

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
26
27

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC
Petitioner
v.
QWEST CORPORATION, INC.
Respondent.

Docket No. UT-013097
QWEST CORPORATION'S PART A
PREHEARING BRIEF
[OS/DA AND BILLING DISPUTES ISSUES]

TABLE OF CONTENTS

I. INTRODUCTION.....5

II. FACTUAL BACKGROUND.....6

III. ISSUES PRESENTED.....13

IV. DISCUSSION.....14

 A. A Section 530 Adjudication Is Narrow In Scope.....14

 B. OS/DA: The Evidence Does Not Support Tel West’s Claim
 That Qwest Violated The Current Interconnection Agreement.....15

 1. Tel West fundamentally misconstrues or misunderstands
 the concept and requirements of resale.15

 2. The parties’ interconnection agreement does not require
 Qwest to provide Tel West, for resale, a local exchange
 line free of access to OS and DA without charging Tel West
 for the requisite blocking features required to restrict Tel
 West’s customers from accessing OS and DA.16

 3. As a matter of policy, Tel West’s relief (on the OS/DA
 question) should be denied.21

 4. Ancillary matters.24

 C. Billing Disputes: The Evidence Does Not Support Tel West’s
 Claim Of Breach By Qwest Or That The Commission Should
 Re-Write The Agreement.....27

 1. There is no forward-looking problem to be resolved by
 the Commission in this docket.27

 2. The interconnection agreement does not impose a hard-
 and-fast response time on Qwest, as Tel West now wishes it did.....27

 3. As a matter of policy, Tel West’s relief requested regarding
 billing dispute provisions of the agreement should be denied.29

 4. Ancillary matters.31

V. CONCLUSION32

TABLE OF ISSUES RAISED BY ADMINISTRATIVE LAW JUDGE

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
26
27

Question

Page Lines

- | | | | |
|-----|--|-------|------------|
| 1. | Is Section 6.2.9 ambiguous? If it is not, what does it mean? If it is, is it necessary to refer to other sources (and if so, which)? If it is ambiguous, what principles should guide the Commission in resolving the ambiguity? | 18-22 | 14-6 |
| 2. | Does Section 6.1.1 impact the interpretation of Section 6.2.9? | 18 | 3-17 |
| 3. | Qwest asserts that its obligation to a reseller is limited to providing services for resale in the same form as it offers to its retail customers. Discuss the impact of that argument on the interpretation of the interconnection agreement. In so doing, discuss FCC law and the effect of such law on the interpretation of the interconnection agreement. | 16-17 | 8-8 |
| 4. | How does Dial Lock work and what representations did Qwest make regarding it to Tel West? | 11-12 | 21-13 |
| 5. | How does Customized Routing work and how would it work for Tel West? | 13-14 | 12-4 |
| 6. | Does Qwest offer OS/DA on a stand-alone basis to resellers? | 26 | 3-25 |
| 7. | With regard to Tel West's billing disputes issue, brief the relationship between resolving the OS/DA issue and resolving the billing dispute issue. | 27 | 23-27 |
| 8. | To what extent does this controversy involve UNE-P? To what extent can a CLEC order UNE-P without access to OS or DA? | 24-25 | 12-10 |
| 9. | Is there any provision in the interconnection agreement or requirement at law requiring Tel West to exhaust its rights to collect pay-per-use charges from its customers before seeking credit from Qwest for the same? | 22 | Note
11 |
| 10. | Is there any provision in the interconnection agreement or requirement at law providing that Tel West waives its right to seek credits from Qwest for unauthorized pay-per-use charges if its claims is not timely presented to Qwest? | 31 | 17-22 |
| 11. | Are Tel West and its customers jointly and severally liable to Qwest for usage based fees incurred by Tel West's customers? | 25-27 | 13-2 |
| 12. | Is Tel West required by contract or at law to give a particular notice to its customers regarding incurring pay-per-use charges? | 28 | 1-9 |
| 13. | If Tel West is severed from liability based on its purchase of ancillary services, is the customer incurring the pay-per-use charges also exempt? | 25-27 | 13-2 |

Question

Page Lines

- | | | | |
|-----|--|-------|------|
| 14. | Who purchases ancillary services from Qwest, Tel West or its customer? | 25-27 | 13-2 |
| 15. | Is Tel West the agent for its end user? | 25-27 | 13-2 |

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
26
27

16.	Can Qwest pursue collection against Tel West's customers for pay-per-use charges, despite the existence of ancillary services?	25-27	13-2
17.	If the answer to question 16 is yes, has Qwest by contract or by law waived its right to terminate service?	25-27	13-2
18.	What information should be included in a claim for credit?	31	2-20
19.	Does Tel West receive its statements from Qwest for each of its customer lines on the same date?	8	3
20.	What constitute efficient practices for resolution of billing disputes?	31	2-20

1 Qwest Corporation, by and through its undersigned counsel, hereby submits its prehearing brief
2 regarding Part A of this docket. Qwest respectfully requests that the Commission deny all relief
3 requested by Tel West in Part A.

4 **I. INTRODUCTION**

5 Part A of this case involves Tel West's complaint that Qwest is not complying with the terms of
6 the parties' current interconnection agreement by (a) not providing Tel West basic local exchange lines
7 free of access to Operator Services and Directory Assistance without charging Tel West for available
8 blocking products, and (b) failing to expeditiously investigate and respond to Tel West's numerous
9 monthly billing disputes. Tel West asks the Commission to re-write the parties' negotiated
10 interconnection agreement by (a) "[d]irecting Qwest to permit Tel West to order residential service
11 without OS and DA, and without requiring Tel West to order blocking services" and (b) "ordering that all
12 billing disputes that Qwest has not resolved within thirty days after Tel West presents them to Qwest shall
13 be deemed resolved in Tel West's favor, unless Tel West is responsible for the delay."

14 Qwest strongly disagrees with Tel West's self-serving interpretation of the agreement. Qwest
15 further disagrees that it has breached its obligations under the agreement or that Tel West's requested
16 relief is reasonable or appropriate.

17 Tel West's interpretation of the agreement (specifically Section 6.2.9 regarding the OS and DA
18 issue) is contrary to law and the fundamental concept and structure of resale. Viewed in context and in
19 conjunction with several other provisions of the agreement that would be rendered meaningless by Tel
20 West's interpretation, Section 6.2.9 can not have the meaning Tel West advocates. Both important
21 policy considerations and Tel West's subsequent conduct that was entirely inconsistent with the
22 interpretation it now offers also support Qwest's view. Section 6.2.9 merely provides Tel West special
23 or generic branding opportunities if Tel West chooses them. The interconnection agreement provides Tel
24 West the ability to resell all of Qwest's retail telecommunications services. Various provisions in the
25 agreement allow Tel West to block some of its end users' calls, to re-route their traffic to other providers
26 or to "re-brand" Qwest's service with a different name. None of these provisions gives Tel West the
27 right to demand "free" blocking of access to Qwest's OS and DA.

1 As to Tel West's analysis of Section 5.4.4 of the agreement (regarding billing disputes), Tel West
2 is again inappropriately urging the Commission to re-write a provision of the parties' negotiated
3 agreement that it wishes read differently. Tel West has failed to present or even allege facts supporting a
4 conclusion that Qwest has failed to expeditiously investigate its voluminous billing disputes. The relief Tel
5 West seeks, a unilateral penalty mechanism which triggers if Qwest has not resolved its disputes within 30
6 days, was not contemplated by the parties before executing the agreement and would impose ridiculous
7 burdens on Qwest. The length of time it takes Qwest to respond to Tel West's billing disputes is directly
8 related to Tel West's own practices and desire to shift administrative burdens and costs to Qwest.
9 Further, Tel West does not comply with Section 5.4.4, yet is asking the Commission to expand it to
10 impose a penalty mechanism affecting only Qwest.

11 In this brief, Qwest will first set out in detail the relevant facts that have been or will be submitted
12 for the Commission's consideration. After reviewing these facts in their entirety, as well as Qwest's legal
13 and policy analysis which will follow, Qwest believes it will be clear that the Commission should deny the
14 relief requested by Tel West in this phase of the docket.

15 **II. FACTUAL BACKGROUND**

16 The parties' testimony and the evidence submitted at hearing will demonstrate the following:

17 1. Tel West is a competitively-classified CLEC in the state of Washington. *See In re Tel*
18 *West Communications, Inc., et al., Docket No. UT-991130, Order Granting Competitive*
19 *Classification (September 27, 1999)*. Tel West has on file with the Commission two price lists, a resale
20 price list (effective September 15, 2001) and a switched access service price list (effective October 20,
21 2001). *Response to data requests Qwest-005, -019.*¹ The resale price list permits Tel West to furnish
22 "resold intrastate telecommunications services." *Id.* While Tel West's price list does not specify that Tel
23 West may provide services via UNE-Platform, Tel West does have a number of UNE-P customers.
24 *Response to data requests Qwest-002, -004, -005, -019.*

25 2. Tel West and Qwest executed an interconnection agreement in August 2001 that became

26 _____
27 ¹ Each reference to a data request response is intended to refer to the party's original and supplemental responses to the applicable data request.

1 effective on October 31, 2001. Previously, the parties were bound by a resale agreement, the original
2 term of which expired on August 1, 2001. *Response to Bench Request 1*. Specific relevant sections of
3 the current and prior interconnection agreements will be discussed below.

4 3. Tel West primarily resells Qwest's basic local exchange service. *Response to data*
5 *requests Qwest-001, -002, -051*. Qwest provides, as components of basic residential local exchange
6 service, the following elements: single party service, voice grade access to the public switched network,
7 unlimited access and usage of the switched network within the local calling area, Touch Tone signaling,
8 access to emergency services (e.g., E911), access to operator services ("OS"), access to interexchange
9 services, access to directory assistance ("DA"), and access to toll limitation services. In other words,
10 when a residential customer purchases Qwest's flat-rated residential service for \$12.50 per month, all of
11 the above-listed functions are provided as a part of that local exchange service. In addition, Qwest's
12 residential basic local exchange customers are currently entitled to one free call per month to Qwest's DA
13 service. *Response Testimony of David L. Teitzel, Exhibit DLT-1T ("DLT-1T")*, at 3:1-16. Qwest
14 offers a variety of blocking services, but does not offer such services for free. Call blocking services are
15 considered optional and are not part of the basic service "package" provided with basic residential
16 service in this state. Retail customers wishing to restrict access to certain types of telephone numbers are
17 required to purchase the optional call blocking services contained Qwest's tariffs. *Id.*, at 8:16-20. In
18 this proceeding, Tel West is demanding that the Commission order Qwest to provide Tel West, for
19 resale, a basic local exchange line free of access to OS or DA without charging Tel West for blocking
20 services that Qwest's retail customers must purchase to achieve the same result. *Amended Petition*, at
21 ¶ 33(d)(6). Tel West's representative initially demanded this result prior to the parties' negotiation of the
22 current interconnection agreement. *Response to data request Qwest-022; Direct Testimony of Jeff*
23 *Swickard, Exhibit ___ (JS-T) ("JS-T")*, at Exhibit A. However, Qwest did not agree to this demand,
24 and Tel West did not specifically negotiate this issue and did not avail itself of its rights under Section 252
25 of the Telecommunications Act (the "Act") to seek Commission mediation or arbitration of the issue.
26 *Response to data requests Qwest-022, -026*.

27 4. Tel West markets its services to the segment of the public that has poor credit or has

1 been disconnected by an ILEC (such as Qwest) for nonpayment. *Amended Petition, at ¶ 26; JS-T, at*
2 *3:6-10.* Tel West acknowledges that, as such, its likelihood of incurring bad debt costs is higher and is
3 considered in its pricing methodology. *Response to data request Qwest-034.*

4 5. Tel West's resale price list specifies that Tel West does not require security deposits,
5 charges \$79.99 for the first month of basic local service and charges \$49.99 per month thereafter.
6 *Response to data request Qwest-005.* Tel West's actual charges to its customers frequently vary from
7 the amount stated in Tel West's price list and Tel West appears to collect a flat amount from each
8 customer for each month for "taxes and surcharges" regardless of the principal amount of the customer's
9 bill. *Response to data requests Qwest-020, -061.* Tel West also bills its customers for charges that are
10 not specified in its resale price list. *Id.* Thus, in addition to its admittedly high monthly rates (which it
11 admits are high because of its increased bad debt exposure), Tel West is often collecting amounts in
12 addition its authorized charges;² these additional amounts serve to offset Tel West's "losses" relating to
13 uncollected customer charges.

14 6. Tel West's written rules state that its customers may not make use of pay-per-use
15 services (e.g., DA, OS, toll) and that any such use will (without limitation) result in disconnection.
16 *Response to data request Qwest-062.* Despite being aware each month of numerous instances in which
17 its customers have incurred pay-per-use charges,³ Tel West does not follow through with its
18 disconnection policy in a uniform manner, but instead admittedly handles disconnection on a case-by-case
19 basis. *Response to data request Qwest-053.*

20 7. Once per month, Qwest bills Tel West for each of its Washington lines. Each such billing
21 includes a summary bill and itemized bills for each individual line. Those itemized bills specify, among
22 other things, pay-per-use charges incurred by Tel West's customer. While Tel West complains that they

23 _____
24 ² To Qwest's knowledge, Tel West is not exempt from the requirements of WAC 480-120-027, which provides in
25 relevant part that "[a]ll price lists filed with the commission must describe the service being offered and all prices,
charges, terms, and conditions pertaining thereto...Price lists must provide sufficient detail for customers and potential
customers reasonably to determine what is being offered and what charges the customer incurs in obtaining the
service."

26 ³ Tel West's awareness is evidenced by Tel West's own documentation, namely its monthly billing dispute
27 spreadsheets which reveal repeated use of pay-per-use services by Tel West over the course of consecutive
(sometimes several) months. *See, e.g., Swickard Testim, at Exhibit B.*

1 can not pass those pay-per-use charges on to their customers because Qwest's billing statements do not
2 indicate the date and time of the call (*response to data request Qwest-032*), Qwest provides Tel West
3 the same level of detail it provides its retail customers.

4 8. Tel West makes no attempt, except in rare circumstances that it has not precisely defined,
5 to collect pay-per-use charges from its customers. *Response to data requests Qwest-010, -012, -*
6 *013(a), -053, -059*. Tel West has the ability to add such charges, at whatever reasonable markup it
7 deems appropriate, to its customers' bills each month. *Response to data request Qwest-020, -061*. Tel
8 West does not do so. Instead, Tel West disputes to Qwest 100% of such charges by compiling a
9 spreadsheet identifying the telephone number, amount of the charge disputed and a one or two word
10 description (e.g., "directory assistance" or "toll"). *Response to data request Qwest-010; JS-T, at*
11 *Exhibit B*. In the case of toll calls, Tel West's spreadsheets do not specify whether the toll charges were
12 outgoing toll charges or incoming (e.g., collect or third-party calls) charges and do not specify whether
13 such charges relate to collect calls from correctional facilities. *JS-T, at Exhibit B*.

14 9. Once it compiles its spreadsheet, without having attempted to collect the corresponding
15 charges, and without even having investigated or researched the individual charges to make sure that it
16 had properly ordered a blocking product from Qwest, Tel West emails its billing dispute spreadsheet to
17 Qwest. Tel West then demands that Qwest credit each compiled line item charge. Despite a requirement
18 under the current interconnection agreement to provide its disputes to Qwest within 30 calendar days of
19 receiving Qwest's billing, Tel West does not do so. Tel West emailed 390 of its 740 December 2001
20 billing disputes on January 18, 2002 and the other 350 of its December disputes on February 28, 2002.⁴
21 The bill date for Qwest's billing statements to Tel West is the 7th of each month. *Response Testimony of*
22 *Larry B. Brotherson, Exhibit LBB-T1 ("LBB-T1"), at Exhibit LBB-C2*. With the exception of 5
23 January disputes that were included in Tel West's February 28 spreadsheet, Tel West has yet to notify

24 _____
25 ⁴ At the time Qwest filed its responsive testimony, Qwest believed Tel West's January 18, 2002 spreadsheet
26 regarding Tel West's 390 December billing disputes constituted all of its disputes for December. Qwest's comments in
27 its testimony were based on this assumption. *See, e.g., LBB-T1, at 6:5-9, 10:12-15; see also response to data requests*
Qwest-049 and -050. However, on February 28, Tel West emailed to Qwest a separate spreadsheet that includes an
additional 350 December disputes and a few (5) January disputes. Qwest anticipates presenting Tel West's February
28 spreadsheet at the time of hearing so that the record is complete on this point.

1 Qwest of any disputes from Qwest's January 2002 billing statement, despite the passage of
2 approximately two months.

3 10. Qwest's process for reviewing each line item dispute (of which there are many – 1,109
4 between April and November 2001; 740 for December 2001 alone) is detailed and takes considerable
5 time. The billing manager's first step is to pull up the bill Tel West is disputing to check the description
6 and amounts on the disputed charges on the bill.

7 11. Second, the billing manager must review the end user's Customer Service Record
8 ("CSR") to check for the Uniform Service Order Code ("USOC") of any restriction or blocking service
9 that Tel West may have ordered to limit pay-per-use charges from being incurred. If there is no blocking
10 service in place, the billing manager next goes into a Qwest database to identify the date the service went
11 in and to check the original Local Service Request ("LSR") to see if Tel West had indeed requested a
12 restriction/ blocking service be placed on the line at the time the service was ordered. If it did not, the
13 billing manager sustains the disputed charge and generally notes on the spreadsheet it returns to Tel West
14 (detailing resolution of each of the disputed line items) something like 'no block req. on any LSR.' If the
15 billing manager finds that a restriction/blocking service was requested and that Qwest had inadvertently
16 neglected to put it in place, the billing manager completes and sends (internally) a billing feedback form to
17 not only get the service put in place, but also sometimes to provide a full credit on the charges Qwest
18 billed to Tel West. If the restriction/blocking service is on the CSR, the billing manager also has to check
19
20 to make sure the necessary Field Identifier ("FID")⁵ was properly programmed. If the FID appears on
21 the CSR, the billing manager then calls repair to see if the blocking service is working.

22 12. The length of that process varies with how many steps the billing manager needs to go
23 through. *LBB-T1, at 7:10 - 8:9*. Once Qwest completes this in-depth review, it returns to Tel West a
24 spreadsheet listing each Tel West dispute and describing Qwest's treatment of that dispute. Qwest's
25 billing manager then directs that an aggregate credit, if applicable, be provided to Tel West on its next

26 _____
27 ⁵ A FID is an internal Qwest code often necessary (in conjunction with the USOC) to program the switch properly.

1 billing statement. Qwest responded to each of Tel West's 1,109 billing disputes for April through
2 November 2001 on February 15, 2001. Qwest received 390 of Tel West's 740 individual December
3 2001 billing disputes on January 18, 2002 and responded to Tel West with the results of its review on
4 February 27, 2002. *LBB-T1, at 6:3-9; response to data requests Qwest-048, -049, -050.*

5 13. In terms of restricting its customers' access to pay-per-use services, Tel West primarily
6 orders a product called Dial Lock for outgoing calls and a product called Billed Number Screening
7 ("BNS") for incoming calls. *Response to data requests Qwest-006, -055.* While Tel West claims that
8 it orders Dial Lock on 100% of lines where available, it has not done so. Analysis of its November and
9 partial-December billing dispute spreadsheets reveals that in many cases Tel West had never ordered any
10 blocking service, yet it still disputed the pay-per-use charges incurred by its customer. More specifically,
11 of the 461 disputes raised in the November and partial-December spreadsheets, approximately 330 were
12 sustained because Tel West had failed to order a blocking product for the affected line. *LBB-T1, at 9:9-*
13 *15.*

14 14. Dial Lock is an optional call restriction service that is based on Advanced Intelligent
15 Network ("AIN") technology, and provides greater flexibility to the end user in defining the types of
16 originating calls to be blocked. Dial Lock allows Qwest's customer the ability to manage outbound calls,
17 including local and long distance, by selectively blocking different types of calls placed from the
18 customer's telephone. This service allows blocking of all non-emergency local calls, long distance calls,
19 international calls, operator assisted calls, toll-free (e.g., 800/888) calls, information services (e.g.,
20 900/976), and DA calls. The retail customer can select the types of calls to be blocked, and also have
21 the option of overriding the call blocking at any time through use of a Personal Identification Number
22 ("PIN") code. *DLT-1T, at 5:4-13.* Any person (including Tel West's customer) who has the PIN code
23 can make changes to how the service works, and can choose to set up or take off various blocks. *Id., at*
24 *5:24 – 6:2.* In addition, the Dial Lock customer has the option of defining a list of up to twenty
25 authorized phone numbers that can be called even while Dial Lock is activated. Finally, Dial Lock
26 enables the subscriber to call Qwest, at no additional charge, to modify the types of calls blocked as the
27 subscriber's calling needs changes. Dial Lock carries a nonrecurring charge of either \$7.00 (residential)

1 or \$11.00 (business) and a recurring charge of \$3.95. It is defined in Qwest Washington Tariff WN U-
2 40, Section 5.4.3. *Id.*, at 5:13-20. Both the recurring and nonrecurring charges associated with Dial
3 Lock are subject to the resale discount.

4 15. BNS addresses a customer's desire not to have collect or third party billed calls charged
5 to that number. BNS carries a nonrecurring rate of \$6.50 and there is no recurring charge associated
6 with this service. It is defined in Qwest's Washington Tariff WN U-40, Section 10.4.3. It should be
7 noted that the tariff explicitly states that all calls may not be prevented, and that Qwest's customer
8 remains responsible for all calls that are charged to the line. *Id.*, at 7:7-14.

9 16. Dial Lock is a retail offering. In late 2001, Qwest explicitly advised its reseller customers
10 (including Tel West) that they should not purchase Dial Lock as a tool to restrict their end users' access
11 to pay-per-use services. *Response Testimony of Kathryn Malone, Exhibit KM-T1 ("KM-T1")*, at
12 8:15- 9:4, *Exhibit KM-3; response to data requests Qwest-008, -029(a), -056*. Regardless, Tel West
13 persists in relying on Dial Lock. To date, Tel West has not ordered either of two alternative products
14 which would be more appropriate for Tel West's intended purpose and less expensive in the aggregate
15 than Dial Lock. Those two alternatives are CustomNet (a retail offering) and customized routing (a
16 wholesale product).

17 17. CustomNet is an optional retail service provided to individual line subscribers that does
18 not permit certain types of calls to be completed, and is provided in two options, only the first of which is
19 relevant to this proceeding. Option 1 blocks all "1+" calls and calls to DA. However, operator-handled
20 calls originated by dialing "0" are permitted, but only if alternate billing (such as credit card billing) is
21 provided by the call originator. This option allows local and non-chargeable calls, such as calls to
22 800/888 services, 950 services, Qwest repair and emergency services numbers.⁶ CustomNet carries a
23 nonrecurring charge of \$24.00, which is only assessed if this service is added subsequent to the initial
24 establishment of the customer's basic exchange service. It carries a recurring charge of \$2.00. It is listed

25 _____
26 ⁶ Option 2 permits origination of most calls, including direct-dialed long distance calls and calls to Directory
27 Assistance, and is not a recommended option for customers wishing to restrict access to Directory Assistance and/or
Operator Services, but is a good option for entities such as hotels, hospitals, etc. who have telephone systems capable
of call identification and rating.

1 in Qwest Washington Tariff WN U-40, Section 10.4.1. *DLT-IT, 4:13 – 5:2; KM-T1, 7:21-25*. If Tel
2 West were to order CustomNet for resale, both of the recurring and nonrecurring charges would be
3 subject to the resale discount. If Tel West were to order CustomNet in a UNE-P environment,
4 CustomNet would carry no charge whatsoever.

5 18. Customized routing is a wholesale service that enables the CLEC to direct particular
6 classes of calls to specific outgoing trunks that will permit the CLEC to provide its own interoffice facilities
7 or select among other providers of interoffice facilities, OS and DA. Customized routing is a software
8 function of a switch, and requires both changes in the switch and the purchase of DS1 trunks and DS1
9 trunk ports to transport the calls to the alternative provider. Customized routing may be ordered as an
10 application with resale, unbundled local switching or UNE-P combination services. A variation of
11 customized routing would allow a CLEC to divert OS and DA calls to an intercept announcement
12 (announcing that the requested service is unavailable) rather than an alternative provider. Under this
13 variation, since there is no requirement to transport the calls to another provider, Tel West would not be
14 required to purchase the DS1 trunks or trunk ports. The prices for customized routing are being
15 addressed in Part D of the current cost docket. However, the service is currently available to Tel West
16 and other carriers, at the rates in their interconnection agreements or, if there are no rates in the
17 agreement, at SGAT rates. Qwest expressly suggested in late 2001 that Tel West submit a request form
18 so that Qwest and Tel West could investigate the viability and expense of a customized routing solution
19 for Tel West. Tel West refused to do so based on its misunderstanding of the capabilities of the product
20 and its uncorroborated sense as to the expense of the product. *KM-T1, at 9:15 – 11:17*.

21 **III. ISSUES PRESENTED**

- 22 1. What is the appropriate scope of an adjudication conducted under WAC 480-09-530?
- 23 2. Does the evidence support Tel West's theory that Qwest has breached the parties'
24 current interconnection agreement by refusing to offer Tel West, for resale, a basic local exchange line
25 free of access to OS and DA without charging Tel West for blocking services that Qwest's retail
26 customers must purchase to restrict access to such services?
- 27 3. Does the evidence support Tel West's theory that Qwest has failed to expeditiously

1 investigate Tel West’s billing disputes and that the proper relief for such violation is to rewrite the parties’
2 negotiated agreement to add a unilateral, self-executing penalty that will automatically trigger should
3 Qwest not resolve/respond to Tel West’s billing disputes (regardless of their number) in 30 days?

4 **IV. DISCUSSION**

5 **A. A Section 530 Adjudication Is Narrow In Scope.**

6 The special proceeding created by WAC 480-09-530 (a “Section 530 Adjudication”) is a
7 dramatically truncated and expedited adjudicative process reserved only for situations in which a
8 telecommunications company that is party to an interconnection agreement with another
9 telecommunications company seeks enforcement of that interconnection agreement. *WAC 480-09-*
10 *530(1)*. Both as a matter of law and a matter of policy, a Section 530 Adjudication is not the appropriate
11 forum for raising disputes or seeking remedies outside this narrow scope. This is evident from the
12 Commissioners’ own description of the purpose of the rule. In a recent Interpretive and Policy
13 Statement, the Commissioners unanimously explained that “[t]he Commission adopted WAC 480-09-
14 530 to establish an expedited process to resolve disputes between parties to existing interconnection
15 agreements pursuant to Section 252(e) of the [Telecommunications] Act.” *In the Matter of the*
16 *Implementation of Section 252(i) of the Telecommunications Act of 1996 Interpretive and Policy*
17 *Statement (First Revision), Docket No. UT-990355 (April 12, 2000), at ¶ 25.*⁷

18 Thus, the only allegations properly within the scope to this Section 530 Adjudication are the
19 relevant provisions of the parties’ current interconnection agreement and any allegations by Tel West that

20 _____
21 ⁷ That the drafters of the WAC 480-09-530 intended this narrow scope is likewise evident from Commission Staff’s
22 1998 Open Meeting Memorandum supporting adoption of the rule. In relevant part, Administrative Law Judge Robert
23 Wallis (for Commission Staff) articulated the scope and purpose of the rule as follows:

24 This proposal would provide a specific process for companies who have entered interconnection
25 agreements *to secure enforcement* of those agreements.....

26 Telecommunications interconnection agreements are provided for by federal law, and a process for
27 mediation or Commission arbitration of the agreements is set by federal law. *This rule would apply after an*
interconnection agreement becomes effective, when one party believes that the other is failing to meet its
commitments under an agreement. It would provide a process tailored to the setting, in which the
requirements of the agreement may be determined, behavior may be examined to see if it is in compliance
with the terms of the agreement, and enforcement may be ordered if required by the agreement and the
facts of the case.

Rulemaking Docket No. A-970591, Open Meeting Memorandum (August 26, 1998) (emphasis added).

1 Qwest is not abiding by such provisions. Similarly, the only appropriate relief that Tel West (which
2 consciously availed itself of this process rather than pursuing a general complaint) can legitimately seek is
3 prospective relief limited solely to compelling Qwest's performance with the terms of the existing
4 interconnection agreement. Qwest strongly denies that it has in any respect breached its obligations under
5 the parties' current agreement, which is only a little over four months old. However, should the
6 Commission disagree, the Commission may not grant any form of relief which has the purpose or effect of
7 compensating Tel West for acts or omissions occurring prior to October 31, 2001. Nor is the
8 Commission permitted to pursue or consider any allegations by Tel West regarding more generalized
9 misconduct by Qwest (i.e., misconduct that does not constitute a breach of the interconnection
10 agreement). If Tel West is concerned more generally that Qwest's policies or practices are
11 discriminatory or constitute violations of federal or state law, the appropriate forum for such concerns is a
12 general complaint proceeding pursuant to RCW 80.04.110. The Administrative Law Judge recognized
13 this crucial distinction (between a Section 530 Adjudication and a general complaint proceeding) at the
14 March 1, 2002 prehearing conference in this docket when discussing Tel West data requests which
15 sought to expand the scope of the proceeding.

16 Qwest asks that the narrow scope of the Section 530 Adjudication, with its extraordinary
17 burdens and limited opportunities for developing a full record, be strictly respected.⁸

18 **B. OS/DA: The Evidence Does Not Support Tel West's Claim That Qwest Violated**
19 **The Current Interconnection Agreement.**

20 **1. Tel West fundamentally misconstrues or misunderstands the concept and**
21 **requirements of resale.**

22 The FCC has spoken clearly and unequivocally about what an ILEC is obligated to provide to a
23 reseller. The FCC has adopted rules that implement the resale provisions of the Act, and has stated in 47
24 CFR 51.603 (consistent with Section 251(c)(4)(A)) that an ILEC "shall offer to any requesting

25 ⁸ In this respect, for purposes of preserving its rights on appeal, Qwest restates its opposition to the Commission's
26 denial of Qwest's January 18, 2002 motion to strike and to the Commission's consideration of allegations by Tel West
27 pre-dating the effective period of the current interconnection agreement. Given the Administrative Law Judge's denial
of the motion to strike, Qwest's limited reference to the parties' acts or omissions pre-dating October 31, 2001 should
not be construed as a waiver of its concerns, but only as a recognition that the Judge has already ruled that he will
consider such matters despite Qwest's argument that they are extraneous to a Section 530 proceeding.

1 telecommunications carrier any telecommunications service that the incumbent LEC offers on a retail basis
2 to subscribers that are not telecommunications carriers”. There is no question that Qwest complies with
3 that requirement. The ILEC is permitted to charge the retail price for those services, less the “avoided
4 cost” discount (also referred to as the wholesale discount or the resale discount). However, the ILEC is
5 not required to provide to the reseller or create for the reseller any services it does not offer its own
6 customers.

7 In all respects, the resale provisions of the Act retain the structure and the pricing of the ILEC’s
8 services to its retail customers, less only those costs that the ILEC will avoid by selling to a reseller as
9 opposed to an individual end user. There is no requirement that an ILEC give a reseller any preferential
10 treatment, or any free services if the ILEC charges its retail customers for those services. Qwest does not
11 offer a line that restricts access to OS/DA to its end users for free, and thus cannot and will not do so for
12 a reseller. Qwest does offer certain screening services to its end users at no additional charge (such as
13 BNS) and offers those same services to its resellers at no additional charge.

14 There is no colorable argument advanced by Tel West in this case that any of Qwest’s service
15 offerings or pricing is in violation of the resale requirements of the Act. Yet Tel West unabashedly asks for
16 preferential treatment and free services in this docket, without legal or factual support for that request. As
17 such, what Tel West is demanding is not really resale. It is demanding to be treated as a special class of
18 CLEC not contemplated by the Act or Commission statute.

19 **2. The parties’ interconnection agreement does not require Qwest to**
20 **provide Tel West, for resale, a local exchange line free of access to OS**
21 **and DA without charging Tel West for the requisite blocking features**
22 **required to restrict Tel West’s customers from accessing OS and DA.**

23 In interpreting the current interconnection agreement, the Commission should be guided by
24 several fundamental canons of construction. First, the principal goal of contract interpretation is to
25 ascertain the intention of the parties. Determination of the parties’ intent is to be accomplished by
26 applying the context rule, which requires the finder of fact to view the contract as a whole, the subject
27 matter and objective of the contract, all the circumstances surrounding the making of the contract, the
subsequent acts and conduct of the parties and the reasonableness of the respective interpretations

1 advocated by the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). While
2 extrinsic evidence can not change the plain meaning, the meaning can almost never be plain except in
3 context. *Id. at 668*. In addition, in construing a contractual provision, a meaning should not be assigned
4 which renders meaningless other contractual provisions; instead, the contract should be read as a whole,
5 with all parts given effect, if possible. *Tucker v. Bankers Life & Cas. Co.*, 67 Wn.2d 60, 66, 406 P.2d
6 628 (1965). Applying all of these basic cannons of construction, Tel West's interpretation of Section
7 6.2.9 of the interconnection agreement is untenable.

8 **a) Read in context, Section 6.2.9 simply provides Tel West special
9 and generic branding options.**

10 This dispute stems from Tel West's misconstruction of Section 6.2.9 of the agreement, which
11 provides:

12 If Qwest provides and CLEC accepts Qwest's directory assistance
13 service or operator services for CLEC's resold local Exchange Service
14 lines, IntraLATA, such directory assistance and operator services may be
provided with branding as provided in the Ancillary Services Section of
this Agreement [Section 10].

15 Tel West urges the Commission to read the words "[i]f Qwest provides and CLEC accepts" in a
16 vacuum, without reading the remainder of the Section or the remainder of the agreement. Even reading
17 the provision as Tel West urges the Commission to do, it is impossible that one could view this provision
18 as implying that resold lines do not have access to OS and DA. It is possible, though, and even correct,
19 to conclude that, unless Tel West elects an option⁹ to prevent access to OS and DA, the resold line will
20 have such access.

21 Section 6.2.9 does not provide Tel West the option of rejecting altogether, free of charge, access
22 to OS and DA. Instead, it unambiguously and simply provides Tel West a branding option in the event it
23 chooses to have its resold lines utilize Qwest OS and DA rather than, via customized routing, another
24 carrier's OS and DA. If Tel West does not exercise its contractual right to seek OS and DA on its

25 ⁹ Tel West's access to Qwest's OS and DA is in fact optional in two ways. First, Tel West is free to elect alternate
26 OS and DA providers via customized routing, as provided in Section 9 of the agreement. Further, access to OS and DA
27 on its resold lines is optional in the sense that Tel West is free to restrict such access by purchasing an appropriate
blocking product such as those described in section II above at a wholesale discount.

1 resold lines from alternate carriers, it has the right to re-brand Qwest's OS and DA such that, when its
2 customer dials 411 or 0, it hears Tel West branding (or no branding at all) rather than Qwest branding.
3 Tel West's rights to specially or generically brand its customers' calls to Qwest OS and DA are
4 discussed thoroughly and repeatedly, including in Sections 9.23.3.11.2, 10.5.1.1, 10.5.1.1.1.3, 10.5.2.5,
5 10.5.3.2, 10.7.2.10, 10.7.2.11 and 10.7.2.12 of the agreement. Section 6.2.9 is simply a reference for
6 resellers to review these Ancillary Services [Section 10] sections for the terms and conditions regarding
7 branding.¹⁰

8 **b) Tel West's interpretation renders numerous provisions of the**
9 **agreement meaningless and superfluous.**

10 Tel West's strained interpretation of Section 6.2.9 would render several sections of the
11 interconnection agreement meaningless. For instance, Section 6.1.1 states in relevant part:

12 Qwest shall offer for resale at wholesale rates any Telecommunications
13 Service that it provides at retail to subscribers who are not
14 Telecommunications Carriers, subject to the terms and conditions of this
15 Section. All Qwest retail Telecommunications Services are available for
16 resale from Qwest pursuant to the Act and will include terms and
17 conditions (except prices) in Qwest's applicable product Tariffs,
18 Catalogs, Price Lists, or other retail Telecommunications Services
19 offerings.

20 As described above, this section is consistent with federal law and the fundamental concept and
21 structure of resale. Tel West's interpretation that it is entitled to a basic local exchange line free of access
22 to OS and DA (without paying for blocking services) runs afoul of the parties' agreement at Section 6.1.1
23 that "[a]ll Qwest retail Telecommunications Services are available for resale from Qwest pursuant to the
24 Act and will include terms and conditions (except prices) in Qwest's applicable product Tariffs,
25
26
27

¹⁰ The same is true of Sections 10.5.4 and 10.7.4, which Tel West additionally relies on to support its
misinterpretation of Section 6.2.9. However, Sections 10.5.4 and 10.7.4 are provisions that are in place in order for
Qwest to meet its obligation under Section 271 of the Act to provide non-discriminatory access to Qwest's OS and DA.
These provisions are contained separately in the agreement because they apply to all carriers, not just resellers.
Because the provisions are contained in Section 10, facilities-based carriers, or carriers purchasing UNEs can also
obtain access to OS and DA. Qwest meets its obligation to provide non-discriminatory access to OS and DA to
resellers by virtue of the fact that such access is automatically included on the resold line in the same manner that
Qwest provides to its own retail services. Tel West is attempting to use the provisions in Section 10 inappropriately to
support its misinterpretation of Section 6.2.9. These provisions simply describe the ordering process for a non-reseller
CLEC, or for a reseller if the reseller chooses to have Qwest brand the services.

1 *Catalogs, Price Lists, or other retail Telecommunications Services offerings.*” At retail, the basic
2 local exchange line comes with access to OS and DA unless the customer orders and pays for a blocking
3 product.

4 Tel West’s interpretation further renders meaningless Section 6.3.5, which provides that Tel West
5 “agrees to pay Qwest when its end user activates any services or features that are billed on a per use or
6 per activation basis...” Under Tel West’s interpretation of Section 6.2.9, it is not obligated to Qwest to
7 pay for any such charges. For that reason, it disputes each and every pay-per-use charge that appears
8 on its billing statement from Qwest on a monthly basis.

9
10 Tel West’s reading of Section 6.2.9 similarly runs afoul of Section 4.7 of the parties’ agreement,
11 which defines “Basic Exchange Telecommunications Service” and provides in relevant part:

12 Basic residence and business line services are Basic Exchange
13 Telecommunications Services. As used solely in the context of this
14 Agreement and unless otherwise agreed, *Basic Exchange
Telecommunications Service includes access to ancillary services
such as 911, directory assistance and operator services.*

15 Tel West’s interpretation of Section 6.2.9 as requiring Qwest to provide it a basic line which
16 automatically (and for free) lacks access to OS and DA can not be reconciled with the parties’ agreement
17 as to what such basic service includes, as explained in Section 4.7.

18 Tel West’s interpretation of Section 6.2.9 is also inconsistent with Section 9.12 of the parties’
19 agreement. Section 9.12.1.1 and the numerous other subparts of Section 9.12 describe how and under
20 what terms and conditions a CLEC can use customized routing:

21 to designate a particular outgoing trunk that will carry certain classes of
22 traffic originating from CLEC’s end-users. Customized routing enables
23 CLEC to direct particular classes of calls to particular outgoing trunks
which will permit CLEC to self-provide or select among other providers
of interoffice facilities, operator services and directory assistance.

24 If Tel West’s interpretation of the agreement were correct, Tel West would have no need for customized
25 routing, since its basic lines would automatically be free of access to OS and DA. Thus, Section 9.12
26 would be largely superfluous.

1 *Exhibit F (page 4, under heading “Additional Complaints Against Qwest) and Exhibit H.* It was
2 not until Tel West retained Mr. Harlow and Mr. Rice as counsel in the December 2001/January 2002
3 timeframe that Tel West raised a “contractual” OS/DA argument based on Section 6.2.9. These facts
4 undermine Tel West’s assertion that it believed all along that Section 6.2.9 unambiguously entitled it to the
5 local line free of access to OS and DA. Further evidencing that Tel West’s state of mind at the time it
6 executed the agreement is different than it now claims, in discovery, Qwest asked Tel West to identify
7 whether Qwest ever represented to Tel West that, under the parties’ new agreement, Tel West would no
8 longer be responsible to pay Qwest for charges for pay-per-use services incurred by Tel West’s
9 customers. In response, Tel West identified no such representations. *Response to data request Qwest-*
10 *022(f).* In endeavoring to understand the context and meaning of Section 6.2.9, the Commission should
11 pay special attention to Tel West’s state of mind. By doing so, it should become apparent that Tel
12 West’s dependence on Section 6.2.9 is one of convenience rather than long-held principle.

13 **3. As a matter of policy, Tel West’s relief (on the OS/DA question) should**
14 **be denied.**

15 While the terms of the agreement itself, especially when properly viewed in the context of
16 applicable law, should lead the Commission to reject Tel West’s proposed relief, there are several
17 relevant policy considerations requiring the same result.

18 First, because Qwest is obligated to offer telecommunications services under the same terms and
19 conditions (except price) to its retail customers and its reseller customers, Tel West’s requested relief
20 would subject Qwest to an argument that it must fundamentally redefine local service in a manner
21 inconsistent with its current practices and inconsistent with the definition of basic telecommunications
22 services provided in RCW 80.36.600, which defines “basic telecommunications service” as including
23 access to OS and DA. *RCW 80.36.600(6)(b).* This is not the appropriate forum to drive such a
24 fundamental change in company and industry practice.

25 Second, the Commission should remain mindful that the Section 530 Adjudication process was
26 intended to resolve discreet, discernable disputes concerning a party’s performance under the terms of an
27 interconnection agreement. It is not a vehicle to be used by one party to renegotiate the agreement’s

1 provisions. Tel West did not attempt to negotiate inclusion of a provision that would have entitled it to a
2 basic local line for resale free of access to OS and DA. Nor did Tel West avail itself of its Section 252
3 right to seek Commission mediation or arbitration of the issue it now deems so critical. Its attempt,
4 months after the interconnection agreement was signed and became effective, to use the Section 530
5 Adjudication process to re-write its agreement should not be rewarded.

6 Third, to the extent Tel West is disadvantaged by having to pay to block access to OS and DA
7 on its lines (and Qwest disputes that it is), it can not be overlooked that Tel West is largely and
8 consciously responsible for establishing its own business plan and taking steps to safeguard itself from the
9 risks inherent in serving its niche market. That said, Qwest wishes to make clear that it finds nothing
10 unsavory about either resale or niche providers like Tel West. To the contrary, Qwest values its
11 relationship with resellers and believes that it has proven that it serves these customers in a non-
12 discriminatory and fair manner, consistent with its obligations under the Act. However, Qwest urges the
13 Commission not to be swayed by Tel West's claims that Qwest's practices (notably, requiring Tel West
14 to purchase basic local services under the same terms and conditions as those services are provided to
15 Qwest's retail customers) are destructive to Tel West's business or its business model.

16 Tel West is responsible for such harm (if any) it suffers in conjunction with its customers' use of
17 pay-per-use charges. Tel West inexplicably does not require security deposits, does not follow through
18 on its policy to disconnect customers who use pay-per-use services, does not attempt to collect pay-per-
19 use charges from its customers despite the clear ability to do so,¹¹ has not fully investigated Qwest's
20 published tariffs and publicly-available resources to determine what appropriate blocking products (e.g.,
21 CustomNet and customized routing) it could order to minimize its exposure to such costs and has not
22 even ordered Dial Lock on all its lines (as it alleges it has). Instead, Tel West prefers to minimize its own

23
24 ¹¹ In answer to one of the Judge's questions, Qwest does not assert that (contractually or otherwise) Tel West must
25 exhaust collection efforts before seeking credit from Qwest. However, Tel West's practice of disputing all pay-per-use
26 charges without investigation is itself a violation of the agreement, specifically Sections 5.4.4 (which limits the parties
27 to disputing charges unless under a good faith belief that it does not owe the sum) and 6.3.5 (by which Tel West
agrees to pay Qwest when its end user activates any services or features that are billed on a per use or per activation
basis). Further, to the extent Tel West is claiming that Qwest's conduct is causing it harm and damages, Tel West is
obliged to mitigate its own damages. Its refusal to do so should bear on the Commission's consideration of this
proceeding from a policy perspective.

1 administrative efforts and pass the risk of its own business model on to Qwest by challenging (without
2 investigation, analysis or attempt to collect) each and every pay-per-use charge which appears on its
3 monthly bill. Further, to the extent Tel West is truly at risk for high bad debt costs, its high rates (by its
4 own admission) contemplate such exposure and, through charges not disclosed in its price list (including
5 varying basic rates, services not described in the price list and flat “tax and surcharge” amounts), Tel
6 West collects a great deal more than it is authorized to by its published price list.

7 The last and perhaps most important policy consideration for the Commission to consider with
8 regard to the OS/DA issue is that there really is no problem to be properly resolved in this forward-
9 looking Section 530 proceeding. While (through its own lack of due diligence) Tel West may have been
10 unaware of affordable, effective products available to it to limit its exposure to pay-per-use charges, it
11 should now be clear that Tel West has a very simple and tenable solution in its grasp. Should Tel West
12 remain in a resale environment, it simply needs to order CustomNet or customized routing, in conjunction
13 with BNS, on each of its Washington lines. While the ultimate cost of a customized routing solution is
14 unclear and will require more effort on Tel West’s part to investigate, clearly CustomNet is, on a recurring
15 basis, half as expensive as Dial Lock. Further, to the extent Tel West orders CustomNet when it
16 provisions new lines from Qwest, there are no nonrecurring charges. Should Tel West convert to a
17 UNE-P environment, CustomNet would be available at no additional charge.

18 It is unclear whether Tel West will be asking the Commission to order Qwest to provide
19 CustomNet for free. It appears, from Tel West’s testimony and arguments to date, that it may ask the
20 Commission for this relief. Such relief is fundamentally inconsistent with any rights Tel West has under the
21 Act or state law. If Tel West seeks to resell Qwest’s retail services, it may do so at the tariffed rates, less
22 14.74%, as set forth in its interconnection agreement. CustomNet is a tariffed service that has a monthly
23 rate of \$2.00. Thus, it is available to Tel West for approximately \$1.70 per month. If Tel West develops
24 a different operational plan and elects to offer service to an end user through UNE-P, Tel West can
25 purchase the combination of network elements that constitute local service, including the loop, switching,
26 and shared transport. This combination of elements is priced much differently from resold services, as
27 mandated by the Act, this Commission’s prior pricing decisions, and Tel West’s interconnection

1 agreement. Under a UNE-P arrangement, CustomNet, as a vertical feature associated with the
2 unbundled switching, would be available to Tel West and its end users at no additional incremental cost.

3 However, it would not be appropriate for the Commission to consider allowing Tel West to
4 obtain CustomNet for free in a resale environment. Under the Act, a CLEC selects an operational
5 strategy, either resale under Section 251(c)(4), with prices established under 252(d)(3), or the purchase
6 of UNEs under Section 251(c)(3), with pricing under Section 252(d)(1). It is clear that a CLEC may
7 choose to combine those strategies, and serve some customers under UNE-P and others through resale,
8 as Tel West currently does. However, there is no authority to allow a CLEC to demand the “best” of
9 resale and the “best” of UNE-P and combine those for service to a single customer. Such a result is
10 counter to the Act and the FCC’s rules, as well as to Tel West’s interconnection agreement.

11 **4. Ancillary matters.**

12 **a) Qwest’s relationship with Tel West’s customers.**

13 In answer to the Administrative Law Judge’s questions 11 and 13-17 regarding Qwest’s
14 relationship with Tel West’s customers, Qwest can answer simply that it has none. Qwest has, in most
15 cases, had no contact whatsoever with Tel West’s customers and thus Qwest is not aware of any basis
16 for determining that Tel West and its customers are jointly and severally liable to Qwest for charges
17 ordered by Tel West from Qwest. Those customers and Qwest have had no meeting of the minds as to
18 terms and conditions, types and costs of services to be provided. Instead, Tel West is Qwest’s customer
19 of record in all respects. See Section 6.3.5, for example. Tel West is its customers’ telecommunications
20 carrier, not its agent. Qwest often does not know who Tel West’s customers are. Tel West’s customers
21 have not applied for service with Qwest and have not met Qwest’s tariff requirements. Qwest is not
22 permitted to serve customers who do not meet its tariff requirements or apply for service. Both the
23 interconnection agreement and Qwest’s resale tariff (*see Qwest Washington Tariff WN U-43, Section*
24 *2.1 B.8, Section 2.1 B.12, Section 2.2 B.6, Section 2.2 B.12*) repeatedly make clear that all charges
25 incurred by the reseller’s customers are to be billed by Qwest to the reseller, not its customers. Lastly,
26 Qwest’s ability to disconnect Tel West is governed by Section 5.4 of the agreement.

27 This issue has been addressed by the Oregon Commission in a case strikingly similar to this one.

1 In 1997, the Oregon Commission issued a decision in a case regarding the claims of several “third party
2 dial tone providers.” *In re Investigation of Toll Restriction Service, Billed Number Screening, Local*
3 *Exchange Carrier Billing and Collection Practices, and Related Issues, Docket No. UM 775 (copy*
4 *of Order attached)*. These third party dial tone providers were telecommunications companies who
5 purchased residential service at retail prices from the incumbent and then generally resold the incumbent’s
6 services to customers with poor credit histories, at prices significantly higher than the incumbent’s price
7 for residential service.

8 These providers purchased at retail because their businesses often predated the Act and they had
9 no right to purchase at a “wholesale discount” because no such discount existed. Otherwise, the service
10 they offered, the prices, and the customers they targeted are very similar to Tel West’s. Like Tel West,
11 these carriers generally ordered services such as billed number screening for their resold lines, and then
12 claimed that they were not liable for any collect calls or other operator service or toll charges that might
13 subsequently be charged to a particular account. Like Tel West, they argued that the end user was liable
14 for those charges, and that the end users should be billed by the carrier who completed the collect call,
15 either Qwest or another operator services provider. Also like Tel West, collect calls from prisons and
16 other correctional facilities were a frequent cause of dispute.

17 The Oregon Commission held hearings on the case and entered a written order generally
18 resolving the issues in a manner consistent with Qwest’s positions in this case. First, the Commission
19 concluded that the third party dial tone providers (resellers) were the customer of record with the
20 incumbent, and as such were generally liable for any charges to the account set up in their names, even if
21 the charges were incurred by an end user in a way contrary to the reseller’s wishes. Second, the
22 Commission held that if the reseller ordered a blocking or screening service such as BNS or TRS, and the
23 incumbent failed to install the service correctly or in a timely manner, the incumbent should credit any
24 charges that would have or should have been blocked if the service had been installed properly. Finally,
25 the Commission held that a carrier who does not check for BNS or honor a BNS indicator should not bill
26 the customer for the completed collect call.

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
26
27

b) Ordering OS/DA on a stand-alone basis.

The Administrative Law Judge asked Qwest to explain whether OS and DA are available on a stand-alone basis to its reseller customers. Qwest does not understand the Judge’s question and is unsure exactly how to respond except to explain that OS and DA are currently available in a number of different ways, in compliance with Qwest’s various obligations under different provisions of the Act.

OS/DA as UNEs. OS and DA were originally designated by the FCC as unbundled network elements under the Act. However, when the FCC reevaluated the list of network elements in the UNE Remand Order, the FCC determined that OS and DA are not unbundled network elements and are therefore not available to facilities-based CLECs at TELRIC prices except under the limited circumstances where the incumbent does not offer customized routing. Qwest offers OS and DA in its interconnection agreements and in its Washington wholesale tariff, WN U-42.

OS/DA for Resale. OS and DA are available to resellers in the same manner and under the same terms and conditions as to Qwest’s retail customers. All resellers and end users obtain default access to these services at no charge when they subscribe to local service from Qwest. These services are currently available for resale at a 7.97% wholesale discount, pursuant to Qwest’s tariff (WN U-43) and order of this Commission. The fact that the FCC has determined that OS and DA are not UNEs does not affect Qwest’s obligation to provide these services for resale, as the obligations arise under different provisions of the Act.

OS/DA under Section 271. Qwest also has an obligation under Section 271(c)(2)((B)(vii)(II) and (III) to provide nondiscriminatory access to OS and DA. It is to satisfy this obligation that Qwest’s interconnection agreement with Tel West contains sections 10.5 and 10.7 regarding ancillary services.

c) Tel West’s duty to notify its customers of its policy regarding pay-per-use services.

With regard whether to Tel West has a legal obligation to provide notice to its customers regarding incurring pay-per-use charges, Qwest has no opinion on this question. Tel West, not Qwest, is responsible for policing its customers’ use of services and for preventing (via the purchase of appropriate

1 blocking products) the use of such services. While Qwest is neutral about Tel West's business decision
2 not to enforce its policies intended to prevent the use of pay-per-use services, Qwest does object to Tel
3 West's attempt to wholly shift the administrative burden and expense of avoiding this "problem" to
4 Qwest.

5 **C. Billing Disputes: The Evidence Does Not Support Tel West's Claim Of Breach**
6 **By Qwest Or That The Commission Should Re-Write The Agreement.**

7 **1. There is no forward-looking problem to be resolved by the Commission in**
8 **this docket.**

9 Again, given that Tel West is entitled to seek only prospective relief in this Section 530
10 Adjudication, the evidence shows that there is currently no problem for the Commission to resolve
11 regarding billing disputes. While Tel West's outstanding April through October 2001 billing disputes are
12 extraneous to this Section 530 Adjudication, Qwest has responded to each of those disputes, as well as
13 Tel West's November 2001 disputes. It did so at once on February 15, 2002. Qwest responded on
14 February 27, 2002 to the 390 of Tel West's 740 December disputes provided by Tel West on January
15 18, 2002. Despite the passage of two months, Tel West has provided Qwest only a handful (5) of
16 disputes regarding Qwest's January 2002 billing statement, and did so on February 28. Thus, at present,
17 there are no outstanding billing disputes subject to complaint by Tel West.

18 From a forward-looking perspective, Qwest would anticipate that Tel West would begin ordering
19 CustomNet or customized routing to more effectively restrict its customers' access to outbound pay-per-
20 use services. Since these charges constitute virtually all of Tel West's billing disputes, Qwest anticipates
21 that Tel West will have far fewer disputes in the future. This further reduces the need for Commission
22 intervention.

23 **2. The interconnection agreement does not impose a hard-and-fast response**
24 **time on Qwest, as Tel West now wishes it did.**

25 In this Section 530 Adjudication, it can not be overlooked that the parties' prior resale agreement
26 did not impose any obligation on Qwest to "expedite" its response to Tel West billing disputes. *See*
27 *Amended Petition, ¶ 31; Response to Bench Request No. 1, § VII.C.* Thus, in this forum, it is both
unreasonable and unfair for Tel West to offer Qwest's response times for April through October 2001

1 billing disputes to evidence its alleged breach of the current interconnection agreement, which did not
2 become effective until October 31, 2001.¹²

3 The current agreement, which is the only agreement relevant to resolution of this docket, provides
4 at Section 5.4.4:

5 Should CLEC or Qwest dispute, in good faith, any portion of the monthly
6 billing under this Agreement, the Parties will notify each other in writing
7 within thirty (30) calendar days of the receipt of such billing, identifying
8 the amount, reason and rationale of such dispute. At a minimum, CLEC
9 and Qwest shall pay all undisputed amounts due. Both CLEC and
Qwest agree to expedite the investigation of any disputed amounts in an
effort to resolve and settle the dispute prior to initiating any other rights or
remedies.

10 Tel West urges the Commission to interpret or expand “agree to expedite the investigation of any
11 disputed amounts” to mean that if Qwest does not resolve or respond to¹³ each of Tel West’s billing
12 disputes in 30 days, all such disputes will be deemed resolved in Tel West’s favor. Tel West does not
13 support the basis or reasonableness of imposing this unilateral, self-executing penalty on Qwest except by
14 Mr. Swickard’s conclusory and self-serving testimony that “I believe 30 days is a reasonable maximum
15 time for Qwest to respond to Tel West’s billing disputes.” *JS-T, at 12:8-9.*

16 Contrary to Mr. Swickard’s unsupported statement, the concept of expedited investigation is
17 largely subjective. Imposition of a penalty triggering after a fixed number of days is inappropriate in the
18 absence of mutual agreement by the parties. What constitutes reasonable, expedited investigation will
19 necessarily vary depending on the number of line item charges disputed, the number of errors Tel West
20 makes in identifying the affected telephone numbers and the number of steps required to resolve each
21 individual dispute. It is critical that the Commission appreciate the stark differences between the
22 processes followed by Tel West and Qwest in processing Tel West billing disputes. As explained in

23 _____
24 ¹² Besides being plainly out of bounds in a Section 530 Adjudication, any attempt to introduce the parties pre-
25 October 31, 2001 conduct as evidence of Qwest’s breach of the current agreement would be contrary to Mr. Harlow’s
representations at the January 23, 2002 prehearing conference that such information is simply offered as “background”
factual information. *Transcript of January 23, 2002 Prehearing Conference, at 8:14-18.*

26 ¹³ Tel West’s Amended Petition and testimony are not consistent in this regard. While the Amended Petition (at ¶
27 33(d)(9)) asks the Commission to amend the parties’ interconnection agreement by imposing a self-executing
mechanism if Qwest has not *resolved* all Tel West’s disputes within 30 days, Mr. Swickard’s testimony urges that the
mechanism should trigger if Qwest has not *responded* to Tel West’s disputes. *Swickard Direct Testim., at 12:8-13.*

1 section II above, Tel West engages in no analysis and simply compiles a spreadsheet of all pay-per-use
2 charges. Qwest, on the other hand, investigates and analyzes each line item charge in painstaking detail.
3 Had the parties sought to impose on Qwest a predetermined, fixed number of days to respond, they
4 would have done so in the language of the interconnection agreement.

5 **3. As a matter of policy, Tel West's relief requested regarding billing**
6 **dispute provisions of the agreement should be denied.**

7 Important policy considerations also require that Tel West's requested relief be denied.

8 **a) In essence, Tel West is demanding that the Commission re-write**
9 **Section 5.4.4 when it failed to negotiate this provision or seek a**
10 **determination of its rights before executing the agreement.**

11 Had Tel West believed it was necessary when negotiating the interconnection agreement, it would
12 have at least proposed the penalty mechanism it now seeks imposed on Qwest. It did not do so and
13 should not be permitted to employ the Section 530 Adjudication process to renegotiate its agreement
14 with Qwest. At the time the parties executed the agreement in August 2001, Tel West claims it had
15 outstanding billing disputes dating back to April 2001. The April disputes had been transmitted to Qwest
16 over three months earlier. Apparently, despite the passage of that amount of time, Tel West was not
17 sufficiently alarmed about Qwest's response time to urge that Section 5.4.4 be made more specific and
18 punitive. In fact, Tel West admits that when the parties were negotiating the agreement, billing disputes
19 were not an issue, and thus Tel West did not need to negotiate anything related to billing disputes or
20 invoke its rights under Section 252 of the Act to seek Commission mediation or arbitration. *Response to*
21 *data request Qwest-047*. It is inappropriate for Tel West to now seek revision of its interconnection
22 agreement via litigation when it failed to assert its concerns prior to executing the agreement.

23 **b) Tel West's practices contribute significantly to the length of time it**
24 **takes Qwest to respond to its billing disputes.**

25 While considering Tel West's request that the Commission re-write Section 5.4.4 to impose a
26 unilateral, self-executing penalty provision, the Commission should be mindful that Tel West's practices
27 and administrative philosophy contribute significantly to the length of time it takes Qwest to respond.
First, Tel West admittedly makes no attempt (despite the demonstrated ability to do so) to collect pay-

1 per-use charges from its customers. At bare minimum, Tel West could dramatically reduce the number of
2 billing disputes Qwest is required to investigate (and thus Qwest's response time) if it placed on its
3 customers' bills the pay-per-use charges incurred by its customers (at whatever reasonable markup it
4 deems appropriate) and then pursued with Qwest only those charges it could not collect.¹⁴ Second, Tel
5 West disputes a very large number of charges (740 in December alone just for Washington), including
6 100% of pay-per-use charges incurred by its customers. This obviously adds to the length of Qwest's
7 review process. To impose a 30-day penalty mechanism on Qwest, when Tel West controls the number
8 of charges it disputes and the number of charges that its customers incur (see below), would be unfair in
9 the extreme. Third, Tel West has greatly contributed to the length of the process by failing to fully
10 investigate Qwest's blocking offerings, by relying on a product (Dial Lock) despite being advised by
11 Qwest that the product is not intended or necessarily effective for a reseller's blocking of its customers
12 pay-per-use calls, by failing to order even that product in all cases (as it claims it does) and by failing to
13 follow through on its written policy that it will disconnect customers who access pay-per-use
14 services. Had Tel West been more diligent in enforcing its own rules or in adequately safeguarding itself
15 (given the inherent risks of chosen niche enterprise), the number of billing disputes Qwest is required to
16 investigate and analyze would be smaller. As a matter of policy, Tel West's contribution to the problem
17 (if one even exists) can not be overlooked while considering whether to re-write the parties' negotiated
18 agreement to impose on Qwest a self-executing penalty tied to a fixed number (30) of days to respond.

19
20 **c) Tel West's chronic noncompliance with Section 5.4.4 also weighs**
21 **against its demand that the Commission re-write the Section to**
22 **add a unilateral penalty provision.**

23 As quoted above, Section 5.4.4 plainly requires Tel West to notify Qwest in writing of its billing
24 disputes within 30 calendar days of the receipt of Qwest's billing, identifying the amount, reason and

25 ¹⁴ This statement should not be deemed by Qwest a waiver of its position that Tel West's practice of disputing all
26 pay-per-use charges (without first investigating the matter and determining, in good faith, that the associated service
27 was never utilized by its customer) is appropriate and consistent with Section 5.4.4 of the agreement. To the contrary,
Qwest believes Tel West is abusing and construing too broadly its right to challenge amounts billed by Qwest for
charges incurred by Tel West's customers.

1 rationale of such dispute. Despite the fact that Tel West's efforts in this regard are limited to compiling a
2 spreadsheet of all pay-per-use charges and forwarding that spreadsheet via email to Qwest, Tel West
3 does not comply with this objective requirement. Tel West took more than 30 days to notify Qwest of
4 even the first batch of its December billing disputes, more than 60 days to notify Qwest of its second
5 batch of December disputes and has yet to notify Qwest of any January 2002 billing disputes, aside from
6 the handful included in its February 28 spreadsheet.¹⁵

7 Qwest offers this information not to argue that the Commission should, in this docket, adjudicate
8 whether such failure by Tel West constitutes a waiver of its right to seek credits. While that may well be
9 the case, it is merely offered to demonstrate that Tel West does not come to this litigation it initiated with
10 clean hands and should not be permitted to renegotiate, via litigation, a more favorable billing disputes
11 provision, especially given that it does not comply with its obligations under the existing provision.

12 13 14 **4. Ancillary matters.**

15 At the March 4, 2002 prehearing conference, the Administrative Law Judge asked the parties to
16 include in their briefs responses to a series of legal, factual and policy questions. Qwest has done its best
17 to respond to each. Two questions in particular, however, concern Qwest since they appear to
18 significantly expand the narrow scope of this Section 530 Adjudication. Those questions (numbers 18
19 and 20 on the table provided above) request the parties to identify what information should be included in
20 a claim for credit and what constitutes efficient practices for resolution of billing disputes. Qwest believes
21 that it would greatly expand the scope of this narrow proceeding and the single billing dispute issue
22 specifically raised by Tel West (i.e., whether Section 5.4.4 be re-written to impose a unilateral, self-
23 executing penalty on Qwest if it does not respond/resolve Tel West's billing disputes in 30 days) for the
24 Commission to seek to re-write in its entirety Section 5.4.4. On this point, Qwest and Tel West agree.¹⁶

25 _____
26 ¹⁵ As detailed in Mr. Brotherson's responsive testimony, during the effective period of the prior interconnection
agreement, Tel West regularly took greater than 30 days to present its billing disputes. *LBB-T1, at 10: footnote 7.*

27 ¹⁶ On March 7, 2002, the undersigned spoke with counsel for Tel West (Mr. Rice) and agreed that neither party
would address these topics in its brief, except to explain why it was not discussing the issues.

1 For the Commission to be in the position to prescribe all details of a billing dispute process, a
2 proceeding much larger in scope and involving far greater investigation into industry practices would be
3 required. This is not the appropriate forum. Tel West is the moving party and the party with the burden of
4 proof. It has selected this truncated procedural mechanism and has identified a single, discreet form of
5 relief it would like added to the parties' agreement. Qwest urges the Commission not to pursue additional
6 lines of relief, especially when Tel West has not shown that any problem currently exists and the parties
7 have not had adequate opportunity to develop the broader record that would be required to do address
8 this matter meaningfully.

9 ///

10 ///

11 ///

12 ///

13 ///

14 **V. CONCLUSION**

15 In summary, Qwest requests that the Commission deny all relief requested by Tel West in this
16 Phase of the docket and that the Commission, in considering each of Tel West's allegations and proposed
17 solutions, remain mindful of the narrow scope of the Section 530 Adjudication process Tel West has
18 elected to pursue.

19 RESPECTFULLY SUBMITTED this _____ day of March, 2002.

20 QWEST

21
22 _____
23 Lisa Anderl, WSBA #13236
24 Adam Sherr, WSBA #25291
25 Qwest
26 1600 7th Avenue, Room 3206
27 Seattle, WA 98191
Phone: (206) 398-2500
Attorneys for Qwest