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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

Docket No. UT-013097
TEL WEST'S PREHEARING BRIEF ON
OPERATOR SERVICE/DIRECTORY
SERVICE AND BILLING ISSUES

There are three simple issues in this proceeding, although it might seem differently based on the mountain of testimony and data requests served by Qwest: (1) whether the Current Agreement between Tel West and Qwest ("Current Agreement") requires Tel West to accept and pay for operator service/directory assistance ("OS/DA"); (2) the legal consequences of the failure of Qwest's blocking services for OS/DA to function correctly; and (3) whether Qwest has met its duty to expedite billing disputes. The answer to these questions is clear. Under the plain terms of the Current Agreement, Tel West does not have to accept or pay for OS/DA service. Also, Tel West should not have to pay for blocked services when blocking fails. Finally, Qwest has failed to expedite billing disputes, which is evident from the fact that some of them have lingered unresolved for more than ten months. Qwest's response to these issues in its testimony is simply an effort to confuse the Commission by ignoring relevant language in the Current Agreement and its negotiations with Tel West on these issues.

1 A. TEL WEST IS NOT REQUIRED TO ACCEPT AND PAY FOR OS/DA CHARGES UNDER
2 THE CURRENT AGREEMENT.

3 Under the Current Agreement,¹ Tel West only must pay for OS/DA service if it
4 "accepts" them from Qwest. Tel West specified that it did not want to pay these charges during
5 negotiations of the Current Agreement, and Qwest complied by forwarding an agreement that
6 met Tel West's requirements and specifically eliminated the requirement under the previous
7 interconnection agreement ("First Agreement") that Tel West must accept these services.
8 Accordingly, the Current Agreement supports Tel West's interpretation, regardless of whether
9 this Commission determines that the agreement is unambiguous or whether it must refer to
10 extrinsic evidence to interpret its terms.

11 1. The Current Agreement unambiguously states that OS/DA are optional services.

12 A contract is unambiguous when a reading of the contract as a whole leads to only
13 one meaning. *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 917 (1970). When an
14 agreement is unambiguous, the Commission must apply it as written:

15 With the terms of a contract taken as a whole are plain and unambiguous, the
16 meaning of the contract is to be deduced from language alone, and it is
17 unnecessary for a court to resort to any aids to construction.

18 *Jacoby*, 77 Wn.2d at 917; *Pepper v. Evanson*, 70 Wn.2d 309, 313 (1967); *Shauerman v. Haag*,
19 68 Wn.2d 868, 873 (1966); *Ross v. Harding*, 64 Wn.2d 231, 237 (1964). As explained below,
20 the Current Agreement approved on October 31, 2001 unambiguously provides that OS and DA
21 are optional services.

22 First, the Current Agreement states that Tel West only receives OS and DA if it
23 "accepts" them from Qwest:

24 ¹ In 1998, Tel West entered into a resale agreement with Qwest in Washington. The First Agreement
25 expired on August 1, 2001, but remained in effect pending the approval of a new agreement. Qwest and
26 Tel West entered a new interconnection and resale agreement, which is the Current Agreement, that was
approved on October 31, 2001, in Docket UT-013086. The First and Current Agreements are referred to
collectively as the "Agreements." Tel West has ordered residential service for resale under the
Agreements from Qwest since 1998.

1 [I]f *Qwest provides and CLEC accepts* Qwest's directory assistance service or
2 operator services for CLECs resold local Exchange Service lines, IntraLATA,
3 such directory assistance and operator services may be provided with branding as
4 provided in the Ancillary Services Section of this Agreement.

5 Current Agreement at § 6.2.9 (*emphasis added*). By saying "[i]f. . . CLEC accepts" OS/DA, the
6 Current Agreement gives Tel West the right to accept or reject OS/DA services. This provision
7 anticipates that Tel West may want to use an alternative OS and DA provider or no provider at
8 all.

9 Tel West has never "accepted" OS/DA from Qwest. To the contrary, Tel West
10 has always rejected it by consistently informing Qwest that it does not want OS/DA for its lines.
11 Swickard Test. at 4, ll. 8-14. For example, prior to the effective date of the Current Agreement,
12 Mr. Swickard frequently complained to Qwest's account representatives that it was unreasonable
13 for Qwest to force Tel West to order and pay for OS/DA when Tel West did not want these
14 services. *Id.* Then, after the Current Agreement became effective on October 31, 2001,
15 Mr. Swickard informed Qwest billing account managers that Tel West would no longer accept
16 these services from Qwest. *Id.* At 4, ll. 15-19. The only reason Tel West still pays for these
17 services and blocking for them is because Qwest unlawfully forces Tel West to do so.

18 Second, the Current Agreement contains an ordering procedure for OS/DA that is
19 separate from the ordering procedure for residential services, which proves that it is a separate
20 unbundled service. The Current Agreement states that "CLEC will order Directory Assistance
21 Service by completing the questionnaire entitled 'Qwest Operator Services/Directory Assistance
22 Questionnaire for Local Service Providers,' " Current Agreement at § 10.5.4, and that "CLEC
23 will order Operator Services by completing the 'Qwest Operator Services/Directory Assistance
24 Questionnaire for Local Service Providers.' " Current Agreement at § 10.7.4. Obviously, there
25 would be no separate ordering procedures if OS/DA were bundled with residential service, as
26 Qwest argues. Tel West has never submitted this questionnaire and has not ordered these
services.

1 Third, nothing in the Current Agreement requires Tel West to purchase OS and
2 DA as part of a bundled package with residential service. Qwest has never identified any
3 *specific* language bundling these services, and its failure to do so demonstrates that these terms
4 are not there.

5 2. Extrinsic evidence also proves that Tel West is not required to accept, order or
6 pay for OS/DA.

7 As stated above, the Current Agreement, by its clear terms, provides that OS/DA
8 are optional services that Tel West may accept or reject. If this Commission believes that the
9 Current Agreement is ambiguous and requires interpretation, it should consider extrinsic
10 evidence, including the parties' intent, to resolve the ambiguity. *See Michak v. Transnation Title*,
11 108 Wn. App. 412, 423 (Div. II 2001). However, the intent of parties is determined by
12 examining the "*objective manifestations*" of their intent, which means their actions, rather than
13 their *subjective*, undisclosed intent. *Chatterton v. Business Valuation*, 90 Wn. App. 150, 155
14 (1998) (*emphasis added*). A court cannot allow one party's "double-secret" interpretation of a
15 word used in a contract to undermine the other party's justified expectations as to what that word
16 means. *Scribner v. WorldCom, Inc.*, 249 F.3d 902, 908 (9th Cir. 2001). As explained below,
17 under all available extrinsic evidence and principles of contract interpretation, it remains clear
18 that Tel West is not required to accept OS/DA.

19 (a) The parties' negotiations support Tel West's interpretation.

20 Courts may consider negotiations prior to or contemporaneous with adoption of a
21 contract when determining the meaning of the contract, whether or not the negotiations are
22 integrated into the contract. *Hall v. Custom Craft Fixtures, Inc.*, 87 Wn. App. 1, 8 (Div. II 1997).
23 In this case, the negotiations of the Current Agreement demonstrate beyond dispute that OS/DA
24 are optional. Don Taylor, a negotiator for Tel West, specifically informed Nancy Donahue of
25 Qwest during the negotiations of the Current Agreement that Tel West wanted a new
26 interconnection agreement that no longer required Tel West to order and pay for OS/DA.

1 Swickard Test. at 4, l. 20 to 5, l. 11. Subsequently, Mr. Taylor sent a letter to Ms. Donahue
2 dated May 10, 2001 that specifically lists "the items Tel West needs to see in its new
3 interconnection agreement with Qwest." Exhibit A to Swickard Test. at 1. One of these items is
4 "[n]o requirement to buy and resell unwanted products (e.g., OS/DA)." *Id.*

5 Qwest's response shows that it accepted Tel West's proposal. It forwarded the
6 Current Agreement for signature to Tel West containing language allowing Tel West to accept or
7 reject OS/DA service, as explained in the preceding section. Current Agreement at §6.2.9. The
8 words "[i]f ... CLEC accepts" in the Current Agreement are different from the parallel section in
9 Tel West's First Agreement, which stated that "[a]s part of the resold line, USWC provides *and*
10 *Reseller accepts, at this time, operator services, directory assistance, and IntraLATA long*
11 *distance with standard USWC branding.*" First Agreement at IV.E.9 (*emphasis added*). Qwest's
12 addition of this conditional language in response to Tel West's request objectively manifests an
13 intention to make OS/DA optional in the Current Agreement. Qwest never informed Tel West
14 during the negotiation of the Current Agreement that it intended to force Tel West to accept and
15 pay for OS/DA, or that residential access line service and OS/DA were bundled. Swickard Test.
16 at 5, ll. 4-11.

17 Qwest may now claim that it never meant to make OS/DA service optional.
18 However, its unexpressed intentions regarding the change in OS/DA language from the First
19 Agreement to the Current Agreement carry no weight.

20 (b) The Commission should construe any ambiguity against Qwest
21 since Qwest drafted the Current Agreement.

22 Courts "construe ambiguities against the drafter of a document." *Riss v. Angel*,
23 80 Wn. App. 553, 557 (Div. I 1996), *amended, review granted*, 129 Wn.2d 1019, *affirmed and*
24 *remanded*, 131 Wn.2d 612. Here, Qwest drafted the Current Agreement and forwarded it to
25 Tel West for signature. If Qwest wanted different language, it could have written it. In fact, all
26 Qwest had to do was to leave the language the same as in the First Agreement. Qwest was on

1 notice that TelWest was interested in this issue, through Mr. Taylor's communications with
2 Ms. Donahue. Swickard Test. at p. 4, l. 20 to 5, l. 11.

3 Obviously, Qwest now regrets its handling of negotiations with Tel West and its
4 decision to enter the Current Agreement as written. Despite this, Qwest must follow the
5 agreement it signed. That agreement, and the accompanying negotiation sessions, make it clear
6 that Tel West has the option of accepting or rejecting OS/DA and any associated charges.

7 (c) Qwest should collect OS/DA charges from end users, not
8 Tel West.

9 Qwest's contract for ancillary services like OS/DA is with the end user, not
10 Tel West. When Qwest provides OS or DA services, Qwest brands the call, states "[t]hank you
11 for using Qwest," and completes the call. Swickard Test. at 6, ll. 19-21. With collect OS toll
12 calls, Qwest's OSP division calls the end user and verifies that it can bill them. Swickard Supp.
13 Test. at 3, ll. 22-25. During this process, Tel West has not agreed to accept these charges and it
14 is not liable for them. So, Qwest should collect these charges from end users.

15 Tel West's decision to resell Qwest's residential service does not make it Qwest's
16 collection agent. The Current Agreement does not state that Tel West is jointly and severally
17 liable for the charges the end user makes, that Tel West is Qwest's collection agent for them, or
18 that Tel West is the customer's agent. In fact the Current Agreement states that:

19 *Except for provisions herein expressly authorizing a Party to act for another,*
20 *nothing in this Agreement shall constitute a Party as a legal representative or*
21 *agent of the other Party, nor shall a Party have the right or authority to assume,*
22 *create or incur any liability or any obligation of any kind, express or implied,*
23 *against or in the name or on behalf of the other party unless otherwise expressly*
24 *permitted by such other party. Except as otherwise expressly provided in this*
25 *Agreement, no Party undertakes to perform any obligation of the other party*
26 *whether regulatory or contractual, or to assume any responsibility for the*
management of the other Party's business.

Current Agreement at § 5.14.1(*emphasis added*). Tel West is not Qwest's collection agent for
services it does not resell, so collection for these charges is Qwest's responsibility.

1 The reason that Qwest chooses to cram charges on Tel West rather than recover
2 them from end users is that it is easier for Qwest to recover them from Tel West. Clearly, Qwest
3 is making its bad debt problem regarding OS/DA into Tel West's bad debt problem by cramming
4 these charges.

5 (d) Qwest cannot bundle OS/DA with residential service because they
6 are provided by different Qwest divisions subject to different
7 regulations.

8 Qwest is a single corporate entity that does business in a number of markets,
9 including local exchange, operator services, and directory assistance services. In response to
10 Tel West's Petition, Qwest attempts to blur the distinction between these three distinct lines of
11 business, just as it attempts to bundle them together for provisioning purposes. Local exchange,
12 a monopoly service, is what Tel West has ordered and resells. Except for certain larger users, the
13 Commission still regulates it as a monopoly under tariffs. OS and DA, on the other hand, are
14 competitive and generally provided under price list. Qwest Corp. Price List, § 6.2.4.A.3.6.
(DA); § 6.2.1.E.4.b(OS). Therefore, Qwest cannot bundle OS/DA with residential service.

15 In reality, Qwest does not cram OS/DA on Tel West's bills because they are
16 bundled with residential service, but because it can do so as the monopoly provider of local
17 access service. Although OS and DA should be competitive services, Qwest uses its control over
18 local exchange services to give advantages to its OS and DA divisions. It does this in two ways.
19 First, it makes it easier for end users and CLECs to access its own OS and DA by making Qwest
20 the OS and DA provider by default. End users and CLECs must take extra steps and/or incur
21 extra costs to access other OS or DA providers. Second, Qwest crams the charges of its own OS
22 and DA divisions onto its local exchange bills of end users or CLECs. The latter advantage is
23 the subject of Tel West's petition. No other OS or DA provider has the leverage to force
24 Tel West to bill and collect their OS and DA charges the way Qwest can, even though the
25 Tel West local exchange provides "access" to them as well.

1 3. Qwest's interpretation of the Current Agreement is contrary to its plain meaning.

2 Qwest's testimony largely ignores both the relevant language in § 6.2.9 of the
3 Current Agreement giving Tel West the option of accepting OS/DA and the negotiations that led
4 to that language, probably because these are not rebuttable. Instead, Qwest focuses on contract
5 terms that contain language of general applicability. This is simply an effort to distort the plain
6 meaning of the Current Agreement.

7 First, Qwest believes that § 6.2.9 does not actually give Tel West the right to
8 refuse to accept OS/DA service. Qwest admits that, under §6.2.9, "Tel West does indeed have
9 the choice or option of obtaining OS/DA from Qwest, but is not required to do so." Malone Test.
10 at 3, ll. 22-24. Qwest then argues that this section really means that Tel West obtains "access" to
11 Qwest's OS/DA. *Id.* In doing so, Qwest simply ignores the terms "[i]f . . . CLEC accepts," upon
12 which this case turns. This violates the basic tenet that each term in an agreement must be
13 construed in a way that gives it meaning. *Public Util. Dist. No. 1 v. Wash. Public Power*,
14 104 Wn.2d 353, 373 (1985). Qwest never explains why Tel West has the option of accepting
15 OS/DA yet has no option of whether or not to pay for it.

16 Qwest also mistakenly believes that § 6.3.5 requires Tel West to pay for OS/DA
17 charges:

18 *CLEC agrees to pay Qwest when its end user activates any services or features*
19 *that are billed on a per use or per activation basis (e.g., continuance redial, last*
20 *call return, call back calling, call trace) subject to the applicable discount in*
21 *Exhibit A as such may be amended pursuant to this section. With respect to all*
22 *such charges, Qwest shall provide CLEC with sufficient information to enable*
23 *CLEC to bill its end users.*

24 Current Agreement at § 6.3.5 (*emphasis added*). Most importantly, this section presumes that
25 Tel West has agreed to "accept" OS/DA service from Qwest under § 6.2.9. Tel West has not
26 done so. Also, § 6.3.5 contains general language about pay-per-use services that are all
classified as "Custom Calling Services." Qwest Corp. Tariff WN U-40, §5.4.3. The Custom
Calling Services Tariff contains rates "per activation." *Id.*, § 5.4.3.D.3. Not one of the examples

1 in § 6.3.5 of the Current Agreement is an OS or DA service. Nor do the OS and DA price lists
2 track the "per activation" or "per use" language of § 6.3.5. Unlike § 6.2.9, § 6.3.5 does not
3 mention OS/DA. "[W]hen there is an inconsistency between a general and a specific provision
4 of a contract, the specific provision ordinarily qualifies the meaning of the general provision."
5 *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn. App. 416, 423 (1995). So, the specific
6 language regarding OS/DA in § 6.2.9 controls, not the language of Section 6.3.5, which is
7 specific to Custom Calling Services instead.

8 Similarly, Qwest misinterprets § 6.1.1, which is the section that discusses what
9 services Qwest offers for resale. Qwest believes that this section means that Tel West has
10 "access" to OS/DA and therefore has agreed to resell it. Qwest is wrong. Under §6.1.1, as
11 supplemented by the sentence Qwest failed to include in its testimony:

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

21 Current Agreement at §6.1.1 (*emphasis added*). This section does not state that Tel West agreed
22 to resell OS/DA, that Tel West has access to OS/DA, or that it must pay for these services. Also,
23 this section says nothing specifically about OS/DA service. As noted above, specific contract
24 terms supercede terms of general applicability. Additionally, the italicized text above shows that
25 the Current Agreement trumps the tariff, to the extent there is a conflict. So, Qwest cannot claim
26 that the tariff requires Tel West to accept OS/DA.

27 Qwest's apparent contention that Tel West has agreed to resell OS/DA is
28 ridiculous, since Tel West has objected to these services for years. Tel West's price list contains
29 no prices, terms, or conditions for provision of either OS or DA. The only time Tel West
30 attempts to collect OS/DA charges is when it is making an attempt to mitigate damages Qwest

1 imposes on Tel West, and it rarely does this because it is not cost-effective. Swickard Test. at 6,
2 ll. 7-21. In fact, Tel West cannot resell many of the services Qwest crams on Tel West. For
3 example, Tel West cannot resell collect calls because Qwest provides the calling party with a rate
4 quote at Qwest's tariffed or price-listed rates. Swickard Supp. Test. at 4, ll. 22-26. That rate
5 quote caps the rate and thereby prevents Tel West from assessing a resale markup.

6 Finally, Qwest believes that the definition of basic exchange telecommunications
7 service supports its interpretation because it states that Tel West has "access" to OS/DA. Again,
8 Qwest has misinterpreted the Current Agreement, which provides:

9 "Basic Exchange Telecommunications Service" means a service offered to end
10 users which provides the end user with a telephonic connection to, and a unique
11 local telephone number address on, the public switched telecommunications
12 network, and which enables such end user to generally place calls to, or receive
13 calls from, other stations on the public switched telecommunications network.
14 Basic residence and business line services are Basic Exchange
15 Telecommunications Services. As used solely in the context of this Agreement
16 *and unless otherwise agreed*, Basic Exchange Telecommunications Service
17 *includes access* to ancillary services such as 911, directory assistance and operator
18 services.

19 Current Agreement at § 4.7 (*emphasis added*). "Access," as used in this section, means that
20 these services are available if the CLEC chooses to accept them, not that it must accept, order,
21 and pay for them. This is clear from the rest of the Current Agreement. For example, under the
22 Current Agreement, Tel West has "access" to pole attachments: "Qwest will provide CLEC with
23 *access* to available pole attachment space for the placing of facilities for the purpose of
24 transmitting Telecommunications Services." Current Agreement at § 10.8.1.1 (*emphasis added*).
25 Tel West also has "non-discriminatory *access* to unbundled network elements on rates, terms and
26 conditions that are non-discriminatory, just and reasonable." *Id.* at § 9.1.2 (*emphasis added*).
Tel West has "*access* to the same 911 trunks used for Qwest's retail end-users which extend from
the Qwest end office switch to the basic 911 PSAP or the E911 tandem." *Id.* at § 10.3.7.5
(*emphasis added*). Obviously, the term "access" means that the service is available *if CLEC*

1 orders it or agrees to accept it. Qwest has not identified any portion of the Agreement which
2 states otherwise.

3 Even if Qwest were correct about the meaning of access (which is not the case),
4 § 4.7 expressly states that access is included "unless otherwise agreed." The parties clearly
5 agreed otherwise in this case. Tel West expressly negotiated an end to payments for OS/DA
6 services, and Qwest responded by forwarding the Current Agreement which contained language
7 in § 6.2.9 meeting Tel West's requirements. Swickard Test. at 4, l. 20 to 5, l. 11.

8 **B. QWEST'S BLOCKING FEATURES DO NOT WORK AS THEY ARE DESIGNED, DUE**
9 **TO QWEST'S OWN ACTIONS.**

10 As stated above, Tel West believes that it has no obligation to accept and pay for
11 OS/DA service under the Current Agreement, regardless of whether it orders blocking services
12 or not. Even if it did, it would at least have the right to blocking features that work. Yet Qwest's
13 blocking features consistently fail to block these calls.

14 1. Billed number screening service often does not function correctly.

15 Tel West orders a service called billed number screening service ("BNS"), which
16 is intended to prohibit collect and/or third number billed calls from being charged to BNS
17 equipped numbers. Swickard Supp. Test. at 2, ll. 4-9. Tel West also informs its customers that
18 they may not accept collect calls. However, Qwest attempts to bill Tel West for these calls.

19 Qwest, not Tel West, should be responsible for these calls. These calls slip by
20 BNS because Qwest does not properly execute a "line information data base dip" ("LIDB dip").
21 A LIDB dip is a computer inquiry that reveals what restrictions and blocking are on the line,
22 which includes BNS. Operator service providers perform a LIDB dip for all collect calls to
23 determine whether they may assess charges on a line to be billed.

24 To the best of Tel West's knowledge, Qwest's OSP arm, which is a separate
25 division from Qwest's regulated local exchange entity, is the OSP for all collect calls resulting in
26 the disputed OSP charges. Swickard Supp. Test. at 2, ll. 22-26. So, Qwest's OSP division had a

1 duty to perform a LIDB dip before charging Tel West's lines for these calls. Had it done so, it
2 would have learned that Tel West ordered BNS for all its lines. Apparently, Qwest does not
3 protect itself by performing a LIDB dip in some circumstances.

4 A billing email that Qwest sent to Tel West in April 2001 explains Qwest's
5 unreasonable actions regarding collect calls originating from correctional facilities. Qwest
6 Response to Tel West No. 01-011 at 10. Qwest's OSP division is the OSP for numerous
7 correctional facility calls billed to Tel West, so Qwest had a duty to take reasonable steps to
8 ensure that it may bill a call to a particular line. This includes conducting a LIDB dip using the
9 most current information available. Yet according to the billing email, [CONFIDENTIAL
10 INSERT NO. 1] Qwest wants to dump the duty to update the LIDB data base on Tel West,
11 which is improper because Tel West has nothing to do with these calls. Qwest, as both the OSP
12 and the operator of the CPE at the facilities, bears this responsibility, if it exists. The only
13 reasonable approach is for Qwest's OSP to perform an LIDB dip using correct data like all other
14 OSPs. Ex. Swickard Supp. Test. at 4, ll. 3-7 (Swickard). Since Qwest's OSP has chosen an
15 unreliable method of screening, it should bear the costs of its poor decisionmaking.

16 Of course, Tel West is also not responsible for these charges under Qwest's tariff,
17 as the billing email suggests. The tariff only states that the customer remains responsible for
18 their calls even if BNS is on the line. Qwest Corp. WN U-40, § 10.4.3.B.3. This is appropriate
19 for Qwest retail local exchange customers because Qwest's OSP calls these Qwest end users and
20 verifies that it can bill them. The end user, as a Qwest subscriber, has accepted service under
21 this term of Qwest's tariff. This tariff provision does not require Tel West to pay these charges,
22 because it has never accepted the service and instead done everything possible to avoid them.

23 There is no technical reason for Qwest to force Tel West to pay these collect call
24 charges. This is apparent because Qwest only bills the collect call charges of Qwest's OSP
25 division, not unaffiliated OSPs. Swickard Supp. Test. At 5, ll. 14-19. Qwest should treat the
26

1 charges of its own OSP in the same way as it treats other carriers' OSP charges and not bill any
2 of them.

3 2. Dial Lock often does not function correctly.

4 To avoid DA costs crammed by Qwest, Tel West must order blocking features, an
5 example of which is a service called "Dial Lock." See Qwest Corp. WN U-40, § 5.4.3; Swickard
6 Test. at 5, ll. 11-25. This service costs Tel West \$3.95 per line, per month. Qwest Corp. WN U-
7 40, § 5.6.3. Even with the blocking feature, Tel West is forced to pay for the DA services
8 ordered but not paid for by its customers, since Dial Lock is not 100% effective. Qwest now
9 claims that Tel West should not use Dial Lock, but this is contrary to the advice Qwest gave
10 Tel West up until after this petition was filed. See Swickard Test. at 6, ll. 14-18. Also, Qwest
11 refuses to make Dial Lock available with UNE-P services. Tel West should not have to pay for a
12 service that does not function correctly.

13 3. Customized Routing is not designed to solve Tel West's problems.

14 Qwest suggests that Tel West should use customized routing, See Malone Test.
15 at 9, ll. 6-14, but it is not designed to solve Tel West's problems. Customized routing "enables
16 CLEC[s] to direct particular classes of calls to particular outgoing trunks which will permit
17 CLEC[s] to self-provide or select among other providers of interoffice facilities, operator
18 services, and directory assistance." Current Agreement, § 9.12.1.1. It is intended to permit
19 CLECs to choose a different OS/DA provider than Qwest, and all OS/DA calls are routed to that
20 provider. In contrast, Tel West wants *no* OS/DA provider. Swickard Test. at 9, l. 22 to p. 10,
21 l. 9. There is no alternative OS/DA provider to which Qwest could route the calls. Qwest now
22 states that Tel West could have an "intercept announcement" instead of an alternative OS/DA
23 provider, See Malone Test. at 9, l. 9-10, but it is unreasonable to expect Tel West to order this
24 service to disable OS/DA, which it never ordered or accepted in the first place. Further, this
25 option is not mentioned in the Current Agreement (to Tel West's knowledge), was not mentioned
26

1 in the November 2001 announcement Qwest claims it sent to Tel West about Dial Lock, and is
2 not in the tariff.

3 Customized Routing is also cost prohibitive. The charges are on a per central
4 office ("CO") basis, and Tel West provides services statewide. Swickard Test. at 10, ll. 3-9. It
5 makes no sense for Tel West to incur a substantial charge for customized routing in a small CO
6 where Tel West may only have a few customers.

7 Finally, customized routing will not help Tel West because it only blocks or
8 redirects a certain type of outgoing calls.² A large number of the OS calls improperly billed to
9 Tel West are collect calls that are incoming. Swickard Supp. Test. at 1, ll. 19-22. Tel West
10 already orders BNS, which is supposed to block incoming collect calls. That alone should be
11 sufficient. Customized routing also does not work with call waiting with DMS 10 switches
12 central offices. For all these reasons, Qwest's customized routing "solution" shows how Qwest
13 seeks to force Tel West into expensive and unwanted services to resolve a problem that is of
14 Qwest's own making, for Qwest's own benefit.

15 4. Tel West is not required to order CustomNet service.

16 After long advising Tel West to use Dial Lock, Swickard Test. at 5, ll. 14-18,
17 Qwest now in the testimony of Larry Brotherson filed February 28, 2002 suggests that Tel West
18 should instead use CustomNet. Brotherson Test. At 8, ll. 21-23. Of course, Tel West should
19 never have to order this service whether it would block OS/DA calls or not, since it is not liable
20 for OS/DA charges. However, if the Commission determines that Tel West must order a
21 blocking service to stop Qwest cramming of OS/DA charges, Tel West may choose to order
22 CustomNet. If that occurs, Qwest should compensate Tel West for the fact that up until very
23 recently it recommended Dial Lock, which costs \$3.95 when it could have recommended
24 CustomNet, which is \$2 per month.

25

26 ² This same problem exists with CustomNet, which Qwest also suggests as a solution.

1 5. There is no technical reason why Qwest must force Tel West to order and pay for
2 OS/DA service.

3 Qwest argues that Tel West cannot avoid OS/DA charges without a blocking
4 service. Teitzel Test. at 8, ll. 13-20. This is nonsense. Qwest's switches are electronic, and
5 Qwest controls their functionality by software. Swickard Test. at 8, ll. 7-21. Qwest can change
6 these functionalities as it pleases. In fact, Qwest has currently configured its switches in a
7 manner that allows Tel West not to accept or order services such as last call return, three way
8 calling, call trace service, and other features for its lines without requiring payment for a
9 blocking service. Swickard Test. at 8, ll. 17-21. There is no reason why OS/DA service is any
10 different.

11 Tel West is not asking for free blocking services. Tel West agrees that Qwest
12 should be paid for services it prudently provides. Swickard Test. at 8, l. 21 to 9, l. 11. If Qwest
13 believes that Tel West's refusal to order or accept OS/DA service requires Qwest to provide a
14 service, then Qwest should look to the end user for payment, as noted above. These end users
15 are Qwest's customers for purposes of OS/DA. Qwest can ask for alternative billing such as
16 credit cards from the end users if Qwest is concerned about recovering these charges. In fact, its
17 price list already permits alternate billing for DA. Qwest Corp. Price List, § 6.2.4.A.3.b. It
18 certainly cannot pass these costs on to Tel West.

19 The real problem is Qwest's continued desire to benefit by promoting its OS/DA
20 services and cramming them on resellers like Tel West by bundling the services with local
21 exchange. This eliminates Qwest's motivation to block the services, recover charges from end
22 users, or make it harder for end users that cannot pay for the services to access them.

23 6. Qwest has made it nearly impossible to block OS/DA calls by undermining
24 Tel West's efforts to limit end user access to them.

25 Qwest has made it progressively easier to access OS/DA service while
26 simultaneously increasing the risk that improper OS/DA charges will slip passed blocking
features. Swickard Test. At 7, ll. 4-21. Qwest once required customers seeking DA service to

1 dial "1+Area Code+555-1212." Companies like Tel West could easily block this service by
2 ordering a "1+" toll call screening service. Qwest now requires customers only to dial "411" to
3 access these services. So, the "1+" toll restriction no longer blocks DA calls. It is probably no
4 coincidence that Qwest made this change in 1998 as DA was becoming competitive and CLECs
5 were beginning to resell local exchange services. Similarly, Qwest allows access to its operator
6 services by simply dialing "0." Qwest could require end users to dial "10xxxx-0," "950-xxxx,"
7 or some other type of access code, as other OSPs must do. By making it so easy to access the
8 service, Qwest reaps the benefits of the revenues from creditworthy customers and passes on
9 much of the bad debt costs for the less creditworthy customers to Tel West.

10 In contrast, Tel West takes reasonable efforts to prevent its customers from
11 ordering OS/DA service. Swickard Test. at 4, ll. 11-15. If the customer requests service over the
12 telephone, Tel West plays an audio message for the customer that indicates the terms and
13 conditions of service and specifies that the customer may not access OS/DA or accept collect
14 calls. If the customer requests service in person, Tel West provides them with a pamphlet
15 explaining the same information. Tel West disconnects customers that violate these terms.
16 Ultimately, Qwest, not Tel West, should bear the costs for the billing problems that is created by
17 these optional services.

18 7. Qwest's unlawful actions force Tel West to bear unnecessary costs.

19 By requiring Tel West to purchase OS and DA in violation of the Current
20 Agreement, Qwest has unjustly imposed unrecoverable costs on Tel West. This is because it is
21 not cost-effective for Tel West to attempt to collect these charges from its end users. Tel West,
22 for practical reasons, cannot recover the OS and DA charges from its customers. Swickard Test.
23 at 6, ll. 6-21. To briefly summarize, Tel West serves the portion of the residential customer
24 market that is unable, for credit or payment reasons, to obtain service directly from Qwest. Due
25 to the nature of this market, Tel West blocks access to features or services that incur additional
26 charges, such as OS and DA. If Tel West does not block these types of services, Tel West is

1 often left with high charges for them but is unable to collect from the customer, who may have
2 disconnected service or cannot pay for them.

3 As a result, Qwest has forced Tel West to charge a very high rate in Washington
4 in order to cover the OS/DA charges it crams on to Tel West. Swickard Test. at 9, ll. 11-22.
5 Tel West's rates in Washington are higher than in any other states in which it operates with the
6 exception of Arizona (another Qwest state) where rates are equal to those in Washington.
7 Clearly, the cost of Qwest's OS/DA cramming are largely borne by Washington rate payers. *Id.*

8 Ultimately, Tel West's efforts to collect OS/DA charges is only relevant to show
9 how Qwest has injured Tel West. The Current Agreement does not require Tel West to exhaust
10 collection efforts against its customers before seeking a credit from Qwest. Qwest disagrees, but
11 it has not identified any contract provision that specifically supports its position.

12 **C. QWEST HAS NOT EXPEDITED BILLING DISPUTES.**

13 The Current Agreement requires Qwest to "expedite" the handling of billing
14 disputes:

15 Should CLEC or Qwest dispute, in good faith, any portion of the monthly billing
16 under this Agreement, the Parties will notify each other in writing within thirty
17 (30) calendar days of the receipt of such billing, identifying the amount, reason
18 and rationale of such dispute. At a minimum, CLEC 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.

19 Current Agreement at §5.4.4 (*emphasis added*). The plain meaning of the word expedite is "to
20 execute promptly." Webster's Ninth New Collegiate Dictionary at 436. The First Agreement did
21 not require expediting, but did state that all billing disputes must be "processed and jointly
22 resolved." First Agreement at § VII.C.2.

23 Qwest has failed to expedite many of Tel West's billing disputes under any
24 reasonable definition of the word. Some of the disputes Tel West identified in Mr. Swickard's
25 testimony dated from April 2001. Qwest admits that it did not respond to these billing requests
26 until February 15, 2002. Brotherson Test. at 6, ll. 3-7. Yet despite this phenomenal delay,

1 Qwest claims that it "has acted reasonably with regard to Tel West's billing disputes." *Id.* at 4,
2 ll. 10-12. There is no justification for these delays, since Tel West's customer service
3 representatives have worked diligently and provided all the necessary information that Qwest
4 requested. Swickard Test. at 11, ll. 20-25.

5 Qwest's past practices and its blatantly unreasonable interpretation of the term
6 "expedite" requires this Commission to define for the parties what that term means. Tel West
7 believes that expedite means that Qwest should respond in no more than 30 days to Tel West's
8 billing disputes. To ensure that Qwest will not violate this 30 day requirement, the Commission
9 should order that all billing disputes that Qwest has not responded to within 30 days after
10 Tel West presents them to Qwest shall be deemed resolved in Tel West's favor, unless Tel West
11 is responsible for the delay. Swickard Test. at 12, ll. 5-14.

12 Tel West's proposed 30-day deadline is not an effort to renegotiate its contract
13 with Qwest. During negotiations, Tel West could not have foreseen Qwest's unreasonable
14 behavior. Indeed, if this Commission accepts Qwest's refusal to interpret the word expedite, it
15 would encourage Qwest to continue its actions, which severely prejudice Tel West.

16 Qwest's objections to this are not convincing. It objects to Tel West's approach
17 because it is allegedly "onerous" to resolve Tel West's billing disputes. Brotherson Test. at 6,
18 l. 11. These are problems of Qwest's own making. Tel West does not tell Qwest the procedures
19 it must follow to resolve billing disputes. Further, Qwest could reduce the number of billing
20 disputes if it simply followed the plain terms of the Current Agreement and discontinued
21 cramming services on Tel West.³

22 Qwest witness Larry Brotherson complains that Tel West did not submit the
23 December 2001 billing disputes until January 18th, 2002, which was after the 30 day period in
24 § 5.4.4 had elapsed. Brotherson Test. at 10, ll. 7-19. Whether or not this is true, this fact would

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26 ³ Pursuant to agreement of the parties, Tel West is not providing information regarding claims for credit
or efficient billing practices beyond what is discussed above.

1 not cause Tel West to waive its right to recovery for those disputed charges. First, if Tel West
2 missed the 30 day deadline by a very short period, then this would not be a material breach and
3 could not then cause Tel West to waive its rights. Additionally, Qwest never complained about
4 the lateness of the disputes on the December bills until it filed testimony on February 28, 2002,
5 which is well over a month after Tel West provided an itemization of the December billing
6 disputes on January 18, 2002. Accordingly, Qwest has waived its right to dispute the timeliness
7 of these challenges to Qwest's bills.

8 **D. RELIEF REQUESTED.**

9 Based on the Qwest violations of the Current and First Agreement identified
10 above, Tel West is entitled to the following relief. As to the OS/DA claim, the Commission
11 should:

12 (1) Enter findings and conclusions that Qwest has violated the terms
13 and conditions of the Current Agreement, by forcing Tel West to accept and pay for OS
14 and DA services that Tel West did not order.

15 (2) Directing Qwest to permit Tel West to order residential service
16 without OS and DA and prohibiting Qwest from billing Tel West for such services,
17 without requiring Tel West to order any blocking services (but permitting Qwest to use
18 blocking functions and permitting Qwest to bill Tel West end users directly if it wishes).

19 (3) Finding that Qwest's efforts to bill and collect for OA and DA
20 services were "willful or intentional misconduct" under Section 5.8.4 of the Current
21 Agreement.

22 (4) Directing Qwest to credit or refund to Tel West all charges Qwest
23 has imposed for blocking OS and DA plus all charges billed to Tel West for Qwest's OS
24 and DA services since the effective date of the Current Agreement, regardless of whether
25 or not Tel West had a blocking service on the lines in question.

26 As to the Billing Disputes claim, the Commission should:

1 (1) Enter findings and conclusions that Qwest has violated the terms
2 and conditions of the Current Agreement and the First Agreement.

3 (2) To ensure that Qwest resolves billing disputes in a timely manner,
4 ordering that all billing disputes that Qwest has not resolved within thirty days after
5 Tel West presents them to Qwest shall be deemed resolved in Tel West's favor, unless
6 Tel West is responsible for the delay.

7 (3) In the alternative, if the Commission denies the foregoing requests
8 for relief under (2) and (3) above, the Commission should order that all billing disputes
9 that Qwest has not resolved within the number of days equal to 1.5 times the number of
10 days it took Tel West to present them to Qwest after the bill date shall be deemed
11 resolved in Tel West's favor.

12 (4) Directing Qwest to issue credits to Tel West for all bills rendered
13 under the Current agreement for all OS and DA services, regardless of whether or not
14 there was blocking on the line.

15 (5) Directing Qwest to issue credits to Tel West for all bills rendered
16 under the First Agreement for all OS and DA services where Tel West had Dial Lock on
17 the line or had ordered Dial Lock for the line prior to the call(s) in question.

18 (6) Providing for any other relief justified under the Current and First
19 Agreements.

20 **E. CONCLUSION.**

21 Under any reasonable interpretation of the Current Agreement, Tel West is not
22 required to accept and pay for OS/DA services. Qwest's alternative interpretation relies
23 exclusively on generic, unrelated provisions in the Agreement and ignores the negotiations of the
24 parties that led to the Current Agreement. Qwest has also failed to provide effective blocking
25 services to eliminate OS/DA calls, at the same time it unreasonably insists that Tel West must
26 order them. While Tel West believes it should not have to order these services to block OS/DA,

1 at a minimum they should function correctly if Tel West does order them. Qwest also
2 undermines Tel West's efforts to limit OS/DA charges generated by end users. Finally, Qwest
3 has failed to "expedite" bill dispute resolution under any reasonable definition of the word.

4 DATED this 8th day of March, 2002.

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