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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC

Petitioner

v.

QWEST CORPORATION, INC.

Respondent.

Docket No. UT-013097

QWEST CORPORATION'S ANSWER
TO TEL WEST'S PETITION FOR
RECONSIDERATION OF COMMISSION
PART A DECISION

Qwest Corporation, by and through its undersigned counsel, hereby answers Tel West's May 31, 2002 petition for reconsideration ("Petition for Reconsideration") of the Commission's May 23, 2002 decision ("OS/DA Final Order") affirming in part and reversing in part the Part A Recommended Decision. This answer is made pursuant to the Commission's June 4, 2002 notice inviting Qwest to answer the Petition for Reconsideration by June 18, 2002.

1. Introduction.

Tel West's Petition for Reconsideration should be denied. Tel West has cited no new legal authorities contradicting the OS/DA Final Order and has failed to raise any credible argument that any portion of the OS/DA Final Order is erroneous. Instead, Tel West resorts to strained analogies and to recycling the arguments it raised prior to the evidentiary hearing, but that it failed to raise in its May 3 Comments on the Recommended Decision. The Petition for Reconsideration is neither procedurally proper nor persuasive. As such, it should be denied.

1 **2. Tel West improperly argues on reconsideration what it failed to argue in**
2 **its Comments on the Recommended Decision.**

3 In its Petition for Reconsideration, Tel West argues why the ALJ’s interpretation of the parties’
4 interconnection agreement was in error. *Petition for Reconsideration, at 6:13 – 8:15.* In addition, it
5 appends its entire prehearing brief as an exhibit to the Petition for Reconsideration. Tel West begins with
6 the complaint that the “Commission did not address one way or the other the finding of the
7 Recommended Decision that rejected Tel West’s arguments regarding proper interpretation of the ICA
8 as it applied to the question of whether or not Qwest would force Tel West to accept and pay for OS
9 and DA services.” *Id., at 6:15-18.*

10 The fact that the Commission did not address the contract interpretation issue in the OS/DA Final
11 Order is easy to explain. Tel West had the burden on administrative review to raise, argue and support
12 its specific objections to the Recommended Decision. It failed to do so regarding this issue. Tel West’s
13 Comments on the Recommended Decision contained one sentence regarding the ALJ’s contract
14 interpretation findings – “Tel West also believes that the Commission should reverse the finding
15 interpreting the Current Agreement to require Tel West to accept OS/DA on its resold lines.”
16 *Comments of Tel West on Recommended Decision, at 6:7-9.*¹ Tel West offered no legal analysis, no
17 cite to legal authorities and no reference to specific arguments contained in its prehearing brief in its
18 Comments. It is improper for Tel West to raise specific contract interpretation arguments on
19 reconsideration that it failed to raise on administrative review. Tel West had a full opportunity to make
20 these arguments in its Comments. Its failure to do so prevents it from doing so now.

21 As to the substance of Tel West’s contract analysis, Qwest will not restate its arguments in this
22 answer. If the Commission deems its necessary to consider this issue further, Qwest would again refer
23 the Commission to Qwest’s prehearing brief, pages 16-28. Qwest concurs with the ALJ’s legal analysis
24 (found at ¶¶ 35 – 98 of the Recommended Decision) both in terms of what principles guide contract

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26 ¹ Tel West’s Comments contained no analysis supporting its view that the ALJ erred in interpreting the parties’ contract. It
27 did, however, dedicate two pages to arguing why the Commission should reverse the ALJ’s findings regarding the credibility of Tel
West’s witness, Mr. Swickard. *Comments of Tel West on Recommended Decision, at 4:20 – 6:11.*

1 interpretation in Washington and how the parties' interconnection agreement should be interpreted using
2 those principles. The ALJ was in the best position to ascertain and weigh the credibility and strength of
3 the parties' testimony and theories of interpretation. Tel West's Petition for Reconsideration offers no
4 persuasive basis for disturbing the ALJ's findings.

5 **3. Due process is not a mere technicality.**

6 As it did in oral argument,² Tel West again shrugs off as mere technicalities Qwest's and the
7 Commission's concerns about fundamental due process and the proper scope of a Section 530
8 adjudication. *Petition for Reconsideration, at 2:1-2* ("Unfortunately, the Commission has become
9 unduly mired in Qwest's technical arguments."). Qwest disagrees with that characterization. The
10 Commission was correct in rejecting Tel West's unsupported arguments regarding both the due process
11 and the Section 530 arguments raised by Qwest. The Recommended Decision's findings and conclusions
12 concerning Section 251(c)(1) were in error as a matter of due process since Qwest had no notice or
13 opportunity to prepare a defense to such a cause of action. Had Tel West raised 251(c)(1) as a claim in
14 its amended petition for enforcement, Qwest would have been able to proffer factual and legal support in
15 opposition to such a claim. Tel West did not. As such, the Recommended Decision went too far in this
16 one respect. The OS/DA Final Order properly reversed the 251(c)(1) findings and deleted paragraphs
17 101-118, 165, 176-178 and 182 of the Recommended Decision. *OS/DA Final Order, at ¶ 42*. The
18 Petition for Reconsideration offers no compelling reason or legal authority supporting a reversal of the
19 OS/DA Final Order in this regard.

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21 **4. Tel West's argument that litigants need not cite every legal authority in**
22 **pleadings is not relevant.**

23 In its Petition for Reconsideration, Tel West attempts to obscure the Commission's ruling by
24 stating that neither Section 530 nor due process required Tel West to plead "every conceivable law[.]"

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26 ² In response to the Chairwoman's question about Qwest's argument that alleged violations of Section 251(c)(1) are outside the
27 scope of an adjudication brought under WAC 480-09-530, counsel for Tel West dismissed such arguments as "hair splitting in the
extreme." *Transcript (5/8/02), at 00461-00462*.

1 rule, regulation, or case authority” in its amended petition for enforcement. *Petition for*
2 *Reconsideration, at 2:9-18.* Qwest agrees that parties need not identify every legal authority supporting
3 its causes of action in its initial pleading. But Tel West misses the point that a party is required to
4 specifically identify its causes of action so as to provide the responding party an opportunity to defend
5 itself. Citing United States Supreme Court precedent, the Commission recognized this in holding that “[i]t
6 is a fundamental tenet of due process of law that the parties to an administrative proceeding must have
7 notice of the contentions that they face.” *OS/DA Final Order, at ¶ 24.*

8 The Commission’s due process analysis is both on point and accurate. It is also consistent with
9 the manner in which Washington courts evaluate pleading requirements.³ Civil Rule 8(a) requires a party
10 asserting a claim to plead “a short and plain statement of the claim showing that the pleader is entitled to
11 relief.” Applying this rule, Washington courts have held that a plaintiff is not entitled to relief on a claim
12 where it has failed to specifically identify the claim in its complaint. *Trask v. Butler, 122 Wn.2d 835,*
13 *845-46 (1994); Fischer-McReynolds v. Quasim, 101 Wn.App. 801, 814 (Div II. 2000)* (“*Finally, we*
14 *decline to consider Fisher-McReynolds’ additional claims, which she failed to assert in her*
15 *amended complaint. . . .The purpose of a complaint is to apprise the defendant of the nature of the*
16 *plaintiff’s claims and the legal grounds upon which the claims rest.”). In Trask, the Supreme Court*

17 held that a plaintiff who had alleged professional negligence, breach of fiduciary duty and breach of
18 contract could not recover on a claim based on the Consumer Protection Act. *123 Wn.2d at 846.* In
19 refusing to consider the CPA claim, the Court explained that if a plaintiff were not required to specifically
20 reference the cause of action in its pleading, “a litigant could simply await trial and surprise their adversary
21 with a CPA claim so long as enough facts were intermixed in the complaint.” *Id.* Tel West’s argument is
22 at odds with constitutional notions of due process, Washington’s rules of civil procedure and Supreme
23 Court precedent.

24 Furthermore, Tel West’s attempt to muddy the distinction between causes of actions or claims
25 and legal theories or legal authorities should not be afforded any weight. Once the petitioner identifies its

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27 ³ In its Petition, Tel West cites Civil Rule 9(k). That rule relates to specific pleading requirements in a civil action when a party
intends to rely on the laws of a foreign jurisdiction. Obviously, that rule has no bearing on this case.

1 causes of action in its complaint, the respondent is able to educate itself as to the elements of those causes
2 of action. Knowledge of those elements allows the respondent to identify areas for internal investigation
3 and external discovery and to shape the development of its prefiled testimony, its cross-examination and
4 its legal briefing.

5 In this case, Tel West's first amended petition for enforcement contained only claims that Qwest
6 was in breach of various sections of the parties' interconnection agreement. In responding to a breach of
7 contract claim, Qwest focused on developing a record as to the meaning of the relevant agreement
8 sections, an analysis of the parties' conduct *vis-a-vis* those sections and affirmative defenses (e.g., failure
9 to mitigate) relevant to such a claim. Aside from attempting to identify what evidence existed as to any
10 representations made by the parties during the course of negotiating the interconnection agreement
11 regarding the relevant provisions,⁴ Qwest did not further investigate the period of the parties' negotiations.
12 Once it determined that Tel West had no contemporaneous evidence supporting its current interpretation
13 of the agreement regarding the OS/DA issue, Qwest moved on to other matters in preparing its case.

14 Had Tel West articulated in its petition for enforcement that Qwest had failed to negotiate the
15 interconnection in good faith, Qwest would have sought additional discovery and engaged in further
16 internal investigation regarding the specific conduct alleged in the 251(c)(1) findings. Unfortunately,
17 Qwest was provided no such opportunity and the Part A record is devoid of either allegations or
18 evidence on this issue.

19 The OS/DA Final Order reversed the 251(c)(1) findings because Tel West had not alleged a
20 relevant cause of action in its petition, not because Tel West's petition lacked cites to all conceivable legal
21 authorities. Tel West's argument that it is not required to plead every law, regulation and case authority is
22 a red herring.

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24 ⁴ As Qwest articulated in oral argument, Tel West (in response to Qwest's data requests) produced only Mr. Taylor's meeting
25 notes as evidence that the parties had specifically negotiated the OS/DA issue before executing the interconnection agreement in
26 August 2001. Since those notes failed to identify any representation by Qwest that it would provide Tel West for resale a basic
27 local exchange line free of access to OS and DA, Qwest did not further pursue discovery regarding the parties' negotiations.
Transcript (5/8/02), at 00473-00475.

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5. Tel West is incorrect that its pleading of the facts and prayer for relief put Qwest on notice that Section 251(c)(1) was in issue.

Tel West next asserts that, in compliance with Section 530, it pleaded relevant facts and, as a result, Qwest should have been aware that it was subject to findings of liability under Section 251(c)(1) of the Act. *Petition for Reconsideration, at 2:11-5:7*. Tel West also relies on its general prayer for relief seeking “any other relief justified by the evidence produced in this proceeding” as fair notice of a 251(c)(1) cause of action. *Id.* With all due respect, both arguments are absurd.

While Section 530 does indeed require pleading of specific facts and does not explicitly require a petitioner to identify causes of action and legal theories,⁵ that can be easily explained by the fact that Section 530 is limited to a single cause of action. It is limited to claims of breach of contract by a party to an existing interconnection agreement. *See WAC 480-09-530(1) (“A telecommunications company that is party to an interconnection agreement with another telecommunications company may petition under this rule for enforcement of the agreement.”)*.

Tel West’s argument that its catch-all prayer for relief put Qwest on notice of the relevance of Section 251(c)(1) would lead to an absurd result if accepted. The catch-all allegation can be found in nearly every petition filed with the Commission. As such, Tel West’s theory would essentially require every responding party in every Commission adjudication to conduct discovery and present testimony and argument on every conceivable cause of action within the Commission’s jurisdiction. Tel West did not cite legal authority from any jurisdiction supporting its catch-all argument. This is hardly surprising given that there is no reasonable basis upon which to support it.

6. Tel West is incorrect that the Commission erred in focusing on the period of time prior to execution of the interconnection agreement.

Tel West next argues that the Commissioners erred in focusing “exclusively on the finding of bad faith in the negotiations and ignor[ing] bad faith performance [by Qwest].” *Petition for*

⁵ Section 530 does, however, require specific pleading in that it requires pleading not only of the detailed facts underlying the petitioner’s claim, but it also requires pleading of specific contract provisions the petitioner alleges are being breached by the respondent. *WAC 480-09-530(1)(a)(ii)-(iii)*.

1 *Reconsideration, at 5:8-9.* Qwest disagrees. The findings against Qwest that were the subject of the
2 parties' Comments were solely based on Section 251(c)(1) of the Act. That section and the FCC's
3 regulation interpreting it⁶ focus exclusively on parties' conduct during the period of negotiating an
4 interconnection agreement. The ALJ made quite clear in the Recommended Decision that Qwest had not
5 breached the interconnection agreement and had not engaged in any intentional misconduct. Instead, he
6 found that certain conduct pre-dating the interconnection agreement constituted a violation of Section
7 251(c)(1). As such, the Commission's conclusion that Qwest had not received fair notice of 251(c)(1)
8 being an issue in the case was entirely proper, as was its attention to the Recommended Decision findings
9 focused on the time period pre-dating execution of the interconnection agreement.

10 **7. Contrary to Tel West's argument, Qwest was surprised by the 251(c)(1)**
11 **findings.**

12 Finally, Tel West argues that "Qwest cannot claim to have been unfairly surprised or denied due
13 process of law when, by its own admission, it steered and then allowed Tel West to remain with the
14 wrong blocking product to address a problem that Tel West had been complaining about since 1999."
15 *Id., at 6:4-7.* To the contrary, it would not be hyperbole to state that Qwest was shocked by the
16 251(c)(1) findings given that Tel West, the party with the burden of proof, had never once uttered
17 reference to such a claim at any stage of this litigation.

18 Furthermore, as Qwest articulated in its Comments on the Recommended Decision, the record is
19 barren of any evidence demonstrating that Tel West has at any time pursued alternatives to Dial Lock as a
20 means of restricting its customers' use of OS, DA and other pay-per-use services. Dating back to May
21 2001, Tel West's position has been that it is entitled to purchase from Qwest for resale a basic local
22 exchange line with no access to OS and DA and that does not require Tel West to procure a blocking
23 product. There is no evidence that Tel West ever once sought an alternative to Dial Lock or that Qwest
24 intentionally withheld such information from Tel West. Qwest refers the Commission to Qwest's
25 Comments on the Recommended Decision, at pages 8-9, fn. 8 for further discussion of this issue.

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27 ⁶ See 47 CFR § 51.301.

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8. Conclusion.

For the above reasons, Qwest respectfully requests the Commission to deny Tel West’s Petition for Reconsideration. Tel West has failed to cite any relevant legal principle or authority in support of its allegation that the Commission erred in reversing the 251(c)(1) findings and in adopting the Recommended Decision with regards to the contract interpretation issues. Tel West’s attempt to raise new arguments on reconsideration that it failed to articulate on administrative review of the Recommended Decision is improper. The OS/DA Final Order should be upheld in all respects.

RESPECTFULLY SUBMITTED this _____ day of June, 2002.

QWEST

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