

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC,)	Docket No. UT-013097
)	
Petitioner,)	Volume II
)	Pages 48 to 79
vs.)	
)	
QWEST CORPORATION,)	
)	
Respondent.)	
_____)

A hearing in the above matter was held on February 7, 2002, at 2:25 p.m., at 1300 South Evergreen Park Drive Southwest, Room 206, Olympia, Washington, before Administrative Law Judge Lawrence Berg.

The parties were present as follows:

QWEST CORPORATION, by LISA ANDERL and ADAM SHERR, Attorneys at Law, 1600 Seventh Avenue, Suite 3206, Seattle, Washington 98191, Telephone (206) 345-1574, Fax (206) 343-4040, E-mail landerl@qwest.com.

TEL WEST COMMUNICATIONS, LLC, by BROOKS E. HARLOW and DAVID RICE, Attorneys at Law, Miller Nash LLP, 601 Union Street, Suite 4400, Seattle, Washington 98101, Telephone (206) 777-7406, Fax (206) 622-7485, E-mail harlow@millernash.com.

Joan E. Kinn, CCR, RPR
Court Reporter

1

P R O C E E D I N G S

2

JUDGE BERG: This is a pre-hearing conference in Docket Number UT-013097 before the Washington Utilities and Transportation Commission. The parties in this proceeding are Tel West Communications, Petitioner, and Qwest Corporation, Respondent. My name is Lawrence Berg. I'm the presiding officer in this case. Today's date is February the 7th, 2002. The pre-hearing conference is being held at the Commission's offices in Olympia, Washington, pursuant to notice that was served on January 31, 2002.

12

At this time, we will take appearances from the parties beginning with the Petitioner. Insofar as counsel have previously provided all of their contact information on the record, you need only state your name and your client.

17

18

19

20

21

22

23

24

25

MR. HARLOW: Thank you, Your Honor, Brooks Harlow and David Rice for Petitioner, Tel West.

MR. SHERR: Your Honor, Adam Sherr, in-house counsel for Qwest.

MS. ANDERL: Lisa Anderl, in-house counsel for Qwest.

JUDGE BERG: All right, thank you. There was a brief discussion off the record regarding the agenda we would follow this afternoon, and the first matter

00050

1 that I want to take up is a pending dispute regarding a
2 data request propounded by Tel West to Qwest identified
3 as Tel West 0-012.

4 Mr. Harlow, I understand that you would like
5 to raise the issue today based on an oral motion; is
6 that correct?

7 MR. HARLOW: Yes, Your Honor, we would
8 appreciate that opportunity.

9 JUDGE BERG: All right, and I understand
10 that, Ms. Anderl, that Qwest objects to the matter being
11 heard on an oral motion here.

12 MS. ANDERL: Yes, and let me clarify. I
13 guess we would not have an objection to Mr. Harlow
14 making his motion orally today. We would, however, like
15 an opportunity to respond in writing and not be
16 compelled to respond orally today. We did discuss --
17 and this would be, of course, in lieu of alternatively
18 having Mr. Harlow present the motion in writing, and
19 then we would be permitted to respond in writing.

20 The gist of the dispute here in terms of the
21 procedural issues being that we have known for some time
22 that we were at impasse on this issue. We asked
23 Mr. Harlow to file a written motion in advance of the
24 pre-hearing conference today in order that we could
25 review his arguments and formulate a response, and he

00051

1 declined to do so.

2 He has had a week to formulate his arguments
3 on the motion to compel, and yet we would, if we are
4 forced to respond today, would be given no time to
5 formulate our response. We had a general idea based on
6 our previous discussions with him as to why he believes
7 he needs this information, but it nevertheless, I think,
8 puts us at a disadvantage to hear his arguments
9 articulated for the first time here today.

10 JUDGE BERG: Do you have a response,
11 Mr. Harlow?

12 MR. HARLOW: Certainly. I think the party
13 that's at the disadvantage here is Tel West either way
14 we do it. We have asked for a site visit so we can
15 visually compare Qwest's OSS with Tel West's. We have
16 offered informally and we will put on the record now
17 that Qwest is welcome to do the same thing at our
18 office. We think it might be something that the Bench
19 would like to come on as well. We think it's best
20 handled live because -- well, let me just briefly read
21 Qwest's objection is that it would be irrelevant, a site
22 visit would be irrelevant. And what we would prefer to
23 do is to get a prompt decision on whether or not it's
24 within the scope of discovery, and then we would like to
25 try to work with Qwest and Your Honor off the record to

00052

1 make it more relevant, in other words to make an apples
2 to apples comparison.

3 We don't know why Qwest is contending a site
4 visit is irrelevant given that we're talking we've got a
5 complaint that says we're not getting parity on OSS and
6 we want to go see their OSS and ours. We really don't
7 understand Qwest's objection. My argument is very brief
8 on that point, the section of the rule that I think
9 applies, and see why Qwest thinks it's irrelevant. I
10 think if we do it live, we'll have a better chance to
11 try to set something up that is relevant and is
12 probative and is helpful to the Commission and the
13 parties to getting the facts to resolve the dispute that
14 they have about the OSS parity question. I think, you
15 know, doing it in papers as we hear this morning in the
16 Bench-Bar thing, it's like E-mails, and this really
17 would join the issues in a way that would be helpful.

18 JUDGE BERG: This is an issue that I want to
19 see resolved today, but at the same time I don't want to
20 put Qwest in the position of hearing arguments for the
21 first time and then having to think on the fly. So
22 we're going to take a 15 minute recess, and I want the
23 parties to talk about 012. I want Tel West to fully
24 disclose its purpose for the site visit as described in
25 012, explain what it expects to occur, and to lay out

00053

1 the arguments it would make, and then I want Qwest to do
2 the same thing in response. This is a chance for the
3 parties to sort of practice your argument before
4 presenting it to me and to see whether we can focus in
5 on the relevance and what could be accomplished through
6 DR 012.

7 In 15 minutes, I will check back at the close
8 of 15 minutes, and if 15 minutes is insufficient, if the
9 parties are still working or if Qwest needs additional
10 time to either place phone calls to other support or to
11 collect their thoughts, then I will allow additional
12 time for that as well.

13 MS. ANDERL: Your Honor, the only thing I
14 might add, and I neglected to hit this bullet point in
15 my opening statement, was that because this data request
16 addresses the provisioning parity issues and that is on
17 the not so fast track, it seems to me that we are not
18 constrained under either the rough schedule you sketched
19 out to get an answer on this today. I understand that
20 you don't want maybe a lot of issues hanging out there
21 undecided, but certainly any type of urgency that
22 Mr. Harlow would try to create about needing a response
23 on this I think is a false urgency.

24 JUDGE BERG: It's also my sense of urgency,
25 Ms. Anderl, just because my time is going to become much

00054

1 more scarce as we go down this road, and anything I can
2 take care of now, it's my preference to do so. And to
3 the extent that this might have a -- there might be some
4 other scheduling issues associated with it, my
5 preference is to get it done today, if possible. If
6 after parties have had a chance to engage in a private
7 debate that they can -- if you can articulate a reason
8 why it would still be prejudicial to resolve this today
9 or if you could explain to me after I hear the positions
10 of the parties as they now stand what else it is that
11 you could develop by having more time, I will consider
12 that at the very end before making a decision if I'm
13 prepared to do that here today.

14 MS. ANDERL: All right.

15 JUDGE BERG: All right, we will be off the
16 record.

17 (Recess taken.)

18 JUDGE BERG: At this time, I'm ready to hear
19 arguments from the parties regarding the oral motion to
20 compel discovery in accordance with Data Request Tel
21 West -012.

22 Mr. Harlow, would you begin.

23 MR. HARLOW: Thank you, Your Honor. Mr. Rice
24 is prepared to provide you with a copy of the Qwest
25 response to the data request that's the subject of the

00055

1 motion.

2 JUDGE BERG: Sure, come on up here however
3 you can most easily get here, Mr. Rice.

4 MR. RICE: How many copies would you like?

5 JUDGE BERG: Let me have two copies, please.

6 MR. HARLOW: Thank you, Your Honor. Our
7 argument I hope is brief and simple. The disputed issue
8 is in the later phase and deals with the question of
9 whether or not Tel West has substantial parity in access
10 to Qwest's OSS. And the data request asks for a site
11 visit to essentially to watch Qwest's OSS, which we have
12 referred to as a service center in Washington, to watch
13 orders, installations, changes, and disconnects being
14 processed.

15 The objection that we received appears to
16 deal primarily with irrelevance. I will note first of
17 all, we think the Commission has broad discretion under
18 its discovery rule to order this kind of discovery. WAC
19 480-09-480(2)(b) defining data requests says:

20 As used in this section, data means
21 information of any type in any form.

22 And we're going to gather information.

23 The Commission also will in difficult cases
24 or cases where it's attempting to determine the proper
25 scope of discovery will use the Civil Rules regarding

00056

1 discovery as a guide. Civil Rule 34 specifically
2 provides for entry upon land for inspection and other
3 purposes, so this isn't an unusual type of request even
4 though it doesn't happen in every case.

5 As for the relevance, Qwest often objects to
6 relevance, but that's not the standard for discovery.
7 The standard for discovery which is found in Rule 26 and
8 has been applied by this Commission is, I will just read
9 a portion of Rule 26(b)(1):

10 It is not grounds for objection that the
11 information sought will be inadmissible
12 at the trial if the information sought
13 appears reasonably calculated to lead to
14 the discovery of admissible evidence.

15 I will let Qwest explain why they think this
16 is not relevant to the proceeding. But in a nutshell,
17 Your Honor, we claim that their systems are better than
18 our systems. We believe that IMA GUI is a Model T and
19 that SONAR and the other systems that Qwest
20 representatives use to enter retail orders are a
21 Ferrari. We have asked for specific data, how many
22 miles per hour, how many seconds from 0 to 60, things
23 like that, but we really want to see what the thing
24 looks like and how it operates and put some flesh on
25 that bone.

00057

1 And if Qwest's arguments about relevance are
2 true, then we may not ultimately have admissible
3 evidence out of this process. But again, that's not the
4 test for the scope of discovery. We think this is a
5 very reasonable request and could well and certainly is
6 reasonably calculated to lead to admissible evidence and
7 could well do so, particularly if we work cooperatively
8 to try to make the comparison as comparable as possible
9 between Tel West's site and Qwest's site.

10 Our request does not address this, but we
11 realize this is a situation where parity is important,
12 and whatever conditions are applied to our visit of
13 Qwest's site, we would be happy to make Tel West's
14 office available and allow Qwest to review order entry
15 by Tel West personnel using IMA GUI.

16 JUDGE BERG: Before I turn to Ms. Anderl,
17 explain to me, if you were to do a site visit and for
18 the purposes of substantiating your theory that IMA GUI
19 is a Model T and SONAR is a Ferrari, what would you see
20 there that would support that contention different from
21 what you would get in more requests for more precise
22 measurements of how the systems perform?

23 MR. HARLOW: We would see how fast the
24 screens come up. We would see how fast the fields are
25 auto populated. We would see how many different things,

00058

1 how many different fields the order typist needs to type
2 in. We would see how long it takes admittedly under a
3 variety of circumstances to process an order from start
4 to finish. It is something of an apples to apples
5 comparison.

6 We explored with Qwest the possibility of
7 processing the same orders twice. That seems to be
8 infeasible. We would be willing to provide some actual
9 Tel West orders to Qwest and have the Qwest
10 representative enter our orders, which would address
11 confidentiality concerns that Qwest might have. And
12 then we would obviously try to endeavor to come up with
13 another series of orders that have the same
14 characteristics to process on IMA GUI. What exactly
15 this would show and what it would work, you know, until
16 I see it, it's hard for me to know exactly, but that's
17 the kind of thing we're looking for, Your Honor.

18 JUDGE BERG: All right.

19 Ms. Anderl.

20 MS. ANDERL: Thank you, Your Honor. Where to
21 begin. We don't believe that Tel West can meet the
22 threshold requirement for discovery of showing that this
23 information is reasonably calculated to lead to the
24 discovery of admissible evidence. We do not believe
25 that anything that Tel West would see on Qwest's

00059

1 premises would be probative of any issues that are in
2 dispute in this docket and therefore could not lead to
3 the discovery of any admissible evidence. We have had
4 some extensive discussions with Mr. Harlow about this.
5 I think I understand what they're trying to do. I think
6 I understand what they are trying to accomplish. I
7 don't think they have chosen the right avenue to do so.

8 And I think that Your Honor should be
9 cautious about ordering this kind of discovery, which is
10 or would be quite invasive of Qwest's business
11 practices, could potentially disclose confidential
12 information to Tel West to which they're not entitled,
13 and we do not believe would lead to anything other than
14 the ability for Tel West to speculate and hypothesize
15 about the systems in a way that would be misleading at
16 best and create a significant additional burdon upon
17 Qwest to counter whatever conclusions Tel West might
18 draw from a site visit.

19 The fundamental problem with Tel West's
20 motion here is it is premised on an incorrect legal
21 theory, and that incorrect legal theory being that
22 somehow parity means that they get the exact same access
23 to Qwest's systems, that either they are entitled to
24 direct access to Qwest's systems or that Qwest's service
25 order processors ought to use the same mediated access

00060

1 that they're entitled to. Both of those are incorrect.

2 If we were permitted to brief this in
3 writing, we would show Your Honor that the FCC has
4 repeatedly ruled that the scope of the Act in requiring
5 access to an ILEC's OSS requires only mediated access
6 and that parity in this sense of the word means that the
7 CLEC be given access to systems that enables the CLEC to
8 have a meaningful opportunity to compete. That is what
9 Tel West's interconnection agreement says. Tel West
10 agreed to access our OSS through mediated access in its
11 interconnection agreement. And we therefore believe
12 that any sort of allegation that mediated access by
13 itself is improper is simply without foundation.

14 I think additionally that the type of
15 comparison that Mr. Harlow wants to be able to make, the
16 Model T versus Ferrari comparison, can't be accomplished
17 through the type of observation they hope to make. I
18 don't know how long Tel West would plan on being on
19 Qwest's premises, I don't know how many orders they
20 would propose that they watch be entered, but certainly
21 if they were to be there for an extensive period of time
22 and to take notes, they would observe Qwest's own
23 customers' orders being entered and processed. This
24 would disclose to them proprietary information about
25 Qwest's customers that they are not entitled to. And

00061

1 yet even no matter how long they were there, it's
2 unclear that they would get any sort of a meaningful
3 cross section of orders and times of entry that could
4 then be matched up to what they experience. We simply I
5 don't think can do it.

6 And to use an analogy that Mr. Harlow and I
7 discussed earlier, I think that this would be akin to
8 the blindfolded person looking at an elephant and
9 touching the tail and deciding what they had was a piece
10 of rope, and then we would have Tel West witnesses in
11 here saying what I saw was a piece of rope.

12 The information that they're looking for, the
13 types of arguments that they want to make I think are
14 ones that they can make if they want to based on the
15 information that we have already provided them. I think
16 by moving to compel on Data Request Number 12, I think
17 what you're maybe not hearing is all of the information
18 that we already have provided to Tel West. And
19 obviously we haven't served Your Honor with copies of
20 the data request responses because that's not part of
21 the process, but in Data Request Number 5 and Number 6,
22 Tel West asked us a number of questions about the
23 electronic systems and data bases that our own retail
24 customer service representatives use and asked us for
25 screen prints from each of those systems, asked us to

00062

1 identify which fields are auto populated, et cetera. We
2 provided on the 6th, yesterday, probably about an inch
3 of what we identified as confidential attachments to
4 those responses, which show the screen prints of the
5 systems that our own retail customer service
6 representatives use, the fields that are required to be
7 entered, identified the fields that auto populate, et
8 cetera. So it's not as though we're saying that Tel
9 West isn't entitled to make, you know, a comparison
10 between our retail and wholesale systems. You know,
11 clearly we have given them the paper to do so. They
12 have had this document less than 24 hours. It's
13 difficult for me to understand that they could conclude
14 that they don't have the information they need from this
15 and that somehow a site visit would provide anything
16 more significant or more meaningful.

17 As I said, we are very concerned about the
18 thought that there would be no mediated access, because
19 we don't think that that's what's legally required. We
20 don't think that -- we think that non-mediated access
21 would give Tel West access to things to which they're
22 not lawfully entitled and is not required by the Act.
23 Again, this is something we would brief.

24 Additionally, Mr. Harlow mentioned Civil Rule
25 34 allowing the presiding officer to order as part of

00063

1 discovery entry upon land for inspection and other
2 purposes. Certainly we have not had a chance to review
3 that rule, analyze any of the cases which have
4 interpreted that rule, or have a fair understanding of
5 whether this type of a site visit specifically is
6 relevant. Perhaps a site visit for determination of
7 whether a fence obstructed someone's view is one
8 question, but this is an entirely different type of a
9 question.

10 We do not believe that it would be meaningful
11 to enter Tel West orders that Tel West would give us,
12 because for the most part our customer service
13 representatives take orders from retail customers when
14 they call in on the telephone to place their order, and
15 they place those orders by navigating through various
16 computer screens while the customer is on the line. For
17 Tel West to give us a sheet of paper that says, well,
18 here's a customers order, why doesn't your service order
19 processor fill that, is not the same and therefore
20 doesn't, even assuming that the comparison that Tel West
21 would want to make would be meaningful or relevant,
22 which we don't, wouldn't accomplish that, because they
23 would be setting up an artificial construct that would
24 not mirror what our service order representatives really
25 do.

00064

1 And I guess the only other thing that I have
2 in my notes is to mention to Your Honor that this is not
3 like a collocation inquiry where we previously agreed to
4 site inspections on our central offices and had CLECs
5 walk through. I think it's significantly different. In
6 those office visits, the question was, is there space
7 available, and I think that a review of each of the
8 floors in a building can provide, you know, very, and
9 along with a floor plan, can provide very specific
10 clearly defined factual information that the parties can
11 then come back and talk to the finder of fact about.
12 And I think that site visits in the collocation
13 inquiries where the very simple question was, is there
14 space available and you could say yes or no was a
15 legitimate -- legitimate in that context.

16 I think this is something that's clearly
17 different and we think very highly improper, and we
18 would ask Your Honor to deny the motion to compel,
19 especially in light of the fact of all the other data
20 that we have provided Tel West with to date.

21 JUDGE BERG: Any response, Mr. Harlow?

22 MR. HARLOW: Thank you, Your Honor. You
23 know, I saw a documentary on the making of Star Wars
24 episode one the other night, and George Lucas showed all
25 the story boards for Star Wars episode one. And while

00065

1 they were helpful, it's not the same experience to see
2 the story boards as it is to see the actual movie. Or
3 to use Ms. Anderl's elephant analogy, we feel we have
4 our hands on the rope, and we would like to take the
5 blindfold off and look at the entire elephant.

6 Ms. Anderl's arguments all go to the weight
7 of the testimony. If indeed testimony can be based on
8 this view, Qwest will be entitled to respond. And
9 indeed, if they take us up on our offer, they will be
10 able to come to our site and do the same thing to us as
11 we might do to them.

12 The issues, I will just address some of them,
13 the issues on the difficulties with the comparison can
14 all be resolved. For example, the concerns about
15 disrupting Qwest's business. I understand from
16 Mr. Swickard that it is possible to obtain access to
17 Qwest's systems off of Qwest's premises, that it is
18 possible to obtain direct access to their systems
19 without actually going to their premise.

20 In terms of, you know, what do the screen
21 prints not show that a live visit would show, well, the
22 screen prints don't show the due date entry and how the
23 response comes back immediately on the Qwest premise.
24 It doesn't show that SONAR gives an immediate firm order
25 confirmation whereas Tel West has to wait for the firm

00066

1 order confirmation. You know, we need interaction with
2 the related systems that we just simply can't get from
3 screen prints. Those screen prints are story boards.
4 We need to see how they flow together and how the whole
5 process works. It just doesn't come to life on pieces
6 of paper regardless of how many they give us, Your
7 Honor. You know, this is something we really have to --
8 we really have to see what it is before we know exactly
9 what happens.

10 And Qwest may have some very valid arguments
11 about the comparison at the time of hearing, but again,
12 it goes to the weight. Qwest will have the ability to
13 move to strike or move for a motion in limine to exclude
14 evidence regarding that. But we're really prejudiced by
15 not being able to see it first and proffer our testimony
16 based on that site visit and then deal with the weight
17 arguments that Qwest argues.

18 MS. ANDERL: Your Honor, I know that I'm not
19 the moving party, and I don't get the last word,
20 however, I have only had a limited amount of time to
21 organize my thoughts on this, if I might just add one
22 other thing.

23 The other concern that we have really is that
24 I think what Mr. Harlow is trying to get at here through
25 a single site visit and an expedited three month

00067

1 proceeding in a single case in a single state is the
2 same issue that the ROC has undertaken in a 13 state
3 region on a 24 month calendar to test Qwest's OSS. I
4 mean really what we are looking at here is the same type
5 of 271 inquiry, which is, is your OSS good enough to
6 allow the CLECs a meaningful opportunity to compete.
7 That is how the FCC has defined what parity is. The
8 FCC, I think, really has the last word on that as the
9 interpreter of the Act and what it means and what's
10 required under both the checklist and Section 251.

11 And that ROC test, that's ROC, regional
12 oversight committee, test is no small undertaking.
13 There is a third party tester, KPMG, who is involved in
14 that. They have undertaken literally thousands of hours
15 of testing of Qwest's OSS, all the aspects of its
16 functioning, the preorder process, the order process,
17 and the provisioning process, and the maintenance and
18 repair processes, and determined through this testing
19 process whether Qwest's IMA, interconnect mediated
20 access, interface through the graphical user interface
21 or the EDI interface gives CLECs parity as defined under
22 the Act, in other words, access to OSS that gives them a
23 meaningful opportunity to compete. KPMG is not
24 comparing Qwest's mediated access to Qwest's own
25 internal systems that its retail customers used, because

00068

1 the determination was made in that case that that was
2 not the test that was required.

3 We hear here that on a three month calendar
4 with, you know, two parties and only very abbreviated
5 discovery and a couple of minutes on a site visit that
6 Tel West is going to try to cut to the chase and reach a
7 conclusion that would be really highly inappropriate to
8 reach based on that type of background, when indeed that
9 is the identical inquiry that is being undertaken in a
10 much more meaningful way in connection with Qwest's 271
11 application.

12 And I apologize that I didn't bring that up
13 before. It was in my mind to mention, and I just didn't
14 have an opportunity. That is another point that if we
15 were to flush this out in writing we could certainly
16 give you a lot more detail on.

17 MR. HARLOW: Just very briefly, Your Honor,
18 271 and the ROC OSS test is just a complete tangent.
19 This is a petition to enforce our interconnection
20 agreement. Section 6.2.3 states that:

21 Qwest shall provide to CLEC
22 telecommunications services for resale .
23 . . in substantially the same time and
24 manner.

25 Our parity argument isn't based on 271 or FCC

00069

1 orders; it's based on our interconnection agreement, and
2 we don't think we're getting the same time in the same
3 manner of provisioning of services.

4 JUDGE BERG: At this time, I'm going to deny
5 the request for a site visit, but I'm going to direct
6 the parties to engage in further efforts to develop an
7 apple to apple test. I do not know what we're really
8 talking about in terms of how fast an order is processed
9 using the IMA GUI or on SONAR, but it's apparent that
10 Tel West thinks it's significant, and they deserve an
11 opportunity to develop their case. In so doing, there
12 are a couple of points that I heard that I want to
13 stress.

14 The first is I share Qwest's concerns over
15 the artificial construct or having observed performance
16 that can not be tied to the types of orders or fall
17 within the same parameters of orders as might be at
18 issue in this case. That's very similar to what we saw
19 in AT&T versus Qwest, not using the observations on a
20 mediated order processing system or a direct input
21 system, but certainly the failings in that case was
22 being able to demonstrate that Qwest's performance on
23 one set of orders was the same set of orders that was
24 case applicable.

25 At the same time, I think it's relevant to

00070

1 try and develop an apples to apples comparison that, you
2 know, working through some of the issues in Part B of
3 the Commission's generic case in UT-003013, I continue
4 to revisit the difficulties the Commission, the
5 long-standing difficulties the Commission has had in
6 validating nonrecurring time and motion studies, much
7 less the testimony of subject matter experts. And I'm
8 not convinced that a proper time and motion study could
9 be derived from a site visit that would be consistent
10 with the rest of the case under development.

11 However, let me say that at this point the
12 parties can take my decision as being an interim
13 decision. If parties are unable to devise some type of
14 a comparison where an order can be submitted to Qwest in
15 whatever way it processes retail orders that can be used
16 as a comparison to the way that orders are submitted and
17 processed from their wholesale customer, Tel West, then
18 I will want to reconsider some of the legal
19 underpinnings that the parties have alluded to in terms
20 of the standard to be applied in this case and as
21 developed by the FCC in light of Tel West's specific
22 need and what it would seek to achieve from the
23 discovery it has not received or is unable to perform.

24 Mr. Harlow, I understand that your -- the
25 analogies are very good here, that the screen prints

00071

1 served as a story board. I think that it would be more
2 valuable to be able to talk about elapsed times and
3 actually how the orders come in and go out to get a
4 handle on whether or not there is parity, however that's
5 defined. What I'm going to do is ask that the parties
6 work together, and if the parties are unable to devise a
7 test to get a more apple to apple comparison, even if
8 it's a Granny Smith to McIntosh, then I want to leave
9 the door open for Tel West to refile a written motion
10 specifically pointing to the discovery, the
11 interrogatories and data requests it has propounded in
12 its attempt to get a complete picture and to make
13 relevant comparisons, and to argue how the responses are
14 insufficient in addition to arguing the standard of
15 parity to be applied in this circumstance.

16 And I would like, we will set a date by which
17 in March that Tel West would make that filing. That
18 would allow sufficient time to resolve it and then to
19 conduct a site visit, if necessary and appropriate, in
20 time to prepare for a conclusion of the provisioning
21 parity part of this case.

22 Any questions?

23 MS. ANDERL: No, Your Honor, we will continue
24 to try to work with Tel West to try to find a way
25 through the issue.

00072

1 JUDGE BERG: All right. I think that kind of
2 a comparison would be very informative. Certainly if it
3 comes to a written motion and Qwest is put in a position
4 of responding, then it would be certainly open for
5 argument as to why it simply wasn't or isn't feasible,
6 but in the meantime it seems to me that it should be. I
7 understand that it might require some kind of a blind
8 submission of at least, you know, one order, telephone
9 order, to a retail order processor, if not others. If
10 there's some other way to get to the comparison, I will
11 leave it to the parties to know their business certainly
12 better than me in addition to what would constitute a
13 significant sample that might produce a reliable result.
14 And, if necessary, I will receive further arguments on
15 this point at whatever date we decide.

16 Okay, let's be off the record.

17 (Discussion off the record.)

18 JUDGE BERG: There has been considerable
19 discussion off the record regarding scheduling in this
20 case. Mr. Harlow has been keeping notes on a several
21 months at a glance calendar with the dates recorded. I
22 will have Mr. Harlow read all significant dates into the
23 record.

24 But as a preliminary, I will indicate that
25 all dates upon which there are filing obligations,

00073

1 filing obligations are parties are to serve each other
2 and file at 4:30 in the afternoon. Parties may serve
3 each other in any way that's mutually agreed to.
4 Parties may file by facsimile to be followed with a hard
5 copy delivered to the Commission the next morning.

6 Have we discussed the number of copies that
7 parties are required to file in this case? I'm looking
8 for a distribution sheet, and I don't have one. What
9 have the parties filed to date?

10 MR. HARLOW: I believe we have been filing
11 original and six plus electronic.

12 JUDGE BERG: All right, let's stay at that,
13 and if that needs to be amended, I will notify the
14 parties.

15 And with that, Mr. Harlow, would you read
16 your dates.

17 MR. HARLOW: Yes, Your Honor. Tel West
18 direct testimony will be filed tomorrow, Friday,
19 February the 8th. Qwest will file its amended answer to
20 the petition on that same date. Tel West, excuse me,
21 Qwest will serve its first data requests on Tel West on
22 Monday, February the 11th. Qwest will serve its
23 supplemental response to Tel West Data Request Number 11
24 on the 12th. Tel West will file its supplemental direct
25 testimony, if any, relating to Qwest's amended answer on

00074

1 Wednesday, February the 13th. Tel West will file its
2 supplemental direct testimony, if any, to Qwest's
3 supplement to Data Request Number 11 on February 15th,
4 that's a Friday. Qwest will serve its second data
5 requests on Tel West on Monday, February the 18th. Tel
6 West will serve responses to Qwest's first data requests
7 on Tuesday, February the 19th.

8 MS. ANDERL: Your Honor.

9 JUDGE BERG: Yes, Ms. Anderl.

10 MS. ANDERL: I suppose I could let Mr. Harlow
11 go, but my records reflect something to the contrary on
12 that date.

13 MR. HARLOW: Wait, wait, wait, there's that
14 alternative thing, which I couldn't fit on the calendar.

15 JUDGE BERG: But that was to the 18th. The
16 five business days from the first set would be -- so
17 first set, data request set from Qwest, would be served
18 on the 11th. Five business days would be the 19th.

19 MS. ANDERL: That's not counting the 18th as
20 a business day because the state offices are closed?

21 JUDGE BERG: That was my interpretation, but
22 it --

23 MR. HARLOW: In all cases, we will endeavor
24 to serve responses early, but we did discuss it as five
25 business days off the record.

00075

1 MS. ANDERL: I didn't consider the 18th a
2 business day, Your Honor, because Mr. Harlow indicated
3 that even though their offices would be closed, they
4 would work around that.

5 MR. HARLOW: Oh, I thought we were working
6 around receipt of the second data requests.

7 JUDGE BERG: Well, my understanding is that
8 the significance of the data requests is to enable Qwest
9 to prepare its responsive testimony, and I'm going to
10 stick with the schedule with the responses due on the
11 19th. If there's something about those requests,
12 Ms. Anderl, those responses, where there was voluminous
13 or unexpected, I'm sure you would notify me in any
14 event. Let's get to that point in time and see what
15 comes in any event. You're also dependent on the
16 responses to the second set of DRs, which won't be
17 served until the 18th and won't be received until the
18 22nd or the 25th. If it turns out that there's some
19 extreme hardship, then you will want to let me know as
20 soon as possible.

21 MS. ANDERL: Yes, Your Honor, it just seems
22 to me that Tel West has just taken a day out of our
23 schedule, and it seems ironic that the 18th should only
24 be a business day for Qwest when, in fact, it is Tel
25 West who wants the expedited schedule. However, if we

00076

1 have an issue with it, we will bring it up at the time.

2 JUDGE BERG: Mr. Harlow.

3 MR. HARLOW: Well, my understanding is the
4 requests that are being served on the 11th are requests
5 that are based on our petition, and so, you know, that's
6 been on file for weeks, so I don't think we're taking a
7 day out of Qwest's schedule. I think Qwest could have
8 served us a lot earlier.

9 JUDGE BERG: Have you done any work
10 developing those data requests, Ms. Anderl?

11 MS. ANDERL: They're very close to getting
12 ready.

13 JUDGE BERG: All right.

14 MS. ANDERL: We're not going to start writing
15 them today. They're underway.

16 MR. HARLOW: I don't know if we're getting 12
17 or 120. I have no clue. We do need clerical people
18 usually to get these things out, and our office is
19 closed on the 18th.

20 JUDGE BERG: That would be my concern,
21 Ms. Anderl, the need for the clerical help.

22 MS. ANDERL: What if we were to serve them
23 tomorrow, would Tel West be able to answer them by the
24 22nd, or by the 15th rather?

25 MR. HARLOW: That would be within our

00077

1 commitment of a five business day turnaround, so the
2 answer would be yes.

3 JUDGE BERG: Can you make that happen,
4 Ms. Anderl?

5 MS. ANDERL: We will make that happen.

6 JUDGE BERG: All right. So what we have is
7 in addition to the Tel West direct and admitted answer
8 to be filed on the 8th, Qwest's first set of data
9 requests shall be served, also served on the 8th, and
10 the responses would then be due on the 15th along with
11 any Tel West supplemental testimony to Data Request
12 Number 11, if necessary.

13 MS. ANDERL: Thank you, Your Honor, I
14 apologize for that interruption.

15 JUDGE BERG: That was very necessary, thank
16 you.

17 MR. HARLOW: Then continuing, Tel West will
18 respond to Qwest's Second Data Request either on the
19 22nd of February or Monday the 25th of February. Qwest
20 will file its responsive testimony on either the 27th of
21 February or the 28th of February, the 27th if Qwest
22 responds to the second data requests on the 22nd and the
23 28th if Tel West responds to the second data requests on
24 the 25th. There is to be another pre-hearing conference
25 on Friday morning, the 1st of March.

00078

1 JUDGE BERG: Let's set that up for 10:00. My
2 preference is that we just agree it will be a
3 teleconference, and I will notify parties if the bridge
4 line is available. If not, we will make other
5 arrangements.

6 MR. HARLOW: And then the hearing is set for
7 Monday, March the 11th and as necessary Tuesday, March
8 the 12th.

9 JUDGE BERG: All right. And likewise, I will
10 notice parties with the room number and a start time,
11 but parties should expect that we will start at parties
12 to be present at 9:00 to deal with the preliminary
13 matters and proceedings to start at 9:30 on the 11th.

14 Anything else before we go off the record?

15 All right, we will be off the record.

16 (Recess taken.)

17 (Discussion off the record.)

18 JUDGE BERG: There's been an off record
19 discussion regarding the preparation and filing of
20 briefs in this matter. The parties have an
21 understanding of the subjects to be addressed, and
22 there's no need to further develop it on the record. I
23 think it might be beneficial if the parties at some
24 point just exchange a letter between them of
25 acknowledgment of the broad issues to be addressed in

00079

1 the brief. Briefs will be filed on Friday, March the
2 8th. There will be a 30 page limit on briefs.

3 At the hearing on March 11th, parties will
4 make a brief opening statement of approximately five
5 minutes in length. At the close of the hearing,
6 presuming there is an evidentiary hearing that takes
7 place with cross-examination of witnesses, there will be
8 an opportunity for oral arguments on the briefs as well
9 as closing arguments on the evidence, and we will
10 discuss at that point in time whether those arguments
11 should take place on the 11th or carry over to the next
12 morning on the 12th.

13 The hearing on the provisioning parity issues
14 shall be May 6th and 7th, 2002. The parties agree to
15 continue working together on a more complete procedural
16 schedule, and I would like the parties to present to me
17 their agreement in as much detail as possible at the
18 Friday, March 1st teleconference, if not sooner.

19 Is there anything else that the parties want
20 to discuss on the record before we adjourn?

21 MS. ANDERL: No, Your Honor.

22 MR. HARLOW: No, Your Honor.

23 JUDGE BERG: All right, thank you everyone,
24 we will be adjourned.

25

