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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Docket No. UT-013097
ANSWER TO QWEST'S MOTION TO
STRIKE

INTRODUCTION

Qwest's "Motion to Strike Allegations From First Amended Petition for Enforcement" ("Motion") should be denied. Qwest's Motion is improperly based on two incorrect presumptions. First, Qwest assumes that Tel West's allegations regarding performance under the parties *first* interconnection agreement ("Allegations")¹ cannot be relevant to an action to enforce the current Agreement. In so doing Qwest confuses the factual background of the Petition with the enforcement relief requested. Second, Qwest assumes that the first agreement no longer "exists" for enforcement purposes. Nothing in the language nor history of WAC 480-09-530 support the conclusion that its procedures cannot apply to enforcement of an agreement that has been amended or superseded where the obligations of the first agreement survive and are clearly enforceable, particularly when substantially the same alleged breaches continue unabated under the same or similar provisions in the new agreement.

¹ Qwest refers to these allegations that are the subject of the motion as the "objectionable allegations." Motion at 1.

1 The vast majority of the relief Tel West seeks is purely prospective and seeks to
2 enforce only the Current Agreement. For purposes of such prospective relief the Allegations
3 regarding the first agreement are for background and context. What little retrospective relief Tel
4 West seeks is completely proper for ongoing violations that span the two agreements. Neither
5 dismissal nor conversion of the case is required based on the challenged Allegations.

6 **DISCUSSION**

7 **I. The Motion to Strike the Allegations Should be Denied Because the Relief Tel West**
8 **Seeks Is Largely Under the Terms of the Current Agreement and is Prospective.**

9 The Allegations are relevant because they show that Qwest's *current behavior*
10 under the *Current Agreement* is part of a long and *ongoing* pattern of inferior service. They
11 demonstrate the urgency of Tel West's concerns and eliminate the impression that the problems
12 Qwest is causing may be only isolated, minor, or temporary problems. The Commission needs
13 to understand the background of the petition in order to understand the basis for Tel West's
14 requested relief.

15 The Allegations of Qwest's behavior under the First Agreement are also relevant
16 to enforcement of the Current Agreement because Qwest's duties were *virtually the same as*
17 *those under the Current Agreement*. Both agreements require Qwest to provision service to Tel
18 West in substantially the same time as Qwest provides these services to itself. Current
19 Agreement at § 6.2.3; First Agreement at § IV.B.2. They both require Qwest to provide Tel
20 West with resale services in substantially the same manner that Qwest provides these services to
21 itself. Current Agreement at § 6.2.3; First Agreement at § IV.B.2. Both agreements require
22 Qwest to provide Tel West with telecommunications services for resale that are at least equal in
23 quality to those it provides to itself. Current Agreement at §6.2.3; First Agreement at §IV.B.2.
24 In fact, virtually everything has remained the same, including customer service problems, IMA-
25 GUI ordering difficulties, billing disputes, and other failures by Qwest. As a result, events that
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1 occurred under the First Agreement are relevant, so long as they provide context and illustrate
2 that Qwest's failure to perform under the Current Agreement is not isolated or temporary.

3 In perhaps the best example of the flaw in Qwest's reasoning (as well as Qwest's
4 strategy to prevent a meaningful review of its performance), the Petition for Enforcement
5 ("Petition") states that Qwest is not providing provisioning parity to Tel West. *Petition* at 4.
6 Chart OP-4C, which was Exhibit E to Tel West's Petition, shows that in **eleven of the past**
7 **twelve months** Qwest has provisioned service more quickly to itself than to Tel West, as Tel
8 West highlighted in Confidential Exhibit No. 2. Qwest's transparent strategy is to limit this
9 docket to reviewing **one month**, November 2001, when Qwest came close to (but fell short of)
10 provisioning parity. If Qwest's Motion were granted, the Commission's review of Qwest's
11 performance would be limited to a month that is an aberration, compared to Qwest's real
12 performance history.

13 **II. The Relief Requested Under the First Agreement Can Properly be Addressed Under**
14 **WAC 480-09-530 Because the Provisions to be Enforced Survive, are Related to the**
Breaches of the Current Agreement, and Adversely Impact Tel West's Ongoing Business.

15 Qwest's Motion is based on an implicit presumption that the parties can only have
16 a single "existing agreement" that is subject to enforcement under WAC 480-09-530. While it is
17 true that Qwest and Tel West entered into the Current Agreement as a replacement agreement, it
18 is equally clear that many of the substantive provisions of the old agreement did not change.
19 More importantly, however, the parties specifically contemplated that the first agreement
20 continued to be enforceable to the extent obligations had not been fully performed when the
21 Current Agreement became effective. Specifically, the first agreement provided in
22 Section VII. P:

23 The parties' obligations under this agreement which by their nature are intended to
24 continue beyond the termination or expiration of this agreement shall survive the
25 termination or expiration of this agreement.

26 Thus, for certain purposes, the first agreement remains an "existing agreement" because it
continues to be enforceable.

1 The Allegations are permitted under Commission orders interpreting the WAC
2 480-09-530 procedures, despite Qwest's claims. The Orders and history Qwest cites basically
3 track the rule itself. But Qwest offers nothing to show that the Commission has ever considered
4 the specific issue of whether the rule permits review of an ongoing dispute that falls under
5 similar provisions in two agreements. The absurdity of Qwest's argument is well-illustrated by
6 the commonplace situation of an amendment to an existing agreement. After the amendment, the
7 parties' agreement is different. But if the amendment does not change the parties obligations as
8 to the matters in dispute and the contract provisions sought to be enforced are still enforceable it
9 does not make sense that the procedures of Rule 530 would no longer be available to the parties.

10 **III. Nothing in the Allegations Justifies Converting the Proceeding to a Regular Complaint**
11 **Proceeding.**

12 As discussed above, the Allegations either provide background to the prospective
13 relief Tel West seeks or seek retrospective enforcement of ongoing obligations that are
14 substantively the same under both agreements based on continuing breaches by Qwest. Thus the
15 Petition is completely proper under WAC 480-09-530. Moreover, there is nothing inherent in
16 the fact that the Petition mentions two agreements that precludes enforcement under Rule 530.
17 Tel West is not, as Qwest asserted, forced to choose between the procedures of Rule 530 or
18 striking its Allegations regarding the first agreement.

19 While the presiding officer has discretion on how to handle the petition, as well as
20 the timing, Qwest's motion to strike or convert should be denied. For the reasons discussed at
21 the preliminary pre-hearing conference, Tel West requests that the proceeding be concluded
22 within 90 days, or as soon thereafter as the Commission's own schedule permits. A 90 day
23 schedule puts equal burden on both parties. If a company the size of Tel West can commit to a
24 90 schedule, then a company with Qwest's resources is able to do so as well. Qwest should not
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1 be permitted to unduly delay this proceeding based vague and unsupported references to unstated
2 defenses it would have to the Allegations if they are not stricken.

3 **IV. The Parties Have Resolved the Issue Raised By Qwest's Motion to Strike the "ER 408"**
4 **Allegations.**

5 On a related issue, Tel West and Qwest have resolved Qwest's objection to
6 certain statements in the Petition based on Evidence Rule 408. A stipulation to resolve the issue
7 was placed on the record at the January 23, 2002, pre-hearing conference.

8 **CONCLUSION**

9 By striking the Allegations, the Commission would only deprive itself of
10 information necessary to fashion an appropriate remedy. Likewise, converting the proceeding
11 would only serve to further delay a meaningful remedy for Tel West to the ongoing
12 discrimination in Qwest's provisioning of services and the continuing financial burden of
13 improper and unnecessary charges from Qwest. The Motion should be denied.

14 DATED this 24th day of January, 2002.

15 MILLER NASH LLP

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20 David L. Rice
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