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BEFORE THE WASHINGTON UTILITIES AND

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TRANSPORTATION COMMISSION

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04 TEL WEST COMMUNICATIONS, LLC, )

04 Petitioner, )

05 vs. ) No. UT 013097

05 QWEST CORPORATION, INC., )

06 Respondent. )

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A prehearing conference in the above matter was held on

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January 23, 2001, at 1:30 p.m., at 1300 South Evergreen Park Drive

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Southwest, Room 206, Olympia, Washington, before Administrative Law

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Judge LAWRENCE BERG.

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The parties were present as follows:

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TEL WEST, by BROOKS HARLOW and DAVID RICE, Miller Nash, 601

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Union Street, Suite 4400, Seattle, Washington 98101-2352,

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Telephone (206) 777-7406, Fax (206) 622-7485, E-mail,

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harlow@millernash.com.

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QWEST, by ADAM SHERR and LISA ANDERL, 1600 7th Avenue, Room

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3206, Seattle, Washington 98191, Telephone, (206) 398-2507, Fax,

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(206) 343-4040, E-mail, asherr@qwest.com.

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PROCEEDINGS

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JUDGE BERG: We're on the record.

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This is a prehearing conference in docket No. UT  
013097 at the Washington Utilities and Transportation  
Commission captioned as Tel West Communications, LLC,  
Petitioner, versus Qwest Corporation, Inc., Respondent.

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My name is Lawrence Berg. I'm the Administrative  
Law Judge that has been assigned as presiding officer in this  
case.

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Today's date is January 23rd, 2002. This prehearing  
conference is being convened pursuant to a notice that was  
duly served on all parties on January 8, 2002, and we are  
convening at the Commission's headquarters in Olympia,  
Washington.

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At this time I will take appearances, and we will  
begin with petitioner, and then respondent.

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MR. HARLOW: Thank you, Your Honor. I am Brooks  
Harlow. I am appearing as attorney for petitioner, Tel West  
Communications, LLC. My address is Suite 4400, 601 Union  
Street, Seattle, Washington, 98101. My telephone number is  
(206) 777-7046. My fax number is (206) 622-7485, and my  
e-mail address is harlow@millernash.com.

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MR. RICE: Your Honor, my name is David Rice. I am  
also here on behalf of Tel West, and my address is the same as

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01 Brooks'. I am also at Miller Nash. My direct phone number is  
02 (206) 777-7424, and my e-mail address is rice@millernash.com.

03 MR. SHERR: Your Honor, Adam Sherr, S-h-e-r-r, on  
04 behalf of Qwest. Address, 1600 7th Avenue, 3206, Seattle,  
05 Washington, 98191; (206) 398-2507; fax number, (206) 343-4040;  
06 e-mail, a-s-h-e-r-r, asherr@Qwest.com.

07 MS. ANDERL: Thank you, Your Honor. Lisa Anderl,  
08 representing Qwest Corporation. My business address and fax  
09 number are the same as Mr. Sherr's. My telephone number is  
10 (206) 345-1574. My e-mail is l-a-n-d-e-r-l at Qwest,  
11 q-w-e-s-t, .com.

12 JUDGE BERG: Thank you, Counsel.

13 Mr. Harlow, will you be speaking on behalf of Tel  
14 West, or will you be sharing those duties with Mr. Rice here  
15 today?

16 MR. HARLOW: I will be speaking, Your Honor.

17 JUDGE BERG: And Mr. Sherr, same question.

18 MR. SHERR: I will be speaking primarily.

19 JUDGE BERG: The first thing I want to touch on with  
20 the parties are some of the key provisions under the  
21 Commission's Rule for Expedited Enforcement of Interconnection  
22 Agreements, that being 480-09-530, under section 4 relating to  
23 prehearing conferences, and particularly under subpart B it  
24 states that "At the prehearing conference, the presiding  
25 officer will determine, based on the pleadings filed and

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01 supporting documents, whether the issues raised in the  
02 petition can be determined on the pleadings and submissions  
03 without further proceedings."

04 To the extent that the parties have responded, my  
05 understanding is that both parties believe that if the claims  
06 as set forth in the petition go forward, that some additional  
07 process will be required.

08 I will note that in the specific items in the motion  
09 to strike, particularly in the category "outside the scope  
10 allegations," that there were no objections to the allegations  
11 in the cause of action relating to OSDA.

12 I also will note that it appears there may be one  
13 discovery request proposed by Tel West that may pertain to  
14 that particular issue.

15 One of the things I intend to do is to see whether  
16 or not that particular claim can be -- parties would agree  
17 that this is a suitable process for that claim, and whether or  
18 not the proposed discovery request can be answered while we  
19 sit here today.

20 Mr. Sherr, am I correct with regards to Qwest's  
21 position on that OSDA complaint issue?

22 MR. SHERR: With regard to the motion to strike, and  
23 the fact that it does not refer to any OSDA allegations, I  
24 believe you are correct. The motion to strike was limited to  
25 allegations concerning the first agreement, as that term is

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01 used.

02 I do not recall -- and I can look quickly. I do not  
03 recall if any of those allegations pertain to the OSDA  
04 provisions of the amended petition.

05 JUDGE BERG: All right. And I have read the answer  
06 and the position of Qwest with regards to the OSDA issue.  
07 We will discuss that in some more detail.

08 At that point in time we will have further  
09 discussion as to whether or not Qwest feels additional  
10 proceedings are necessary to build a record on which to base a  
11 decision.

12 Mr. Harlow, while I make reference to the one  
13 discovery request that seems to pertain to that particular  
14 issue, I will have some other questions for you when I start  
15 going through my notes that pertain to this particular claim,  
16 OSDA, and we will work from there.

17 MR. HARLOW: Okay.

18 JUDGE BERG: The other issue, or other point of the  
19 Commission's rule that I wanted to make reference to was  
20 subpart 5(A), and that provides that in any proceeding to  
21 enforce the provisions of an Interconnection Agreement, the  
22 presiding officer has broad discretion to conduct the  
23 proceeding in a manner that best suits the nature of the  
24 petition, including, but not limited to, converting the  
25 proceeding into a complaint proceeding under RCW 88.04.110.

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01           And I will share with the parties that to the extent  
02 there have been objections raised to several of the causes of  
03 action pertaining to the appropriateness of this rule, and the  
04 possibility of a conversion, I will be taking the issue under  
05 advisement.

06           Certainly with regards to the first cause of action  
07 enumerated paragraph Roman numeral IV(B) -- excuse me, IV(A)  
08 in the petition. The second cause of action enumerated as  
09 IV(B), and the fourth cause of action enumerated as IV(D).  
10 And hopefully by the end of the session I will have -- I may  
11 have an ability to inform the parties as to whether or not  
12 IV(C) and IV(E) will be dealt with under this process.

13           Mr. Harlow, I have reviewed your proposed schedule.  
14 I know that taking certain determinations under advisement  
15 will limit the amount of scheduling discussion that we can  
16 make here today. Certainly we will not be able to set a  
17 thorough schedule as you have outlined in your proposal.

18           But I will continue to proceed under the spirit of  
19 480-09-530 and to make those determinations as quickly as  
20 possible, and to further advise the parties as to either how  
21 the schedule will proceed, or I will reconvene another  
22 prehearing conference on short notice to get the parties  
23 involved in that effort.

24           The other thing I do want to point out is that to  
25 the extent issues are resolved under 480-09-530, the

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01 scheduling, as laid out, again, in subpart 5(B) is that the  
02 enforcement proceeding concludes when the presiding officer  
03 has sufficient information to resolve the issues. And then  
04 there's a dual standard. It's either 75 days from the date of  
05 the petition, or 21 days after the last hearing session or  
06 submission.

07 So we will just want to be clear about that, that as  
08 we look at that schedule we may be setting up a schedule that  
09 will go on a fast schedule, but it may be that in getting to  
10 the conclusion of a recommendation, as well as Commission  
11 review, that that is something that cannot just be determined  
12 until a later point in time.

13 Also, to the extent any claims might be converted to  
14 a complaint proceeding under RCW 80.04.110 the Commission has  
15 great scheduling flexibility, and also has established  
16 expedited schedules within that framework on prior occasions.  
17 So let's take up the Qwest motion to strike.

18 Mr. Harlow, I did receive a prior contact from you  
19 stating that you might be in the position to present a  
20 response from Tel West to the motion today. Is that something  
21 you could do orally, if not in writing?

22 MR. HARLOW: Your Honor, I think we should present  
23 that in writing. We're not prepared to present it today, at  
24 least not in writing. If it's essential to staying within the  
25 schedule we have outlined, I could probably take a stab at



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01 winging it, and orally argue it. But if that's not essential,  
02 then I would prefer to submit it in writing.

03           Again, if we're going to proceed under the spirit,  
04 if not the letter, of 530, I would expect we could file our  
05 written response on Friday of this week.

06           JUDGE BERG: Let's proceed on that schedule.

07           MR. HARLOW: To some extent, I note, Your Honor,  
08 that there is some intermingling here between the motion to  
09 strike and the scheduling question. And that's been created  
10 by Qwest's response where they agreed to proceed under 530 if  
11 their motion to strike is granted, I think. And apparently  
12 they disagreed to proceeding under 530 if their motion to  
13 strike is not granted.

14           So not by way of answering the motion to strike, but  
15 by way of addressing the scheduling question, recognizing they  
16 overlap, the motion to strike really appears to confuse the  
17 question of the background facts relevant to the complaint  
18 with the relief requested.

19           And simply because we allege facts relating to the  
20 parties' entire relationship, which goes back more than the  
21 one or two months that the current agreement has been in  
22 place, that doesn't mean that we're seeking to enforce the old  
23 agreement.

24           That said, there are aspects of the petition that  
25 would certainly suggest that we're seeking to enforce the old

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01 agreement. Just by way of guess, I would say that constitutes  
02 maybe 10 percent of the enforcement petition.

03 The main thrust of our petition, if you look at --  
04 you really need to focus on our requested relief. It's  
05 forward going. For example, yes, we bring in nine months'  
06 data on provisioning -- excuse me, 12 months' data on  
07 provisioning. But relief under the provisioning complaint --  
08 section of the petition, rather, is that we be provided with  
09 parity within 60 days of the initial order.

10 So the relief is totally forward looking, and  
11 relates to enforcement of the current obligation to provide  
12 parity. But the Commission can't determine an appropriate  
13 form of relief on a petition based on one month's data.

14 And if you grant Qwest's motion to look at one  
15 month's data only, rather than 12 months of data, you are  
16 really looking at a data point that is aberrational. And the  
17 Commission would come to a very different form of relief under  
18 that circumstance, as opposed to looking at the entire context  
19 and the entire background of the parties' relationship, and  
20 how Qwest has been provisioning.

21 So I think that is the direction our answer is going  
22 to take. But what that suggests to me is that because we're  
23 not seeking to enforce the prior agreement, the relief is  
24 prospective under the current agreement that really, this is  
25 something that can be done under the rocket docket, because

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01 that is the focus of our petition.

02 JUDGE BERG: My understanding of the petition --

03 MR. HARLOW: Rule 530 is what I mean by "the rocket  
04 docket."

05 JUDGE BERG: My understanding of the allegations in  
06 the petition, whether explicit or implicit, is that these  
07 events are believed to be of a continuing nature, and that the  
08 implementation of the new agreement, the terms and conditions  
09 of the new agreement, do not change the essential working  
10 relationship under which those claims arise.

11 MR. HARLOW: You are almost quoting from our draft  
12 answer, Your Honor. I think you understand what we're talking  
13 about here.

14 JUDGE BERG: And let me also state, if this makes  
15 it, you know, a little more focused for you to file an answer,  
16 I think I understand what Qwest was striving to do in its  
17 motion to strike, and that is we're breaking some new ground  
18 here. And it's not clear how some issues are allowed to go  
19 forward under the expedited rule process, but other issues are  
20 converted to a complaint proceeding.

21 In terms of addressing this as a pure motion to  
22 strike, what I really sense from the totality of Qwest's files  
23 is that it's a motion to convert.

24 Would that be fair, Mr. Sherr?

25 MR. SHERR: In part, Your Honor. Tel West has two

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01 choices. It has -- it has a choice of filing its grievance  
02 under two different rules. There is the Rule 530 rocket  
03 docket, and there is a general complaint proceeding.

04 To the extent that Tel West has chosen, and insists  
05 on choosing, the expedited process, which it self-imposes some  
06 great burdens on the responding party, including having to  
07 answer within five business days, the likelihood of expedited  
08 discovery, and expedited briefing and hearing schedules.

09 To the extent that Tel West has chosen, and  
10 continues to choose the rocket docket, Rule 530 procedure,  
11 allegations pertaining to the prior agreement -- to the time  
12 periods before the current agreement was in effect, are  
13 irrelevant.

14 I take issue with what Mr. Harlow says, with all due  
15 respect, that all that Tel West is doing is laying out the  
16 background for the Commission to make its determination.

17 It seems very clear that it was including that  
18 information as evidence, and its analysis and its summary  
19 of -- especially I am thinking of the provisioning data that  
20 is the table that is provided in the confidential section.

21 That information is provided as evidence, and it's  
22 inappropriately included as evidence for a proceeding under  
23 Rule 530, to the extent -- I apologize for interrupting you.

24 JUDGE BERG: No, it's my interruption. I am sorry.  
25 I thought you were through.

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01           MR. SHERR: -- to the extent that those allegations  
02 that the totality of the relationship between the two parties  
03 is of great importance to Tel West, then the matters that be  
04 converted in whole to a general complaint proceeding.

05           I am not sure what else to say about that, other  
06 than they have the choice of whether they want the expedited  
07 process to be followed, or if they want to follow the general  
08 complaint proceeding. They can't have the benefits of both  
09 systems.

10           JUDGE BERG: For the sake of procedural expediency,  
11 I am not going to grant a motion to strike per se; that is to  
12 strike and force the petitioner refile a complaint alleging  
13 other bases.

14           There is wide discretion for conversion. And the  
15 practical effect, I think, is the same. It may be that  
16 after -- if there were to be a conversion, it may be that,  
17 given that circumstance, that the petitioner would have to  
18 reassess whether or not they would seek to further amend the  
19 petition complaint, but that would be their choice.

20           MR. HARLOW: Your Honor --

21           JUDGE BERG: Excuse me, there's one other thought I  
22 wanted to bring up first, Mr. Harlow.

23           And that is if, in fact, the conversion occurs, the  
24 Commission will figure out a way to either complete the  
25 conversion, or to bifurcate the complaint in such a way that

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01 it doesn't require striking pleadings.

02           But my clear impression is that this is a matter  
03 that is going forward, one way or the other. And unless  
04 there's some necessity from the respondent's point of view  
05 that the petition complaint be further amended in order for it  
06 to -- in order for the respondent to further answer in the  
07 context of a general complaint proceeding, then I see no  
08 reason to deal with it as a motion to strike, but rather a  
09 motion to convert.

10           If there is something about a response -- further  
11 response that would be necessary in the context of a general  
12 complaint proceeding, I invite Qwest to likewise make a  
13 written response on Friday. It's not necessary to respond now  
14 if you are not prepared to do so.

15           MR. SHERR: Could I make a brief response to the  
16 statement you just made?

17           JUDGE BERG: Yes, sir.

18           MR. SHERR: If I could be so bold, I would suggest  
19 that the choice be given by Your Honor to Tel West -- and  
20 I will assume for the sake of the next sentence that you agree  
21 with the analysis that we made, that we set out in the motion  
22 to strike -- that certain of the allegations made in the  
23 petition are not appropriate for Rule 530 proceedings.

24           And the choice, again, I would invite you to give to  
25 Tel West is, "What is more important to you? Is it more

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01 important that all of your allegations be heard, or is it more  
02 important that those allegations that are appropriate for a  
03 530 proceeding, proceed in that expedited fashion?"

04           Obviously, I can't speak for Tel West. I don't know  
05 what is more important to them.

06           JUDGE BERG: Well, we have yet to have a situation  
07 like this where conversion is as serious a concern as it is in  
08 this case. So this is new ground.

09           But the decision whether to convert is not based  
10 solely on whether or not there are allegations of a continuing  
11 violation that predate the current agreement, but neither  
12 should conversion be ruled out on that same basis.

13           It's very possible that, in fact, there would be a  
14 complaint that would be allegations based on violations of an  
15 agreement, as well as violations of statute that might not be  
16 restated in the agreement. And as such, I could imagine an  
17 objection on the basis that those claims are outside the  
18 scope.

19           And again, whether it's a motion to strike and  
20 require the party to file a separate pleading as a general  
21 complaint, or to administratively convert it is something  
22 that, unless there's some great practical effect, it may be  
23 something that there's no difference in the end.

24           MR. HARLOW: Your Honor, all I wanted to ask is at  
25 an appropriate time, I would like to address the timing, and

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01 why we feel it's not just appropriate, but essential, to  
02 proceed in this docket on all of the counts under Rule 530.

03 JUDGE BERG: What I hear you saying, Mr. Harlow, is  
04 why it's important to proceed on an expedited basis.

05 MR. HARLOW: I simply wish to have an opportunity to  
06 argue that. But just in case, since we were talking about it,  
07 and not hearing the parties on it, I wanted to be sure we had  
08 an opportunity to be heard.

09 JUDGE BERG: It's an argument that would be valid  
10 regardless of the forum. If this was a general complaint  
11 case, Mr. Harlow, the Commission would have the same concern  
12 over the need for immediate relief from your client's  
13 perspective.

14 So that is not going to be a determining factor  
15 here. There are other issues about the very nature of the  
16 case to be presented, and the complexity of the issues that  
17 weigh much heavier than the immediacy.

18 There's a timeline for action under the case at hand  
19 that does put certain -- does impose certain limitations on  
20 the Commission's ability to work this into its overall  
21 schedule.

22 And whether you are aware of it or not, this is an  
23 unusually busy time for the Commission to manage proceedings.  
24 And that goes to resolving -- looking at the 480-09-530  
25 petition as to the number of allegations, as well as to the



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01 complexity as to whether or not, on a practical matter, this  
02 can be managed from the Commission's perspective under  
03 480-09-530.

04 But that says nothing to whether or not an expedited  
05 schedule is important in the -- is necessary in the public  
06 interest. And I want to assure you that if there is a  
07 conversion of any portion of the petition, that it will -- the  
08 issue of expedited proceedings will be something that would be  
09 something that would be a genuine concern in a complaint case,  
10 as well as in 480-09-530.

11 MR. HARLOW: Your comments have been helpful, Your  
12 Honor. But perhaps my question wasn't clear, which was, can  
13 we take three or five minutes and explain why we think  
14 expedited -- let's call it expedited handling is of critical  
15 importance to Tel West?

16 JUDGE BERG: Three minutes. But let me say I have  
17 been in this business, not as long as you, but long enough to  
18 appreciate what is happening. And the complaint certainly  
19 makes clear that Tel West perceives a financial impact that,  
20 apart from anything else, that needs to be addressed.

21 MR. HARLOW: Yes, Your Honor. And so I will try --  
22 I will keep to three minutes here.

23 As you know, and I will give you some more  
24 specifics, it's costing Tel West over \$10,000 a month in  
25 improper Qwest bills that are the subject of the petition.

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01           Our belief is -- and we do need some discovery to  
02 pin this down, but our belief is it's costing Tel West about  
03 twice as much as Qwest to process a retail order through the  
04 IMA GUI system, I-M-A, space, G-U-I.

05           Third, Tel West is losing customers regularly to  
06 Qwest due to the provisioning advantages that Qwest retains  
07 for itself.

08           Fourth, Tel West has suffered cash flow issues  
09 relating to the unresolved billing disputes that go back to  
10 April of last year.

11           And fifth, tel West has been working with Qwest, as  
12 detailed in the petition, and problems either aren't being  
13 resolved, or are simply being resolved too slowly for Tel West  
14 to compete effectively.

15           I think what is behind Qwest's resistance here --  
16 and I think they are being disingenuous saying, "Oh, we're not  
17 even going to answer." They were directed to answer, and they  
18 said, "We're not going to answer. We're going to move to  
19 strike."

20           If Qwest had answered, we would have been able to  
21 see exactly what it is they are saying is too hard to deal  
22 with under expedited procedures.

23           In fact, they are hiding the ball by not answering,  
24 and they are putting the cart before the horse; moving to  
25 strike before they show us what it is they want to defend

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01 against these very limited allegations.

02 JUDGE BERG: Well, Mr. Harlow, Qwest makes the point  
03 that they are not under an obligation to file an answer. And  
04 it's -- whatever risks there may be in taking the position, it  
05 is a risk that they are taking.

06 In the meantime, I am here, and it's my job to get  
07 the facts that are necessary in order to resolve the issues.  
08 And I understand that petitioner believes that the respondent  
09 has behaved willfully and intentionally in misconduct. I have  
10 read the petition.

11 But I don't want to get mired down in a debate over  
12 that at this time, because there are a lot of specific  
13 questions that I need in order to go forward.

14 And you know that once it starts, it's hard to stop.  
15 Because Qwest feels as strongly about their position as you do  
16 on behalf of your client. And so I hope that both parties  
17 will understand, or accept, that I understand that you are all  
18 here because there are some serious problems, and you can't  
19 resolve them yourself.

20 MR. HARLOW: Sure, Your Honor. Just to wrap up, I  
21 put the schedule together, and I appreciate how tight it would  
22 be. And it reminds me of what we went through in 1996 with  
23 the first interconnection arbitration.

24 We all thought it was going to be impossible,  
25 including hearing them in two days. And we did it.

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01           And as far as Qwest not answering, we will treat  
02 that as a general denial, and we're prepared to file our  
03 opening testimony in two weeks. And we can make our part  
04 happen. We understand the Commission may need more time  
05 internally, because we are aware of all the other matters you  
06 have scheduled. And that's a different story.

07           But if the parties double these time frames, and  
08 Qwest I am sure, will take as much time as they can on this,  
09 we will make it impossible for the Commission to come close to  
10 those timelines, even taking into account the other scheduling  
11 conflicts.

12           JUDGE BERG: In looking at your proposed schedule,  
13 it seems to be equally severe on both sides. And it may be a  
14 valuable tool at some point, but it won't be of great benefit  
15 to us here today.

16           I need to focus on some of the issues so that I can  
17 make an informed decision as to whether or not 480-09-530 is  
18 feasible, or whether the Commission -- the interest of all  
19 parties are better served through a conversion.

20           We have not had an easy 480-09-530 case yet.  
21 480-09-530, I think, was envisioned so that two parties that  
22 had one sticking point in their relationship could come and  
23 get an easy, quick answer. And instead, what we have had are  
24 some extremely complex issues being brought up, and very often  
25 multiple issues, as is the case here.

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01           And, again, this isn't meant to say that these  
02 aren't important issues that need resolution as soon as  
03 possible, but we're constantly pushing the boundaries of what  
04 can be done within the frame work of the rule as originally  
05 envisioned.

06           But the Commission is committed to getting things  
07 done as quickly as possible, and I will keep that in mind, Mr.  
08 Harlow.

09           MR. HARLOW: We really appreciate that. And I  
10 suspect that if we had the same schedule here under the  
11 complaint rule as under 530, we wouldn't care what it was  
12 called.

13           Tel West's way of viewing this, it's just important  
14 to get this resolved quickly. The sooner the better.

15           JUDGE BERG: Is the larger calendar that you have  
16 brought and prepared, is that the same as the proposed  
17 schedule that you faxed to me?

18           MR. HARLOW: If my secretary entered the dates  
19 right, yes, it is, Your Honor.

20           JUDGE BERG: Let me --

21           MR. SHERR: May I reply, Your Honor, within one  
22 minute, to Mr. Harlow's presentation?

23           JUDGE BERG: Go ahead, Mr. Sherr.

24           MR. SHERR: I will speak quickly, but not too  
25 quickly --

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01           JUDGE BERG: Not too quickly. And do understand  
02 that I have read the pleadings. And while I don't intend or  
03 imagine that I can represent your client as well as you can, I  
04 understand the positions of the parties. So please don't  
05 repeat anything that is already in writing.

06           MR. SHERR: Absolutely. Your Honor, I wrote down,  
07 as Mr. Harlow was talking, that he said five -- I counted  
08 four, but I may have missed one -- reasons why the motion to  
09 strike is inappropriate. And they all seem to go to the  
10 urgency that Tel West feels. And I absolutely cannot deny  
11 that they perceive that there's an urgent need for things to  
12 be resolved.

13           But Mr. Harlow didn't respond in any way  
14 substantively to the motion, and the fact that what guides us,  
15 and the Commission, is Rule 530. And our argument that it's  
16 inappropriate to bring allegations outside the time period of  
17 the existing interconnection agreement to bear as proof that  
18 Qwest is not complying with its obligations under the current  
19 agreement.

20           JUDGE BERG: Well, I am convinced these claims are  
21 of such a nature that they are going to need to be resolved  
22 one place or the other. And I am going to be looking for -- I  
23 am going to look hard to see whether or not this can be  
24 handled under 480-09-530. And if not, how best to make it  
25 happen, and happen quickly so that all parties have a fair

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01 opportunity to give their position and present it to the  
02 Commission.

03 And there may be some further discussion about this  
04 as we go forward as to how best to bring that about.

05 MR. SHERR: We would like that.

06 JUDGE BERG: Mr. Harlow, I need to just step through  
07 my outline of notes on the complaint, and fill in a few blanks  
08 here.

09 MR. HARLOW: Certainly, Your Honor.

10 JUDGE BERG: With regards to Exhibit F to the  
11 amended petition, that exhibit has a date at the bottom that  
12 says December 24th. Is that the date that Exhibit F was  
13 generated?

14 MR. HARLOW: I believe that was the date that Qwest  
15 put on it, and Tel West would have received it shortly after  
16 that. Qwest would have to say.

17 JUDGE BERG: All right.

18 Mr. Sherr, do you know?

19 MR. SHERR: Yes. That date refers to the date of  
20 the report itself.

21 JUDGE BERG: So the data that was represented there  
22 was data that was current as of that date?

23 MR. SHERR: That is correct.

24 JUDGE BERG: Or the most current available  
25 information?

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01 MR. SHERR: That is correct.

02 JUDGE BERG: With regards to what is marked as page  
03 18 of 57, but which is the last page of the Confidential  
04 Exhibit, there are -- this is the OP4C Installation Intervals  
05 Chart. And there are two subcharts, one for residence, one  
06 for business. Can you provide for me the full heading titles  
07 for those columns? Some of them are cut off. Are you  
08 familiar with those, or do you have an uncondensed version?

09 MR. SHERR: Sadly, I am very familiar with them.  
10 Yes, I can describe them to you. There is not, to my  
11 knowledge, an uncondensed version. This is how the report  
12 looks when it goes to them.

13 And just for clarity, Your Honor, I would point out  
14 there's a third subchart for UNE-P-POTS, at the bottom.

15 JUDGE BERG: Yes.

16 MR. SHERR: I just want to make sure we're looking  
17 at the right page, 18 of 57.

18 JUDGE BERG: Yes. The columns are headed the same  
19 for all three of those subcharts.

20 MR. SHERR: That is right.

21 JUDGE BERG: All right.

22 MR. SHERR: As a general matter, attached to our  
23 answer were pages from PIDS version 4.0 that relate to the OP4  
24 measures, and also the OP3 measures.

25 And those are definitions that will -- that describe



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01 the inputs and formulae for OP4, what is excluded, what is  
02 included. That's sort of where you want to start.

03 But I am happy to go through this chart and describe  
04 what those different columns mean.

05 JUDGE BERG: No, that's all right. Let me make  
06 certain I know where that is, and the exhibit number where  
07 that information is located.

08 MR. SHERR: Sure. Exhibit A, the PID version 4.0  
09 report is, I believe, about 90 pages, and I extracted from it  
10 the eight or so pages that relate to OP3 and OP4.

11 And then also as Exhibit A to the Answer is the  
12 summary of notes which recounts some changes or  
13 interpretations or concerns about these measures that develop  
14 over time.

15 Because the PID, the document PID version 4.0 is  
16 dated October 22nd, and as things continue after that point,  
17 they are summarized in the summary of notes.

18 JUDGE BERG: All right. I think I am with you.

19 MR. SHERR: And, Your Honor, I was pointing you to  
20 the PID version 4.0. Not that you need to look at it to  
21 answer your questions, but I want you to know that that  
22 resource is available. It's more descriptive than I can be.

23 JUDGE BERG: Can you point me to a page that would  
24 show me what the headings are?

25 MR. SHERR: Not necessarily. That's what I am

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01 saying. It's a resource that describes the measure itself and  
02 is valuable, but let me go through the Exhibit F that you  
03 asked about.

04 The date column is obviously the month of data that  
05 is being described there.

06 The next column over -- are you with me where I am  
07 looking? The next column says CLEC NUM, C-L-E-C, N-U-M. That  
08 stands for CLEC Numerator, which in this case refers to the  
09 total number of days for all the orders measured for  
10 installation.

11 So if there were two orders provisioned in that  
12 month, and it took three days each, that column would say six.

13 The next column says CLEC, C-L-E-C, D-E-O. And that  
14 stands for denominator. And that refers to the total number  
15 of orders being described for the month.

16 The next column CLEC, R-E-S-U, and that refers to  
17 the CLEC Result. And that is if you divide the CLEC numerator  
18 by the CLEC denominator, you come up with the average number  
19 of days over the period.

20 (The following information is designated  
21 as Confidential:)

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01 (Continuation of non-Confidential  
02 information:)

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04 MR. SHERR: The next column which reads CLEC STD,  
05 space, D, refers to the CLEC Standard Deviation. And not  
06 being a statistics major, I cannot describe to you exactly  
07 what that means.

08 JUDGE BERG: I think at this point if we just run  
09 through the headings, that will work for me.

10 MR. SHERR: The next three columns, Qwest NUM, and  
11 Qwest DENO and Qwest RESU are comparable to the CLEC column  
12 referred to all Qwest retail orders that are measured by this  
13 measure.

14 The next column says MOD, space, Z, space, SCR.  
15 That refers to the modified Z score, which is one of the  
16 statistical measures. And that is described in our answer  
17 as well.

18 And the next column says SCR, and that refers to the  
19 parity score, which is in the second of the two statistical  
20 measures.

21 JUDGE BERG: Thank you, Mr. Sherr. The CLEC  
22 denominator, when we talk about total orders, is that  
23 synonymous with LSRs?

24 MR. SHERR: Not necessarily, because data is  
25 excluded -- and that, again, is why I was directing you to the

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01 PID version 4.0. Certain orders are excluded.

02 I don't know them off the top of my head, but I  
03 think, for instance, it's excluded if the CLEC requests an  
04 interval longer than the standard interval. They ask for an  
05 installation in 10 days, for whatever reason. We don't  
06 include that on either the CLEC side or retail side, because  
07 that would artificially lengthen the average interval. So not  
08 necessarily.

09 JUDGE BERG: All right.

10 Mr. Harlow, referring to the petition Roman numeral  
11 IV (C), paragraphs 22 through 27 --

12 MR. HARLOW: I need a page so I can turn to it more  
13 quickly, Your Honor.

14 JUDGE BERG: Paragraphs 22 through 27 --

15 MR. SHERR: I am sorry, Your Honor. I missed where  
16 you are referring to.

17 JUDGE BERG: The First Amended Petition, paragraphs  
18 22 through 27.

19 MR. HARLOW: It's on page 7.

20 JUDGE BERG: Page 7, beginning at line 7, beginning  
21 at line 10. Looking at page 8, line 23, there's the statement  
22 that Qwest refuses to make dial lock available with UNE-P  
23 services, but I didn't see anything in the request for relief  
24 relating to that particular argument.

25 And I was somewhat confused by that as to whether or

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01 not Tel West seeks that Qwest -- or requests that Qwest make  
02 available UNE-P services with dial lock.

03 MR. HARLOW: There's nothing specific. We have a  
04 request, something along the lines of for such other and  
05 further relief as may be just and equitable based on the  
06 record.

07 Our primary request for relief there, Your Honor, is  
08 that we don't believe Tel West needs to pay to block a service  
09 that it hasn't ordered, or hasn't agreed to order; that  
10 Qwest -- it's Qwest's responsibility, if they choose, to block  
11 that service, and/or to bill the end users who access the  
12 service by dialing the access codes that Qwest enables them to  
13 dial.

14 So our requested relief is simply that Qwest not be  
15 allowed to charge us for services we haven't ordered, that  
16 they can't cram them down, if you will.

17 Should evidence develop in the case that that might  
18 not be appropriate, at that point we might seek, in the  
19 alternative, to get dial lock provided for free. But that's  
20 not what we're seeking to accomplish, Your Honor.

21 JUDGE BERG: Well, this is probably a good time to  
22 segue into a more detailed discussion of this particular  
23 claim.

24 My understanding, Mr. Harlow, is that if your  
25 clients ordered UNE-P services, that UNE-P services does not

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01 encompass OSDA and -- is that correct?

02 MR. HARLOW: Our recollection was that we asked that  
03 question of Qwest, and that they said they would check on it  
04 and get back to us, and we haven't heard back.

05 But even if they come back in the affirmative on  
06 that, it's not economically viable to put all of Tel West's  
07 lines on UNE-P. There would still need to be some resold  
08 lines, so we would still have an issue as to those lines.

09 JUDGE BERG: I understand. The reason I bring that  
10 up is the question of, if you were to request service through  
11 UNE-P, and OSDA is an ancillary service which Qwest would then  
12 provide and a carrier would accept, outside of the reselling  
13 of services, why dial lock would then be necessary.

14 So Ms. Anderl, I guess it comes to Qwest's side as  
15 to whether or not OSDA is bundled with UNE-P?

16 MS. ANDERL: And I don't, Your Honor. I don't  
17 believe that Tel West ever asked us that question.

18 JUDGE BERG: That's all right. I have it on my list  
19 of questions to ask here today.

20 MS. ANDERL: So I am, therefore, not prepared to  
21 answer that today. It is, as we discussed in the answer, a  
22 separate section of their interconnection agreement. We also  
23 have provisions under both resold services and UNE-P services  
24 for a carrier to order a service called customized routing  
25 that would enable them to direct their operator services and

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01 directory assistance dialed numbers to a different platform,  
02 non Qwest provided.

03           Though I would have to, as I said, double-check. I  
04 could not give you a firm answer on the operator services and  
05 directory assistance, the extent to which those are linked to  
06 UNE-P.

07           They are, as we made clear in our answer, access to  
08 operator services and directory assistance comes with the  
09 resold line, whether an end user chooses to avail themselves  
10 of those actual services is not our -- that end user is not  
11 our customer. So we, therefore, do not control or influence  
12 that.

13           Whether access to operator services and directory  
14 assistance comes with -- automatically comes with our UNE-P  
15 services, I think that access to those services probably would  
16 come with the UNE-P platform, because the UNE-P platform is  
17 essentially a combination of the network elements that  
18 constitute local service.

19           So it is the loop, and it is switching, and it is  
20 transport. And the access to operator services and directory  
21 assistance comes with the switching feature. That's how you  
22 get to an operator platform, or a directory assistance  
23 operator.

24           And in order to route those calls someplace other  
25 than the Qwest platform, or operators, you need to request a



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01 service that is contained in section 9 of Tel West's  
02 interconnection agreement called Customized Routing.

03 So as I reason it through, in responding to you, I  
04 believe my answer is correct. We can endeavor to file  
05 something supplemental if I double-check this, which I will,  
06 and turn out to be wrong.

07 JUDGE BERG: All right. If you would double-check  
08 that, I would appreciate it. I had the sense from Qwest's  
09 answer that part of its position was that if Tel West wants to  
10 provision service to its customers without OSDA, it has a  
11 choice. Either it can -- you know, there are alternatives,  
12 but that by proceeding under provisioning through UNE, that  
13 they would not have the same dilemma that they have where OSDA  
14 is, from Qwest's perspective, is part of a bundled service  
15 that comes as an entire package, that there's no obligation  
16 when selling services, to do any kind of combining or  
17 uncombining.

18 MS. ANDERL: Well, I think it's important to  
19 remember the distinction that we're making, which is that they  
20 are not forced to buy any operator services, or any directory  
21 assistance services.

22 JUDGE BERG: I understand that.

23 MR. HARLOW: Your Honor, we're getting into arguing  
24 the substance of the case, and we're running out of time here.

25 JUDGE BERG: I understand this really well. What I

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01 don't understand is if you get rid of OSDA from the Tel West  
02 perspective, then they get rid of the problem. And that's  
03 what they are looking to achieve.

04 And when I read Qwest's answer regarding that one  
05 section in 6.2.9, if Qwest provides and CLEC accepts, my  
06 understanding is that that does not pertain to resold  
07 services. That's Qwest's position that in 6.2.9 -- excuse me,  
08 no, I am misstating the argument.

09 This is the part where earlier I said that the  
10 parties could expect me to be a little confused, but there  
11 was --

12 MS. ANDERL: Operator services and DA bring that on,  
13 I think.

14 JUDGE BERG: Maybe I was thinking -- of the  
15 stipulated ordering provisions -- pardon me for thinking out  
16 loud. All right. I will review the arguments.

17 There is another point I want to move to. Either  
18 Mr. Sherr or Ms. Anderl, although I understand you have a  
19 combined technical expertise that may be necessary to respond,  
20 in looking at the interconnection agreement itself -- do you  
21 happen to have that handy?

22 MR. SHERR: We do have a copy, Your Honor.

23 JUDGE BERG: If you would turn to Exhibit A, page 1  
24 of 15.

25 MS. ANDERL: Yes, Your Honor, we are there.

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01           JUDGE BERG: Under 6.1, wholesale discount rates,  
02 there is a wholesale discount percentage recurring charge for  
03 general under section 6.1.1. And under 6.1.2 there's a  
04 wholesale discount percentage recurring charge separately  
05 stated for operator services and directory assistance.

06           And then later on page 14 of 15, under section 10.0,  
07 ancillary services, and particularly 10.4 and sections that  
08 follow, there are per usage charges. Help me understand what  
09 the wholesale discount percentage recurring charge separately  
10 stated for OSDA at 6.1.2 means.

11           MS. ANDERL: That applies, Your Honor, when the CLEC  
12 is a reseller, such as Tel West, and has a resold local line,  
13 and the end user uses directory assistance.

14           Let's say Your Honor had a resold local line from  
15 Tel West. Tel West would be charged the \$12.50 that we charge  
16 for our basic line, less the 14.74 percent discount. And then  
17 if you were to make two directory assistance calls during that  
18 month, the first one would be no charge to Tel West from  
19 Qwest, because one directory assistance call is included in  
20 local service. And the second one would be billed to Tel West  
21 at Qwest's tariff rate minus 7.97 percent.

22           JUDGE BERG: So you would look to the rate that was  
23 applicable over in section 10?

24           MS. ANDERL: No, Your Honor, you would like to  
25 Qwest's retail tariff for Qwest's retail end users. And the

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01 section 10 in the SGAT, or Exhibit A, is for when directory  
02 assistance and operator services are provided to CLECs who are  
03 not resellers, who are either purchasing UNE platform, or who  
04 are facilities based carriers but who, nevertheless, want  
05 Qwest's operator services and directory assistance.

06 JUDGE BERG: All right.

07 MS. ANDERL: Your Honor, just for additional  
08 clarification, a historical clarification -- and I am mindful  
09 of the time -- but originally the FCC had ordered that  
10 directory assistance and operator services were unbundled  
11 network elements to stand alone, to which ILEC had to offer  
12 unbundled access.

13 So those elements were part of original cost  
14 dockets, I believe. They were also -- and part of  
15 interconnection agreements.

16 Subsequently, the FCC in the UNE remand order  
17 decided that operator services and directory services are not  
18 unbundled network elements.

19 Nevertheless, Qwest and other RBOCs are required to  
20 offer access to operator services and directory assistance to  
21 all CLECs in order to satisfy the requirements of section 271  
22 of the Telecom Act, the checklist items for long distance  
23 entry.

24 So that is why you see them in two different places.  
25 And the wholesale discount was developed separately for

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01 operator services and directory assistance separate from all  
02 of our other retail services, because Qwest advocated, and US  
03 West, at the time, and other parties advocated, and the  
04 Commission agreed -- I don't know about what other parties  
05 did -- but the Commission agreed that Qwest had different  
06 avoided costs when it resold its regular retail services  
07 versus when it resold its operator service and directory  
08 assistance.

09           So it was US West's advocacy that it was  
10 appropriate to develop two different discount rates. So  
11 that's why you see them broken out on a resale basis, and then  
12 also see them in separate sections of the pricing exhibit.

13           MR. HARLOW: I want to alert you, we have several  
14 procedural matters that we intended to raise, that we haven't  
15 gotten into or touched on.

16           JUDGE BERG: I think I am just about through with  
17 this particular section. And let me see the other questions I  
18 have with regard to the complaint.

19           Mr. Harlow, with regard to section Roman numeral IV  
20 (E) of the petition where there's some enumeration or  
21 description of disputes, some being nine months old, and then  
22 there are other statistics or evidence relating to the number  
23 of pending disputes, do those disputes also include disputes  
24 over charges arising from the dial lock, the reliability of  
25 the dial lock feature?

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01           MR. HARLOW: Your Honor, there may be a little bit  
02 in there. But, no, we tried to separate that out. These  
03 would be requests for credit if we're entitled to credit for  
04 failure to timely provision, the customer was disconnected, or  
05 the service wasn't provided. There are just a number of those  
06 disputes that arise every month.

07           JUDGE BERG: And under -- with regards to the  
08 agreement, the section 5.4.4 in the new agreement, is it Tel  
09 West's position that 5.4.4 controls disputes arising prior to  
10 the effective date of the current agreement?

11           MR. HARLOW: No, Your Honor. The prior agreement  
12 governs -- and I guess I will jump ahead a little bit to our  
13 answer, which I think is now due on Friday. But, essentially,  
14 our position is that the parties continue to be a party to the  
15 old agreement as to matters that are still pending and  
16 unresolved.

17           And, therefore, it is an agreement that we can  
18 petition to enforce under 530, because there's -- there  
19 happens to be a survival clause in the old agreement. And  
20 clearly, if we are still owed credits, the account numbers  
21 haven't changed. They are the same accounts. It's just a new  
22 agreement.

23           We think it's not necessary to bifurcate the dispute  
24 when it's the same facts, essentially the same agreement, and  
25 the same remedy that we're seeking. We think it should be

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01 handled in one proceeding and that 530 is appropriate.

02 JUDGE BERG: Thank you. That's helpful.

03 Mr. Harlow, was one of your procedural points to  
04 address discovery?

05 MR. HARLOW: Yes, it was, Your Honor. And  
06 specifically we're requesting a five-day turnaround on  
07 discovery responses -- well, first, we have to request that  
08 discovery rule 480-09-480 be invoked, Your Honor.

09 JUDGE BERG: In the context of 480-09-530, I am not  
10 going to invoke the statute, but I will address specific  
11 requests to conduct discovery, and beginning with the specific  
12 request that has been presented at this time.

13 MR. HARLOW: Yes, Your Honor. And we -- if we stay  
14 under 530, it's our anticipation that that is all the  
15 discovery we need. And not that we would be waiving a right  
16 to come back and request that certain additional specific data  
17 requests be responded to, but we attempted to, within the  
18 spirit of 530, come up with discovery that we felt would be  
19 sufficient, and that we wouldn't go through four or five or  
20 six rounds, and hundreds and hundreds of requests.

21 We really honed it down as best we could, Your  
22 Honor.

23 JUDGE BERG: Being cognizant that if any claims are  
24 converted discovery is likely to expand, Ms. Anderl -- or  
25 excuse me, Mr. Sherr, with regards to these pending requests,

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01 when would Qwest be able to respond with data or objections to  
02 the DRs?

03 MR. SHERR: Your Honor, to be honest, you refer to  
04 them as pending discovery requests, and I assume you meant  
05 "proposed."

06 JUDGE BERG: "Proposed."

07 MR. SHERR: That's good news. To be honest, we have  
08 not had an opportunity, because we received the e-mail version  
09 of these proposed responses from Mr. Harlow.

10 And I appreciate getting them in advance of the  
11 hearing, but we have not had an opportunity to review them in  
12 detail ourselves, or at all with any of the subject matter  
13 experts we would have to invite to the party in order to know  
14 the extent to which we can answer these questions, or parts of  
15 these questions.

16 So I would say by the end of next week we would be  
17 in a position to know to what extent we would object to these.

18 But also note, Your Honor, that our position as to  
19 the propriety of the discovery requests depends entirely on  
20 the scope of the proceeding. If Your Honor grants the motion  
21 to strike, and Tel West's -- I should back up.

22 If we end up with a 530 proceeding that does not  
23 include any of the allegations that we have asked to be  
24 stricken, that's a very different matter than if we end up  
25 with a general complaint.



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01           It's difficult to give you a definite answer. In  
02 terms of answering your request in terms of being able to  
03 devise objections, if necessary, I would say by the end of  
04 next week.

05           JUDGE BERG: These claims aren't going to go away.  
06 Either there's going to be discovery of these requests in the  
07 530 proceeding, or there's going to be discovery of these  
08 requests in a conversion.

09           And my interest at this point in time is to get the  
10 ball rolling. And that's what I want to do. If there's a  
11 decision that there will be a conversion, then there may be  
12 some modifications to the scope of discovery allowed, as well  
13 as to the timing within which things must happen.

14           But what I am looking for is to get an idea, number  
15 one, of when objections to the request can be made, so that I  
16 can ferret out any disputes over the relevancy, or anything  
17 else that might relate to these, and then proceed to develop  
18 responses to the data requests.

19           If, for some reason, the responses were to come in,  
20 and subsequently a Commission decision was to be made that  
21 certain issues should be converted into another proceeding,  
22 the responses to data requests would move over with them as  
23 they pertain to the claims that are approved as well, or  
24 converted.

25           So whether these are proposed or pending, I think --

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01 and I am not directing -- I am not depriving Qwest of the  
02 opportunity to object to certain interrogatories, but I want  
03 for the matter to proceed. And I want Qwest to either  
04 formulate its objections, or to present responses.

05 I am just trying to get some kind of response to the  
06 five-day proposal of Mr. Harlow.

07 MR. SHERR: As you can tell, I am struggling with how  
08 to answer the question. My proposal would be, again, to offer  
09 to get objections to Your Honor by the end of next week. If  
10 that's not quick enough, we can endeavor to get it done a week  
11 from today, and to be able to provide responses, perhaps, two  
12 weeks from today.

13 To the extent we don't object to the data  
14 requests -- and while Mr. Harlow is correct, there are few in  
15 number, they are, as I recall from reviewing these yesterday,  
16 some of these discovery requests are extremely broad, asking  
17 for a mountain of information.

18 MR. HARLOW: Your Honor, if it would help Qwest, and  
19 help us get the ball rolling, as you put it, perhaps Qwest  
20 could provide such information as it's able to gather within a  
21 week of today, and then supplement, as necessary, within the  
22 following week.

23 JUDGE BERG: I would like to go forward on that basis,  
24 because what that will do is there may be some requests that  
25 aren't as complicated as others. And in the very instance of

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01 talking to your subject matter experts, information may become  
02 available.

03 I don't want to sort through these one at a time  
04 at this point, but I am most concerned with getting objections  
05 on the table as quickly as possible, because the sooner that  
06 those objections are made known, the sooner I can address  
07 them.

08 So as usual, I am calendar deprived. One week from  
09 today would be 1/30. Qwest to file and serve objections to  
10 DRs, 001 -- Tel West 001 through Tel West 012, and to provide  
11 whatever responses may be available and to further supplement  
12 those responses --

13 MR. HARLOW: A week from then would be February 6,  
14 Your Honor.

15 JUDGE BERG: And I do this cognizant that Qwest has  
16 made good faith effort in the past to make information  
17 available, and to comply with requests. And I expect this  
18 occasion is no different.

19 I understand that this process may be a little  
20 irregular, but 480-09-530 allows for that. And I am going to  
21 continue to be fair to the parties as we go forward, and  
22 that's my guiding principle.

23 And if Qwest, in the course of providing responses,  
24 for some reason can't respond within the time frame, please  
25 notify me as soon as possible stating the reasons why you

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01 would not be able to comply, and state when you would  
02 otherwise be able to provide a response.

03 MR. HARLOW: Your Honor, in kind of a related issue --  
04 and we included this as a discovery request. But not having  
05 been a party to a 530 proceeding, we're aware that -- I think  
06 Your Honor presided over at least one case where proceeding  
07 included a site visit. I think it was a co-location dispute.

08 We're requesting a site visit to -- and feel it  
09 should be two-way, that Qwest should have the opportunity to  
10 do the same thing at Tel West's premises.

11 And the purpose would be for the parties, and  
12 hopefully, Your Honor, to watch orders being processed at  
13 Qwest through the Qwest system, and watch similar -- and if we  
14 can set it up, actually the same orders processed at Tel West.

15 We think Qwest is going to object to that, but  
16 perhaps we can discuss scheduling and whether Your Honor would  
17 like to treat that as a data request, or motion, or discuss it  
18 in the two minutes remaining.

19 JUDGE BERG: I would rather treat it as a data  
20 request. And give Qwest an opportunity to consider it, and  
21 then set out whatever objections it may have, or to propose  
22 any alternative that may be reasonable.

23 MR. HARLOW: Thank you for that clarification.

24 JUDGE BERG: And that is data request Tel West 010.

25 MR. HARLOW: And I think the final -- not quite the

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01 final, but one thing we haven't touched on, there's no  
02 separate motion to dismiss by Qwest. They say in their answer  
03 it should be dismissed.

04 WAC 480-09-420 requires a separate motion to  
05 dismiss. And so for the time being, we're ignoring that. But  
06 we don't want to do so at our peril.

07 It's really difficult for us to see an answer that  
08 says, "Well, it should be dismissed," when the process of  
09 filing a formal motion makes it clear. I gets it's in the  
10 nature of a summary judgment motion, or something.

11 So we would like to be clear that we don't have to  
12 file an answer to that until such time as Qwest files a  
13 separate motion, if they do.

14 JUDGE BERG: Thank you, Mr. Harlow. I did have it on  
15 my list to talk about, paragraph 35 of the answer.

16 And just to state that at this point in time, no  
17 motion for dismissal has been formally presented. It may be  
18 that that was a general reference to the motion to strike in  
19 the context of the 480-09-530 proceeding.

20 In any event, if there's some other basis for the  
21 motion to dismiss that Qwest chooses to raise, I would ask  
22 that you do so in a separate pleading.

23 MR. SHERR: We will, Your Honor.

24 JUDGE BERG: Anything further, Mr. Harlow?

25 MR. HARLOW: We appreciate that the Commission has

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01 already entered a Protective Order on this docket, and we want  
02 to put on the record -- and hopefully everyone agrees -- that  
03 materials submitted under a "Confidential" designation in this  
04 docket, but before the Protective Order was entered, are  
05 deemed covered by the protective order.

06 MR. SHERR: No objection.

07 JUDGE BERG: I agree. I am sure that was understood,  
08 but I appreciate you bringing it out in front, Mr. Harlow.

09 MR. HARLOW: You are welcome, Your Honor.

10 JUDGE BERG: Anything further?

11 MR. HARLOW: No. I kind of understood, but I want to  
12 make sure that we will be answering the formal motion to  
13 strike on Friday of this week?

14 JUDGE BERG: That's correct. And I will look to have  
15 a decision regarding a conversion as soon as possible,  
16 possibly as soon as the same time that objections to DRs are  
17 posed, if not sooner.

18 This is a decision that is of interest to both the  
19 director of the Administrative Law Division and to the  
20 Commissioners. And to the extent that it's of -- the decision  
21 itself is of interest to them, I plan to make a recommendation  
22 much in the same way that 480-09-530 provides for a  
23 recommendation at the conclusion of the case on substantive  
24 issues.

25 So do understand that this is not a decision that is

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01 going to be made within the four walls of my office alone.

02 MR. HARLOW: Your Honor, can we go off the record?

03 (Discussion off the record.)

04 JUDGE BERG: Back on the record.

05 Mr. Sherr.

06 MR. SHERR: One more point. It's nice to end things  
07 on a high note. I believe off the record Mr. Harlow  
08 and I discussed one matter that we, believe it or not, came to  
09 an agreement, that the motion to strike is two parts; one, the  
10 outside the scope allegations, and second is the ER 408  
11 allegations and the motion to strike. And that's the latter  
12 part that I am referring to on page three, line 9.

13 I will let Mr. Harlow agree on the record, but I  
14 believe he has agreed to withdraw the allegations that have  
15 been described in the motion to strike. And, therefore,  
16 obviously, Qwest would withdraw its motion to strike based on  
17 that particular allegation.

18 MR. HARLOW: And let me read for the record what  
19 we're agreeing to withdraw.

20 Tel West agrees to withdraw or strike starting on  
21 paragraph 15 of the complaint on line 7, starting with "in  
22 addition," through the end of line nine, the last word on that  
23 line being "delays."

24 I just wish to clarify, although we're withdrawing  
25 that, and Qwest is withdrawing the motion to strike that

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01 language, neither party has agreed to waive any right that  
02 they have to offer evidence regarding the matters stricken,  
03 nor has any party waived the right to object to such an offer.

04 MR. SHERR: That's accurate.

05 JUDGE BERG: Thank you. I appreciate the parties  
06 reaching that resolution.

07 MR. HARLOW: Thank you for reminding me.

08 JUDGE BERG: Anything further from the parties  
09 before we go off the record?

10 MR. SHERR: Nothing, Your Honor.

11 MR. HARLOW: No, Your Honor.

12 JUDGE BERG: Thank you very much for your assistance  
13 here. And with that, the hearing is adjourned.

14 (The proceeding was adjourned at 3:05 p.m.)

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