# **EXHIBIT 5**

August 18, 2005

JUDITH A. ENDEJAN  
(206) 340-9694  
jendejan@grahamdunn.com

**VIA FACSIMILE & U.S. MAIL**

Doug A. Hofmann  
Shawn B. Rediger  
Williams Kastner & Gibbs  
Two Union Square  
Suite 4100  
Seattle, WA 98101-2380

**Re: Qwest Corporation v. TSS Communications Corporation  
Thurston County Cause No. 04-2-00324-2**

Dear Ms. Rediger and Mr. Hofmann:

We represent TSS Digital Services, Inc. with respect to certain regulatory matters before the Washington Utilities and Transportation Commission ("WUTC"). We understand that a claim has been asserted by Qwest Corporation, Inc. against TSS Digital in the above docket for \$10,914.54 for non-payment of services provided to TSS Digital. These services involved the provision of interoffice transmission facilities under the terms of the Qwest/TSS Digital Interconnection Agreement ("ICA"). Under Section 26.17 of the ICA, any claim arising from a breach of the ICA must be settled first through negotiation, or if that is unsuccessful pursuant to arbitration conducted by a single arbitrator. A copy of this provision is enclosed. TSS Digital hereby demands that Qwest follow the dispute resolution provision of the ICA, dismiss TSS Digital from the above lawsuit and proceed to arbitrate the amount in dispute. Should Qwest refuse to abide by the dispute resolution provisions of the Interconnection Agreement, TSS Digital will file a petition for enforcement of the ICA with the WUTC pursuant to WAC 480-07-650.

Please contact the undersigned as soon as possible with respect to Qwest's position regarding arbitration of its dispute against TSS Digital. Thank you.

August 18, 2005

Page 2

Sincerely,

**GRAHAM & DUNN PC**

Judith A. Endejan

JAE/ned

Enclosure

cc: Tom Ellis

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