

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 TEL WEST COMMUNICATIONS, LLC,)
4)
5 Petitioner,)
6)
7 vs.) DOCKET NO. UT-013097
8) Volume No. VII
9 QWEST CORPORATION,) Pages 495 - 524
10)
11 Respondent.)

12 In the Matter of the Request)
13 for Approval of Negotiated)
14 Agreement Under the)
15 Telecommunications Act of 1996) DOCKET NO. UT-013086
16 Between) Volume No. VII
17) Pages 495 - 524
18 TEL WEST COMMUNICATIONS, LLC)
19 and)
20 QWEST CORPORATION)

21 CONFIDENTIAL PORTION

22
23 A settlement hearing in the above matter
24 was held on December 5, 2002, at 1:06 p.m., at 1300
25 South Evergreen Park Drive Southwest, Olympia,
Washington, before Administrative Law Judge LARRY BERG.

26 The parties were present as follows:

27 QWEST CORPORATION, by ADAM L. SHERR, Attorney
28 at Law, 1600 Seventh Avenue, Suite 3206, Seattle,
29 Washington 98191, Telephone (206) 345-1574
30 (Via bridge line.)

31 TEL WEST COMMUNICATIONS, LLC, by DAVID L.
32 RICE, Attorney at Law, Miller Nash, 601 Union Street,
33 Suite 4400, Seattle, Washington 98101, Telephone (206)
34 777-7406. (Via bridge line.)
35 Kathryn T. Wilson, CCR
Court Reporter

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

2 JUDGE BERG: Let's be on the record. This is
3 a settlement hearing before the Washington Utilities
4 and Transportation Commission in two dockets which have
5 been consolidated for the purpose of reviewing a
6 proposed settlement agreement between Tel West
7 Communications, LLC, and Qwest Corporation. Those
8 parties may be referred to as Tel West and Qwest
9 respectively.

10 My name is Lawrence Berg. I'm the presiding
11 officer in these proceedings and at this hearing. This
12 hearing is being conducted pursuant to the Commission's
13 order reopening Docket No. UT-013086 and consolidating
14 that docket with Docket No. UT-013097 for purposes of
15 reviewing the proposed settlement agreement. This
16 hearing also takes place pursuant to notice of
17 settlement hearing served to the parties on November
18 27th, 2002.

19 Today's date is December 5, 2002, and this
20 settlement hearing is taking place at the Commission's
21 headquarters in Olympia, Washington. Both parties
22 appear via the Commission's teleconference bridge. At
23 this time, we will proceed to take appearances. Both
24 attorneys who will be entering appearances have
25 previously appeared in this proceeding, and therefore,

0497

1 it's only necessary to state your name, your
2 affiliation, and the client you represent. We will
3 start with Tel West and then Qwest.

4 MR. RICE: This is David Rice with Miller
5 Nash on behalf of Tel West Communications.

6 MR. SHERR: Your Honor, this is Adam Sherr,
7 and I'm in-house counsel for Qwest.

8 JUDGE BERG: Because both parties are
9 appearing via teleconference, I ask that you would tend
10 to speak louder than you would if you were in person in
11 order to assist the reporter. Are there other parties
12 on the bridge line who wish to enter an appearance?
13 Let the record reflect that there is no response.

14 The purpose of the settlement hearing as
15 stated in the notice served to the parties is to allow
16 the parties to make presentations regarding the
17 proposed settlement and to answer questions regarding
18 the proposed settlement agreement, which also includes
19 an amendment to the parties' interconnection agreement.

20 Commission rule WAC 480-09-466 addresses
21 settlement conferences. The Commission's rule states
22 that the Commission favors the voluntary settlements of
23 disputes and states that the Commission will approve
24 settlements when doing so is lawful and when the result
25 is appropriate and consistent with the public interest

0498

1 in light of all the information available.

2 I will just represent for the record that the
3 stipulation of settlement filed by the parties lists
4 four bases for approval of this settlement as
5 represented by the parties. The settlement between the
6 parties will serve to conserve resources for both the
7 parties and the Commission. It reinforces the
8 Commission's decision in Part A of UT-013097 with
9 regards to processing of billing disputes.

10 The parties represent that the provisions of
11 the settlement agreement are not inconsistent with the
12 public interest as they do not preclude the parties
13 under certain circumstances from enforcing contract or
14 other legal rights or obligations in the future. As
15 well, the parties point out that with approval of the
16 proposed agreement, including the amendment to the
17 interconnection agreement, other parties may exercise
18 rights to adopt the amendment under Section 252(i) of
19 the Federal Telecommunications Act of 1996.

20 I'll indicate to the parties that I have
21 reviewed the settlement agreement, the stipulation of
22 settlement and the amendment. I do have some points to
23 raise for the parties for clarification. Typically the
24 way the Commission conducts a review of a settlement
25 agreement is just to go through the agreement from

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1 beginning to end, but I do want to give the parties
2 some opportunity to make any statements at the
3 beginning that they may feel is appropriate or
4 necessary before we actually work our way through the
5 agreement. So let me just first check with the parties
6 and see if either party wishes to make a statement or
7 any other form of presentation before we look to the
8 language of the agreement and the amendment themselves.

9 MR. SHERR: This is Adam Sherr on behalf of
10 Qwest. I don't have a lot to add. The documents
11 pretty well speak for themselves. Our perception of
12 the public interest is, as you just stated, set out in
13 the stipulation, or how these documents are consistent
14 with public interest is stated in the stipulation
15 itself.

16 Just at the outset, I would like to on behalf
17 of Qwest thank Tel West for sticking with us through
18 this process. It was a very exhaustive settlement
19 process that lasted a long time, and I'm sure that Your
20 Honor is aware of how much effort went into this. I
21 just want to say for the record we appreciate the
22 effort of Tel West and think we've reached an agreement
23 which is both fair and in the public interest.

24 JUDGE BERG: Mr. Rice?

25 MR. RICE: On behalf of Tel West, just to say

0500

1 that we too agree with the statements in the
2 stipulation about how this settlement will serve the
3 public interest, and I don't want to repeat what's in
4 the agreement, but it's something we certainly still
5 believe. We also appreciate Qwest's efforts in trying
6 to reach a settlement in this matter.

7 JUDGE BERG: You gentlemen will need to speak
8 up a little bit louder to assist the court reporter as
9 we go forward. I'll just indicate for the record that
10 in Docket No. UT-013086, the Commission approved an
11 interconnection between the parties on or about October
12 31st, 2001, and the Commission entered a subsequent
13 order approving a negotiated first amended agreement on
14 June 17th, 2002. The amendment, which is part of the
15 settlement agreement between the parties, if approved
16 would be styled the second amendment or second amended
17 agreement between the parties.

18 Turning to the settlement agreement itself,
19 I'll indicate that the introduction of agreements
20 states that the agreement is intended by the parties to
21 resolve the specific controversies at issue between
22 them in UT-013097 and other matters in controversies as
23 described in the agreement. Turning to the recitals,
24 on Page 2, Paragraph H, the parties state concerns
25 regarding the prospect of additional litigation or

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1 arbitration regarding ongoing billing dispute issues.

2 Let me also indicate that with the materials
3 filed by the parties were a Confidential Exhibit A and
4 a Confidential Exhibit B. Confidential Exhibit A, as
5 described in the agreement recital Section I, consists
6 of a statement of the aggregate billing disputes
7 pending between Tel West and Qwest, and let me ask the
8 parties whether Confidential Exhibit A remains accurate
9 regarding the information it purports to identify.

10 MR. SHERR: This is Adam Sherr. As you can
11 tell from Exhibit A, it is a statement of those billing
12 disputes as of November 11, 2002, and so by its own
13 terms, it is accurate, because as of November 11, 2002,
14 the rest of the statement is accurate.

15 MR. RICE: On behalf of Tel West, we continue
16 to believe that the information in Exhibit A is
17 correct. We haven't learned anything new that would
18 change what is in Exhibit A.

19 JUDGE BERG: Confidential Exhibit B, as
20 described or referred to in the settlement agreement
21 Section 1, consists of a statement of what's referred
22 to as the settlement amount, a sum of money that shall
23 be -- that's proposed to be paid by Qwest to Tel West.

24 With regards to that section of the agreement
25 regarding the payment to Tel West, let me draw the

0502

1 parties' attention at the statement at the conclusion
2 of that section where the parties' desire for the
3 protective order to remain in effect indefinitely, even
4 after dismissal of the litigation. Does either party
5 maintain that the protective order that is currently in
6 place would not provide the level of protection sought
7 by the parties?

8 MR. SHERR: This is Adam Sherr. The answer
9 to that question is, I'm not sure. The protective
10 order, which is the First Supplemental Order in this
11 docket from January 16th of this year, certainly states
12 in Paragraph 10 that neither party can distribute or
13 discuss confidential information and have to use due
14 diligence to protect that information.

15 Paragraph 18 discusses the return of
16 confidential information once the case is over, but to
17 my review, there was no statement explicitly stating
18 that the effect of the protective order continued after
19 the case was concluded. So to the extent that I'm
20 simply missing that requirement in the protective order
21 or in the rule or statute, I would be happy to have
22 that pointed out to me upon behalf of Qwest. I would
23 appreciate simply an assertion and order approving the
24 settlement if that's where we go. That just makes that
25 explicit.

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1 JUDGE BERG: Anything further from Tel West?

2 MR. RICE: Tel West would also like to
3 have --

4 JUDGE BERG: Mr. Rice, you are going to have
5 to speak up. The reporter isn't able to get your
6 comments accurately recorded. Could you repeat what
7 you just said?

8 MR. RICE: I will try to raise my voice.
9 Tel West would like to see clarification that the
10 protective order applies to the matters related to this
11 proceeding and the settlement, even after the
12 Commission dismisses this litigation.

13 JUDGE BERG: Thank you, Mr. Rice. Please
14 bear with me while I make a few notes. I'll note for
15 the record that Paragraph 3 of the settlement
16 agreement, Section 3 of the settlement agreement,
17 provides that the settlement agreement itself is
18 contingent upon full approval by the Commission of both
19 the agreement and the amendment to the interconnection
20 agreement. Is that right, Mr. Sherr?

21 MR. SHERR: It is, Your Honor. This might be
22 a good opportunity to clarify what the parties mean by
23 that, and I think I will be happy to express my opinion
24 on that and obviously allow Mr. Rice to confirm or deny
25 that that's Tel West's perspective as well.

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1 Certainly our goal here was to provide that
2 if the Commission rejected or modified in its order any
3 part of the settlement agreement or the interconnection
4 agreement, then the parties would not have a
5 settlement, because this entire package of documents is
6 used by Qwest, and I believe by Tel West, as a
7 comprehensive settlement, and to take one leg away from
8 the table does not leave you with the same table, so
9 that was our goal. Perhaps not artfully drawn, but
10 that was our goal in using that language here and also
11 in the stipulation.

12 I think consistent with that, the parties
13 would not object -- again I'll speak for Qwest. Qwest
14 would not object if the Commission affirmatively
15 approved certain portions of the agreement and just
16 decided to take no action on other provisions of the
17 agreement, and I'm thinking specifically that
18 affirmative approval of only three provisions is really
19 necessary.

20 Number one is the protective order issue we
21 just addressed. Number two would be dismissal of the
22 litigation and that paragraph of the settlement
23 agreement, and number three, of course, would be the
24 interconnection agreement amendment, and the rest, I
25 believe, consistent with the parties' agreement and

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1 480-09-466, the Commission can simply take no action on
2 the rest of it.

3 That would be full approval from the parties'
4 perspective, and just to make sure that was crystal
5 clear, the parties could jointly file a very short
6 pleading the next day after we receive an order that
7 does that, which clarifies that the parties believe
8 that the action taken by the Commission constitutes for
9 purposes of the settlement full approval and that the
10 parties consider the date of the Commission order to be
11 the effective date of the settlement agreement.

12 I believe there is plenty of discretion under
13 480-09-466 for the Commission to take that approach
14 because it really states that settlement, the desire to
15 review and approve settlements is within the
16 Commission's interest, so I don't think there is any
17 requirement that the Commission pass affirmatively on
18 each sentence of the agreement.

19 JUDGE BERG: Anything from your side,
20 Mr. Rice?

21 MR. RICE: That approach is acceptable to
22 Tel West.

23 JUDGE BERG: Let me ask the parties, what are
24 the concerns regarding the confidential designation of
25 Exhibit A and Exhibit B? Mr. Sherr, you first.

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1 MR. SHERR: I'm sorry, Your Honor. I'm not
2 sure I understood the question.

3 JUDGE BERG: The question is, why is it
4 important to the parties that Exhibit A and Exhibit B
5 be treated as confidential information?

6 MR. SHERR: This is a point that I haven't
7 discussed with Tel West, so I'll give you my
8 perspective. My perspective is that Exhibit A, given
9 what it says, it's not critically important that that
10 be confidential, but I would be interested in what
11 Tel West has to say about it, and during the
12 negotiation of the settlement agreement, conditions
13 were different and that exhibit would have looked
14 differently at the settlement than earlier in time.

15 It turns out Exhibit B is very important,
16 from Qwest's perspective, that that be held
17 confidential because we believe that it's not a term
18 that is required or requires for order, and that's a
19 sensitive term, condition of a settlement agreement
20 that we do not -- that is evidenced by the fact that
21 the parties are required to keep that confidential in
22 Section 1 of the agreement, and we believe it would be
23 inappropriate to disclose that amount, and we think it
24 would perhaps intensify other parties to pursue
25 litigation with Qwest in the hopes of reaching

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1 settlement with us under similar conditions.

2 So we don't believe there is any requirement
3 that that be disclosed, and we certainly don't believe
4 that would be helpful to Qwest as a company or from the
5 perspective of avoiding litigation.

6 JUDGE BERG: Mr. Rice?

7 MR. RICE: Tel West would also like this
8 settlement amount to remain confidential. In part,
9 this is due to acknowledgment of Qwest's concerns, and
10 we've agreed to respect those concerns, but we also
11 believe that it's inappropriate for the number to be
12 available publicly because it is a reflection of
13 Tel West's internal estimate of what this claim is
14 worth to this point, and that sort of information isn't
15 necessary to be available to the public.

16 Now, of course, if some member of the public
17 wanted to know the information, they could make a
18 request to the Commission, and then at that point, this
19 issue could be fully bedded, and if the Commission
20 found it were not necessary to maintain the
21 confidential designation, then they could lose it at
22 that point and the public would have access to this
23 number, but at this point, it would be best to keep it
24 confidential.

25 JUDGE BERG: Do you have a position with

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1 regards to the confidentiality of the information

2 stated in Exhibit A, Mr. Rice?

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4 (The following information is designated confidential.)

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1 (The following information is designated confidential.)

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3 MR. RICE: You mean that Qwest has no

4 Tel West billing disputes as of November 1?

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8 (End of confidential material.)

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1 (End of confidential material.)

2 JUDGE BERG: Whatever it might say.

3 MR. RICE: This is a private matter between
4 the two companies, and we believe it's something
5 someone can gain access to if they believe it's
6 necessary, but until that need comes up, there is no
7 reason for anyone outside the two companies to know
8 about the situation, the resolution of billing
9 disputes.

10 JUDGE BERG: Would the information in
11 Confidential Exhibit A provide any other party with
12 some kind of competitive benefit?

13 MR. RICE: I'm not certain, and it's out of
14 an abundance of caution that we do request this
15 information to stay confidential. We think an
16 amendment -- and as far as what a company could make
17 use of it, it's not clear, but it is something we are
18 trying to keep confidential because it's an internal
19 matter between the two companies. Once again, if
20 another company felt it was essential to know that
21 information, they could request to have confidential
22 designation lifted.

23 MR. SHERR: Your Honor, this is Adam Sherr.
24 During his presentation, Mr. Rice inadvertently
25 discussed a portion of the contents of Exhibit A, and I

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1 am very familiar with that since I did the same thing
2 early on in this case, and would appreciate if that
3 section of the transcript could be marked as
4 confidential.

5 JUDGE BERG: Let's be off the record for a
6 minute.

7 (Discussion off the record.)

8 JUDGE BERG: While we were off the record, we
9 identified for the court reporter the section of the
10 transcript that should be marked as confidential and
11 for which a confidential page should be produced.

12 We'll turn to Paragraph 5 of the agreement,
13 or Section 5 as it might be referred to. Section 5
14 refers to Paragraphs 144, 145, and 169 of the
15 recommended decision, and I expect that these are
16 sections that the parties believe were accepted and
17 approved in the Commission's final order on Part A
18 issues; is that correct?

19 MR. SHERR: That's correct, Your Honor.
20 These are provisions that were not in any way reversed
21 by the Commission's final order.

22 MR. RICE: On behalf of Tel West, I will say
23 that is correct.

24 JUDGE BERG: With regard to Paragraph 6,
25 dismissal of litigation with prejudice, at this point

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1 with Part A of the litigation having been completed and
2 in light of the provision in Section 6 that the parties
3 are not seeking modification or withdrawal of the
4 Washington Commission's orders or findings pertaining
5 to Part A, then that portion of the litigation for
6 which the parties stipulate should be dismissed with
7 prejudice are those claims that were referred to as the
8 provisioning parity claims in Part B. Is that correct,
9 Mr. Sherr?

10 MR. SHERR: I believe that's correct, Your
11 Honor. I don't believe there is anything that falls
12 outside of Part B that wasn't resolved in Part A. So
13 my perspective on that is to say the case is dismissed
14 with prejudice, but that defining the conclusions in
15 Part A are not in any way affected. I don't think the
16 act of dismissing with prejudice revokes anything that
17 occurred in Part A. It's just a case of not
18 proceeding. To my knowledge, there is nothing left in
19 the case other than what's in Part B.

20 JUDGE BERG: Mr. Rice, as we talk about these
21 things, if I happen to start out with Mr. Sherr, or
22 Mr. Sherr, if I happen to start out with Rice, as soon
23 as one counsel concludes remarks, other counsel should
24 just step in and share your position.

25 MR. RICE: Certainly, Your Honor. This is

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1 David Rice. Tel West also believes that the only
2 remaining issues in Part B and that dismissal with
3 prejudice of Part B does not affect the final order or
4 any of the orders of the Commission in Part A.

5 JUDGE BERG: Thank you, Mr. Rice. I would
6 like the parties to explain for me a little bit more
7 the Section 7 releases by Tel West; in particular, the
8 limited release of future claims in Parenthesis B.
9 Parenthesis B states that as of the effective date as
10 defined in the agreement and for a period of three
11 years from the effective date, the agreement shall also
12 constitute a full and final settlement satisfaction and
13 release by Tel West of all future claims against Qwest
14 which relate to and are dependent upon facts and
15 circumstances in existence as of the effective date,
16 and this is parenthetically referred to as "future
17 claims."

18 When I go up to the introductory section of
19 Section 7, the definition of claim for purposes of this
20 agreement includes theories of liability, so I would
21 like the parties to just comment on how the inclusion
22 of a theory of liability and a definition of claim
23 relates to a release of claims based on facts and
24 circumstances, a theory of liability being a theory and
25 facts and circumstances being something more specific

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1 and concrete, and I understand that there is one
2 example that's provided in Part B, but I would
3 appreciate any further perspective that the parties
4 could provide, particularly in light of the fact that
5 the complaint alleged ongoing violations of certain
6 rights.

7 MR. SHERR: Your Honor, this is Adam Sherr
8 for Qwest. I'll do my best to respond to your
9 question, but please let me know if I missed the point
10 of your question. The idea of Part B, Subsection B of
11 Section 7 of the settlement agreement is to avoid, from
12 Qwest's perspective, claims being made in the future as
13 of after the effective date that rely on facts that
14 were existent prior to the effective date, and so while
15 there may be facts in existence before the effective
16 date that do not in and of themselves give rise to a
17 claim or a theory of liability, perhaps if you
18 aggregated those facts that existed before the
19 effective date with facts subsequent to the effective
20 date, then perhaps one could provide a claim. So the
21 intention of B is to provide Qwest a release of any
22 allegations that predate the effective date of the
23 agreement.

24 MR. RICE: We believe that this provision is
25 intended to prevent Tel West from bringing basically

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1 the same case again, incorporating the mix of currently
2 existing facts and some future facts anytime over the
3 next three years, the parties' intention when this
4 provision was drafted.

5 MR. SHERR: And this is Adam Sherr, and I
6 would agree with Mr. Rice's characterization of that.

7 JUDGE BERG: So then if I'm understanding
8 what the parties are telling me correctly, Tel West for
9 a period of three years would be releasing any
10 opportunity to reallege the theories of liability based
11 on similar supporting facts and circumstances.

12 MR. RICE: That is my understanding.

13 MR. SHERR: That's correct as long as you are
14 limiting that to the fact that Tel West is precluded
15 from bringing that claim and relying upon facts and
16 circumstances that precede the effective date.

17 JUDGE BERG: So that if Tel West were to
18 perceive that Qwest was discriminating against Tel West
19 under some other theory of liability or in some other
20 manner or fashion, it would not be estopped from
21 bringing those claims in the future.

22 MR. SHERR: That's true as long as the facts
23 and circumstances supporting their claim do not precede
24 the effective date. If they arise after the effective
25 date, that's absolutely correct, but in any case, they

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1 can bring a claim if the facts and circumstances arise
2 after the effective date of the agreement.

3 MR. RICE: Of course, the release is subject
4 to certain exceptions listed in C.

5 MR. SHERR: Qwest agrees with that.

6 JUDGE BERG: Does this extend to facts and
7 circumstances that are just known to Tel West at this
8 time, or does this also extend to facts or
9 circumstances that may be in existence but are not
10 known by Tel West?

11 MR. SHERR: The main body of Section 7, the
12 fifth line from the bottom, says "known or unknown."

13 JUDGE BERG: I would like to turn to that
14 same section, Paren C, and just get some clarification
15 regarding existing claims not released by Tel West.
16 Paren 1 refers to pending billing disputes. So if I
17 understand, if there were any pending billing disputes
18 between the parties, those disputes as existing claims
19 would not be released.

20 MR. SHERR: That's correct, Your Honor.

21 MR. RICE: That's correct.

22 JUDGE BERG: Let me just ask under Paren 4
23 whether the reference to Section 6.2.3.1, which relates
24 to retail service quality credits, is that different
25 from Qwest's performance assurance plan?

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1 MR. SHERR: I believe it is, Your Honor, and
2 you will have to forgive me. It's been awhile since I
3 contemplated that provision, but it does say retail.
4 I'm going to open up the interconnection agreement and
5 look at that provision. If you would like me to do
6 that, I can.

7 JUDGE BERG: Yes, I would appreciate it.

8 MR. SHERR: It does say it's relating to
9 retail service quality credits, so I don't think it has
10 anything to do with the Q-Path, which is not in any
11 part of this interconnection agreement at this time.

12 JUDGE BERG: The Q-Path, as I take it,
13 Mr. Sherr, would relate to wholesale service quality
14 credits?

15 MR. SHERR: Right. Your Honor, I can read
16 from Section 6.2.3.1 of the interconnection agreement.
17 It has many subparts, but let me read from the
18 introduction, which is fairly short, and it says:
19 "Qwest shall provide service credits to CLEC's for
20 resold services in accordance with the Commission's
21 retail service requirement that apply to Qwest retail
22 services, if any. Such credits shall be limited in
23 accordance with the following: -- ", and then there are
24 six subparts to that. It would be somewhat lengthy,
25 but I can read those to you as well.

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1 it's in consideration of all that Tel West is giving
2 under this agreement.

3 JUDGE BERG: Turning to Section 9, Section 9
4 provides that by executing this agreement, neither Tel
5 West nor Qwest is making any admission of any
6 wrongdoing or error on its part, and this raises a
7 concern with regards to the Commission's adoption of
8 the settlement agreement and incorporating the
9 settlement agreement into a final order, particularly
10 with regards to the payment of a sum of money from
11 Qwest to Tel West where there are no findings of
12 wrongdoing or error.

13 Let me just approach this in three parts and
14 just ask, first of all, whether either party can cite
15 me to any precedent where the Commission has approved a
16 settlement agreement providing for the payment of a sum
17 from one party to another where there has been no
18 finding of wrongdoing or error.

19 MR. SHERR: Off the top of my head, I cannot.
20 However, I would say that I would venture to guess that
21 the Commission has dismissed litigation before between
22 private parties in connection with a settlement,
23 whether or not that settlement was actually filed and
24 incorporated by the Commission, and that goes back to
25 my prior point when we were talking about full approval

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1 and that Qwest does not believe, and I think Tel West
2 would agree, that the Commission would necessarily have
3 to affirmatively approve the payment of money from
4 Qwest to Tel West; that it could simply allow that to
5 take effect, not pass on that issue and simply
6 affirmatively approve the protective order piece, the
7 dismissal piece, and the interconnection agreement
8 piece, and I could point to one settlement that I'm
9 aware of where the case was settled without the
10 settlement agreement being incorporated, apparently not
11 even filed or incorporated into the final order.

12 This is a case that precedes my employment at
13 Qwest, but it is New Edge versus U S West, Docket No.
14 UT-000141. It was the Fourth Supplemental Order
15 granting joint motion for dismissal of complaint. That
16 is one example of the Commission approving dismissal.
17 I guess you could say approving settlement if not
18 approving specific settlement terms, but allowing the
19 parties after having negotiated a mutually agreeable
20 settlement to resolve their differences and simply to
21 dismiss the litigation.

22 JUDGE BERG: The concern I have is if the
23 Commission on its own could not order a payment without
24 finding of wrongdoing or error, and even that authority
25 being somewhat restrictive in that the Commission can

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1 not impose penalties on the parties, then the question
2 arises, how is the Commission adopting or ordering the
3 payment proposed by the parties would be lawful,
4 appropriate, and consistent with the public interest.

5 MR. SHERR: I think what I'm trying to
6 articulate is that the Commission does not need to
7 adopt or approve or order the payment of money from one
8 entity to the other. It simply needs to dismiss this
9 case to approve the interconnection agreement and then
10 can make some explicit reference to amending the
11 protective order or some statement that the protective
12 order continue into perpetuity.

13 We are not asking the Commission to
14 affirmatively approve, adopt, sanction, whatever verb
15 you would like to use, the payment. That would be my
16 first response, and my second response would be this is
17 not a fine or an order penalty or an order of damages.
18 This is like 99.9 percent a settlement between
19 litigating parties simply a payment, a compromised
20 payment that is made in order to avoid future
21 litigation costs and expenses and risks, and both
22 parties feel strongly that their case may be correct
23 but recognize that there is benefit to resolving
24 litigation, which the Commission's rule also supports,
25 and that the risks and costs of litigation are not

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1 outweighed by reaching this kind of settlement.

2 So we are not asking the Commission to order
3 Qwest to pay Tel West. We are not asking the
4 Commission to adopt or approve that. We are simply
5 asking the Commission to dismiss the case.

6 JUDGE BERG: Thank you, Mr. Sherr. That's
7 very helpful. Anything you wish to add, Mr. Rice?

8 MR. RICE: I would add that we agree that the
9 Commission does not have to approve the dollar figure
10 in the settlement, and secondly, Tel West also agrees
11 that this settlement does not involve a situation where
12 the Commission is ordering damages. It's a compromise
13 between the two companies, and that differs from
14 damages in a situation where there is no agreement to
15 pay a company, where the Commission is forcing the
16 company to pay money that it does not agree to pay.

17 JUDGE BERG: The last point that I had to
18 discuss with the parties relates to Paragraph 15 of the
19 settlement agreement, and that is, if the Commission
20 were to retain jurisdiction to enforce its order
21 approving the settlement agreement, and to whatever
22 extent it does the adoption of the settlement
23 agreement, would that in any way conflict with the
24 parties' agreement in Paragraph 15?

25 MR. RICE: It would not conflict with

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1 Paragraph 15.

2 MR. SHERR: In Qwest's opinion, Qwest
3 understands that the Commission prefers to explicitly
4 retain jurisdiction, and Qwest believes that Paragraph
5 15 and the provisions of Paragraph 15 are appropriate
6 and lawful, and to the extent that this is an issue, it
7 doesn't necessarily have to be resolved at this point
8 since there is no dispute about enforcing the
9 provision.

10 All that said, if the Commission insisted
11 upon providing such a provision in an order otherwise
12 approving or allowing the agreement to take effect,
13 then that would be acceptable to Qwest.

14 JUDGE BERG: Just to be clear, Mr. Sherr, if
15 the Commission were to expressly retain jurisdiction to
16 enforce an order approving a settlement agreement, in
17 your opinion, your client's position, would that be
18 consistent with the terms of the settlement agreement,
19 that the settlement depends on both the agreement and
20 the amendment being approved as presented?

21 MR. SHERR: I don't believe it would be
22 inconsistent with that.

23 JUDGE BERG: Thank you. That concludes all
24 of my questions to the parties with regards to the
25 settlement agreement and the amendment. Is there

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1 anything further that the parties wish to raise?

2 MR. RICE: I have nothing further, Your
3 Honor.

4 MR. SHERR: Your Honor, I don't have anything
5 further that needs to be on the record. I would
6 appreciate the opportunity when we are off the record
7 to discuss matters further, but nothing else on the
8 record.

9 JUDGE BERG: All right. Then I will just
10 represent to the parties that the Commission intends to
11 proceed with this matter on an expedited basis, and we
12 will issue an order based upon the parties' request for
13 approval of the agreement and the amendment just as
14 soon as possible, and with that, the hearing is
15 adjourned.

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17 (Hearing concluded at 2:04 p.m.)

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