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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 ADVANCED TELCOM GROUP, INC.,)

4 Petitioner,)

5 vs.)

6 U S WEST COMMUNICATIONS, INC.,)

7 Respondent.)

DOCKET NO. UT-993003

Volume I

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9 A prehearing conference in the above matter
10 was held on December 1, 1999 at 1:35 p.m., at 1300
11 South Evergreen Park Drive Southwest, Olympia,
12 Washington, before Administrative Law Judge LAWRENCE
13 BERG.

14

The parties were present as follows:

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16 U S WEST COMMUNICATIONS, INC., by LISA A.
ANDERL, Attorney at Law, 1600 Seventh Avenue, Suite
3206, Seattle, Washington 98191.

17

Also Present: Mark Reynolds

18

19 ADVANCED TELCOM GROUP, INC., by GREGORY J.
KOPTA, Attorney at Law, Davis Wright Tremaine, 1501
Fourth Avenue, Suite 2600, Seattle, Washington
98101-1688.

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21 THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION, by SHANNON E. SMITH, Assistant Attorney
General, 1400 South Evergreen Park Drive Southwest,
22 Post Office Box 40128, Olympia, Washington 98504-0128.

23

Also Present: Jing Roth, Trey Hendricks.

24

25 Kathryn T. Wilson, CCR
Court Reporter

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1 P R O C E E D I N G S

2 JUDGE BERG: At this time we'll be on the
3 record. This is a hearing before the Washington
4 Utilities and Transportation Commission in
5 Docket No. UT-993003, captioned, Advanced Telcom Group,
6 Inc., Petitioner, versus U S West Communications, Inc.,
7 Respondent. Advanced Telcom Group, Inc., will also be
8 referred to as "ATG." U S West Communications, Inc.,
9 will also be referred to as "U S West."

10 This matter comes up on ATG's petition for
11 enforcement of interconnection agreement and motion for
12 summary determination. This is a prehearing conference
13 scheduled pursuant to WAC 480-09-530. Notice was
14 served on the parties on November 15, 1999. The
15 prehearing conference identified the purpose of the
16 hearing was to identify issues to be resolved and to
17 determine whether to schedule additional proceedings in
18 accordance with WAC 480-09-530(4)(b).

19 I'll note for the record that I've provided
20 the parties with an agenda that contains, certainly
21 from my perspective, an exhaustive list requiring
22 resolution, and I hope to have an opportunity for the
23 parties to state their positions with regards to those
24 issues and whether, in fact, they require resolution,
25 and if they do require resolution, what additional

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1 process may be necessary.

2 Today's date is Wednesday, December 1, 1999,
3 and this hearing is being conducted at the Commission's
4 office in Olympia, Washington, as previously noticed.
5 Serving as advisors to me in this proceeding are
6 Ms. Jing Roth and Mr. Trey Hendricks, and also
7 Ms. Shannon Smith, assistant attorney general, is also
8 available in an advisory capacity. Again, this is just
9 a formal matter for the record. I'm Lawrence Berg and
10 I was appointed as presiding officer in this matter in
11 the First Supplemental Order entered by the Commission
12 on November 15, 1999.

13 At this point in time, we'll take appearances
14 of the parties beginning with Petitioner and
15 Respondent. Since this is the first formal hearing in
16 this matter, I will ask the parties to provide all
17 relevant contact information.

18 MR. KOPTA: Gregory Kopta of the law firm
19 Davis Wright Tremaine, LLP, on behalf of Advanced
20 Telcom Group, Inc., 2600 Century Square, 1501 Fourth
21 Avenue, Seattle, Washington, 98101-1688. My telephone
22 number is (206) 628-7692; fax number, (206) 628-7699;
23 e-mail address, gregkopta@dwt.com.

24 MS. ANDERL: Lisa Anderl appearing on behalf
25 of U S West Communications, Inc. Mailing address is

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1 1600 Seventh Avenue, Room 3206, Seattle, Washington,
2 98191; telephone, (206) 345-1574, fax; (206) 343-4040;
3 e-mail, landerl@uswest.com.

4 JUDGE BERG: Thank you very much. The first
5 thing I want to address is the ATG motion for summary
6 determination, and as the agenda indicates, this also
7 entails a review of WAC 480-09-530(4)(b). The
8 proceeding which was established under this particular
9 Commission rule is intended to provide the parties with
10 expedited relief relating to the enforcement of
11 interconnection agreements between parties. As such,
12 the summary determination of issues as a motion does
13 not have the same relevance that it might have in other
14 proceedings.

15 One of the duties of the presiding officer in
16 a 480-09-530 hearing is to make a determination as to
17 whether or not there are further proceedings required
18 in order to render a decision resolving all outstanding
19 issues. As such, the motion for summary determination
20 as presented is denied. However, I also take note that
21 under 480-09-530, the presiding officer is charged with
22 considering the preferences of the parties and the
23 reasons they advance to consider whether to schedule an
24 oral enforcement hearing, and I'm going to regard the
25 motion for summary determination as a statement of

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1 ATG's preference that there be no additional oral
2 enforcement hearing, at least in the context of its
3 petition and its prior position that all issues
4 outstanding are legal of nature and would not require
5 additional proceeding.

6 That doesn't necessarily mean that the
7 parties may not be required or consider it necessary to
8 file additional written arguments as well, and a part
9 of the reason for denying the motion for summary
10 determination is because I feel I'm presenting numerous
11 other issues to the parties that they have not
12 considered, and even if the motion for summary
13 determination were well founded as presented, I would
14 certainly be extending to ATG the opportunity to
15 reconsider its motion based upon the agenda that's
16 presented to the parties.

17 Likewise, I will take note that U S West in
18 its response also indicated that based upon its prior
19 review of the petition and analysis of issues that it
20 considered all issues to be legal of nature and would
21 not require any kind of factual investigation or
22 evidentiary presentation in this case. For the same
23 reasons, I would expect that U S West to be entitled to
24 reconsider its position in light of the proceedings
25 here today.

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1 Any comments or responses by the parties;

2 Mr. Kopta?

3 MR. KOPTA: Thank you, Your Honor. I think
4 that that's an appropriate approach to this case. As
5 you've outlined it, I think we are feeling our way
6 still somewhat in terms of implementing this new
7 procedural rule, WAC 480-09-530, since this is only the
8 second case that's been brought, and really what we
9 were attempting to do was to highlight our position
10 that there were certainly legal issues to be resolved
11 and to provide some additional briefing that wouldn't
12 ordinarily be included in what would normally be
13 considered a petition, and so I think the way that you
14 have proposed to proceed is consistent with what we had
15 in mind when we filed the motion.

16 JUDGE BERG: Thank you. Ms. Anderl,
17 anything?

18 MS. ANDERL: No. That's fine with us as
19 well, Your Honor.

20 JUDGE BERG: My first inclination is take the
21 issue at the top and work our way through them. I do
22 expect the parties will have some questions of me in
23 the way of a clarification of the issue or why I framed
24 an issue as pertinent to this proceeding. Likewise, if
25 the parties feel at any time that they wish to have an

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1 off-the-record discussion, I want them to feel free to
2 say so, and then if it's appropriate, we'll summarize
3 whatever off-record discussion occurred when we go back
4 on the record.

5 The first issue, what's identified as Agenda
6 Item D-1 is not so much an issue with a question mark
7 but a series of question marks, and the fundamental
8 issues that this leads to relate to whether or not a
9 carrier with an existing interconnection arrangement
10 should be allowed to request an arrangement from
11 another interconnection agreement that was itself a
12 product of Section 252(i).

13 What we see in under No. 1 are five separate
14 agreements: Two agreements occurring prior to the
15 approval date of the ATG Agreement and two agreements
16 occurring subsequent to the ATG Agreement. The
17 petition filed by ATG is framed as requesting the
18 reciprocal compensation arrangement provided in the MFS
19 Agreement. However, it also makes reference to the
20 Televerse Agreement, which has been approved by the
21 Commission, and it also refers to the Nextlink/U S West
22 Agreement approved by the Commission. What I would
23 like to inquire of U S West is whether it's able to
24 state its position with regards to the termination date
25 of each of these agreements. The agreements, which

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1 include an agreement between Level 3 and U S West,
2 which was approved prior to the ATG Agreement, the
3 information provided here lists the approval dates but
4 the termination dates are unknown. Excuse me; the
5 expiration date is unknown. Certainly, we can look to
6 the agreement and see what the agreement says, but I'm
7 looking for U S West's position with regards to what
8 would be the applicable termination date.

9 MS. ANDERL: Yes, Your Honor. With regard to
10 any opt-in, it's U S West's position that the opting-in
11 carrier gets the agreement for a term no longer than
12 the original carrier got, and that doesn't mean
13 two-and-a-half years, for example, whenever you opt in,
14 but it means for the two-and-a-half years, for example,
15 when the first carrier who created the underlying
16 negotiated or arbitrated agreement got theirs, so in
17 our view, the MFS Agreement and any opt-in to that
18 expired on July 8th, 1999.

19 JUDGE BERG: So just looking at these
20 agreements one by one, Level 3/U S West approved on
21 6/15/98. Do you have any independent knowledge that,
22 or would you accept subject to check that the Level 3
23 Agreement was an opt-in in its entirety of the MFS
24 Agreement?

25 MS. ANDERL: That is what I recall. I can't

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1 swear to it, but that is what I recall and believe to
2 be true, yes. So in our view, that contract does not
3 extend through December 15th, 2000, but rather expired
4 when the MFS Agreement expired.

5 I understand that the MFS Agreement, and just
6 so it's clear on the record, does have a continuation
7 clause in it, and when I referenced the MFS Agreement
8 being expired, I say that in recognition of the fact
9 that we are still operating with MFS under that
10 agreement under the continuation clause in Section -- I
11 think it's 33 V, the term of the agreement, so when I
12 say "expired," I want to distinguish that from kind of
13 having ceased to exist.

14 JUDGE BERG: With regards to Level 3/U S West
15 Agreement, on August 30, 1999, correspondence was filed
16 with the Commission in UT-980321 by Tamar Finn --
17 T-A-M-A-R, last name, F-I-N-N -- counsel for Level 3.
18 It was correspondence directed to Reginald Harrington,
19 interconnect negotiator for U S West in Denver,
20 Colorado, making reference to a disagreement between
21 the parties regarding the effective period of that
22 interconnection agreement. Have you had any
23 involvement in that correspondence or negotiation
24 between the parties?

25 MS. ANDERL: No. I'm not even aware of it.

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1 It may have been that his dealings were with one of our
2 attorneys who supports the negotiations team rather
3 than with me.

4 JUDGE BERG: With regards to the Televerse --
5 and I'll indicate while I've included ATG/U S West in
6 this list of agreements, I did not intend to indicate
7 that I believe that the ATG/U S West Agreement
8 contained the MFS Agreement. It was only there for
9 some chronological comparison, so would it also then be
10 U S West's position that the Televerse/U S West
11 Agreement that was approved on June 9th, 1999,
12 terminated approximately one month later?

13 MS. ANDERL: I think that is our position
14 now, yes. I don't know if that was crystallized as
15 such at the time of the Commission approval of the
16 Televerse decision. As you know, Your Honor, because
17 of your involvement in the Nextlink case, people's
18 positions on these issues were being formed, and right
19 around that time of the year in the April, May, time
20 frame. My guess is if the Televerse decision or
21 interconnection agreement was approved and effective
22 June 9th, 1999, it had been filed sometime before that
23 with the Commission, and discussions with Televerse had
24 probably taken place even earlier than that, and I'm
25 relatively certain that either U S West's position on

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1 that issue had not crystallized yet or a decision was
2 made not to fight about it at that time. I don't know.

3 JUDGE BERG: Mr. Kopta, the Commission
4 approved an amendment to the Nextlink/U S West
5 Agreement on September 9th, 1999. The original
6 agreement was approved on April 30th, 1997. Is it
7 correct that the Nextlink/U S West Agreement terminated
8 on October 30, 1999?

9 MR. KOPTA: If my recollection is correct,
10 the amendment that's referenced here was an agreement
11 by the parties to extend the effectiveness of the
12 current agreement through, I believe, August of 2000.

13 JUDGE BERG: So you think that was the term
14 that was included in the Nextlink Agreement?

15 MR. KOPTA: That was, again, my recollection
16 from having some involvement in representing Nextlink,
17 not in that particular negotiation with U S West or
18 that particular filing, but my understanding is that
19 that was an extension of the existing agreement through
20 August of 2000, and that pursuant to the Commission's
21 order of September 7th, I believe, 1999, resolving
22 Nextlink's petition against U S West, there has not yet
23 been filed an amendment to the agreement that would
24 include some of the provisions from the MFS Agreement
25 as it was ordered by the Commission.

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1 JUDGE BERG: Was the amendment as approved by
2 the Commission include the extension of the expiration
3 date, to the best of your knowledge?

4 MR. KOPTA: That was the primary purpose of
5 that amendment was to extend the effectiveness of the
6 agreement.

7 JUDGE BERG: That's certainly something we
8 can check here.

9 MS. ANDERL: Your Honor, I have one other
10 thing to add on that whole thing, if I may.

11 JUDGE BERG: Absolutely.

12 MS. ANDERL: The other thing that I think is
13 important in terms of the timing of when parties began
14 formulating and crystallizing their positions in terms
15 of what the expiration date is this Global NAPs
16 decision that we'll talk about later, and we feel, I
17 think, to the extent that that postdated most of, if
18 not all, the approvals that we're looking at here in
19 Issue D-1 and bolsters U S West's position that you
20 take the entire agreement subject to its original term
21 may help explain U S West's certainty about its
22 position now and yet willingness to file agreements for
23 approval that were close to their expiration date
24 earlier this year.

25 JUDGE BERG: That's true, and it leads into

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1 some of the other issues is why I'm initiating this
2 discussion in the first place, because if we put these
3 five agreements in chronological order, No. 1, ATG has
4 made the argument that either as a matter of legal
5 right or equity, because it adopted the Kovad Agreement
6 during a period of time when FCC Rule 51809 had been
7 stayed, that when the FCC rule was reinstated, it
8 should be allowed to exercise pick and choose rights
9 over agreements that were in existence at the time it
10 made its election but which it was otherwise not able
11 to do.

12 So that brings the Level 3/U S West Agreement
13 into the picture, because while the MFS/U S West
14 Agreement certainly buys the two-and-a-half year stated
15 in the agreement appears that it would expire on
16 7/8/99, the Level 3 Agreement was not approved until
17 6/15/98, and if, in fact, that agreement were to run
18 for a full two-and-a-half year term, it would run to
19 12/15/year 2000, so that if ATG were to prevail on its
20 argument that it should be allowed to exercise pick and
21 choose over other agreements that were in effect at the
22 time and that were still effective, the Level 3
23 Agreement looks like it might be available to ATG.

24 Likewise, subsequent to the ATG Agreement
25 with U S West, the Commission approved an agreement

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1 between Televerse and U S West, again the MFS, which
2 was an adoption in its entirety of the MFS Agreement.
3 Now we have a subsequently approved agreement, which
4 under any argument seems to be an agreement that would
5 be available to carriers with existing interconnection
6 agreements if effective, and again, if the
7 Televerse/U S West Agreement were considered to be
8 effective for a two-and-a-half year term, that would
9 also establish an MFS type arrangement that would be
10 available to ATG.

11 The other issues that follow up this outline
12 of existing agreements go towards, in fact, how should
13 those agreements, those prior agreements, be
14 interpreted? All the agreements I've just referred to
15 were approved by the Commission prior to the Global
16 NAPS decision, which was released August 3rd, 1999.

17 So let's go ahead and consider Issue 2, and
18 we may be coming back to some discussion of these
19 agreements, and Issue 2 is what impact does the FCC's
20 order in Global NAPS have, and in particular in
21 Footnote 25, on interconnection agreements previously
22 approved by the Commission, and at the outset, let me
23 just ask the parties whether they feel prepared to
24 discuss that issue here today, or whether this is an
25 issue that they prefer not to discuss but will brief?

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1 Mr. Kopta first, just on a preliminary basis, and then
2 Ms. Anderl.

3 MR. KOPTA: I certainly think that it might
4 be better handled to have additional briefing on this
5 particular point. I think the problem with trying to
6 break this issue out from some of the other ones is
7 that they end up coming back together again. For
8 example, in Footnote 25, there is a reference to a
9 dispute over the termination date of that particular
10 agreement. In the last sentence in Footnote 25 it
11 says: "This dispute underscores the importance of
12 contractual terms that unambiguously establish a
13 termination date," and I think we have that same kind
14 of dispute here about the MFS Agreement, and, of
15 course, all this wisdom comes along after the original
16 agreement was approved by the Commission, so we are
17 trying to look at changes in the law as it impacts
18 agreements that were entered into before these changes
19 occurred, and I think that is something that perhaps
20 would benefit from additional briefing.

21 From the point of view of ATG, it doesn't
22 impact relief that ATG has requested, but that really
23 goes more to Issue 3, which is the termination.
24 Ms. Anderl refers to an expiration date. As I read the
25 contract language, there is no such term nor is there

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1 any date by which the agreement expires.

2 JUDGE BERG: Ms. Anderl, we're now talking
3 about both Issues 2 and 3, and Issue No. 3 is more or
4 less related and derived entirely from that language,
5 the thinking being that, Well, there is this issue as a
6 matter of legal precedence. Does the FCC's order on
7 August the 3rd have any bearing on agreements approved
8 by this Commission prior to that date, and if so, then
9 there is also the issue as to whether or not any of
10 these agreements that are essentially the same
11 agreement and have the same termination date language
12 are unambiguous.

13 MS. ANDERL: Your Honor, we're happy to brief
14 it, obviously, if Mr. Kopta wants to. It probably is a
15 dispute that lends itself to a little bit clearer
16 discussion in writing than orally. I think though as
17 to Issues 2 and 3, what we would say regardless of when
18 that FCC order was entered, it sets forth what the
19 FCC's interpretation is of what carriers are permitted
20 to do in an opt-in, and any contrary decision I'm not
21 at all sure the Commission has room to issue a contrary
22 decision on an opt-in.

23 Now, that gets us to the question of what is
24 the termination date, and I agree that we need to
25 discuss that. As I made the distinction before, in our

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1 view there is an expiration after two-and-a-half years,
2 but that does not mean the agreement with MFS ceases to
3 exist, and that is the difficulty we are faced with.

4 Another issue that is raised by this, and I
5 think it's inextricably linked and isn't listed here
6 until later, is the issue of can you opt in to an
7 opt-in is the way we've used it as shorthand, and I
8 think you've got that discussed in Issue 12, so I would
9 argue, because we say that you can't opt in to an
10 agreement that's become effective under 252(i). It
11 doesn't matter what the termination date of Level 3 or
12 Nextlink or Televerse or anything else is because those
13 are all agreements that contain the MFS terms because
14 of 252(i), and we don't think the FCC permits the
15 opt-in to opt in, or as it's been referred to in other
16 discussions, either leapfrogging or daisy-chaining of
17 effective dates by simply either causing contracts to
18 live forever by letting parties extend effective dates
19 or have them become effective and then available for
20 opt-in to subsequent carriers.

21 JUDGE BERG: My understanding of that
22 argument goes something like this: Section 252(i)
23 states that, interconnection service or network element
24 provided under an agreement approved under the section
25 to which is a party must be made available, and that

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1 under Section 252, when you then go to Section 252(e),
2 you find that it states, an interconnection agreement
3 adopted by a negotiation or arbitration shall be
4 submitted for approval, and that under 252(i),
5 agreements that are opted into are not negotiated nor
6 arbitrated, and therefore, arrangements containing
7 those agreements need not be made available.

8 MS. ANDERL: That is it perfectly, yes, and I
9 think just for clarity of the record, I may have said
10 that I believed that the FCC had endorsed that argument
11 when I was at the open meeting yesterday, and I don't
12 know if I'm right about that. It may be what I'm
13 thinking of is a California District Court order in the
14 Pac Bell/Airtouch or Pac Bell/Cook arbitration that
15 talks about the ability to opt in to an opt-in, but it
16 may also be in an FCC decision. That would be another
17 good reason to give us an opportunity to brief this so
18 we can get our citations in order.

19 JUDGE BERG: I think that's something that I
20 would agree with, and we'll have to look at some of the
21 other issues that I've highlighted that would also
22 impact upon that conclusion.

23 In reading the Global NAPs decision, Ms.
24 Anderl, even though I did not see anywhere where, in
25 fact, the FCC more or less connected the dots, in

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1 reading its characterization of opt-in agreements in
2 Paragraphs 3 and 4, they did make the distinction
3 between the established under Section 252(i) and the
4 agreements that might otherwise be a product of
5 arbitration or negotiation as identified in Section
6 252(e)(1).

7 MS. ANDERL: Thank you, Your Honor, and I
8 just want to be sure I don't claim support for a
9 proposition that is not there, but I will check it and
10 make sure I have the proper citation.

11 JUDGE BERG: I'll want to give the parties an
12 opportunity to address that as well to cite any other
13 decisions that they feel are relevant to the
14 determination that needs to be made in this proceeding.

15 So with regards to Issues 2 and Issues 3, I
16 would be looking for additional arguments from the
17 parties, and what I had in mind with regards to Issue 2
18 and I would be looking for the parties to address is as
19 a procedural matter, what impact does a subsequent FCC
20 order have on previously approved agreements, if, in
21 fact, those agreements were approved with language that
22 could be interpreted to mean they have an independent
23 two-and-a-half year term.

24 Now, the thin ice that I'm beginning to tread
25 on here is that potentially I could be making a

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1 decision about the effective date for other parties;
2 that being Televerse/U S West and Level 3/U S West
3 without their representation in this proceeding, but to
4 really flush out the issue as to whether or not a party
5 should be allowed to opt in to an opt-in agreement that
6 is currently effective, I don't see any way to avoid
7 but going there.

8 MR. KOPTA: And certainly I think that has
9 been a matter of contention not just with Level 3 but
10 others that have opted into the MFS Agreement, and to
11 give all parties their due, it was an unsettled area,
12 and reasonable minds can differ on that issue, so I
13 agree with you that it may be difficult unless there is
14 something in the record as to what the agreement
15 provided, and again, we have a tie to Issue 3, which is
16 rather than saying this agreement expires on December
17 31st, 1999, or some other date, it says something
18 different, so it's not as clear as it might otherwise
19 be, and unless the Commission has resolved that issue,
20 and it does in some ways potentially inject that issue
21 in this proceeding.

22 JUDGE BERG: Mr. Kopta, do you feel that this
23 is an issue that can be addressed in a more broader
24 sense that the issue as to whether or not agreements
25 approved by the Commission prior to a certain date that

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1 are the product of an opt-in to another agreement in
2 the entirety should have an independent term? Do you
3 think that's an issue that should be addressed without
4 unfairly infringing upon the rights of third parties?

5 MR. KOPTA: That one I would have to think
6 about. Obviously, if we are talking about agreements
7 between U S West and parties, individuals, or companies
8 that are not parties to this proceeding, any
9 determination here that those agreements have a
10 particular effective date for purposes of this
11 proceeding, I think, would be difficult to make. We
12 obviously can't say, Well, Level 3 in this enforcement
13 proceeding between U S West and ATG, we decided that
14 your agreement expires on July 8th, 1999, and you
15 weren't around; that's too bad.

16 That's why I say it would be difficult,
17 because unless the Commission actually addressed that
18 issue and resolved it at the time of the approval, then
19 certainly the party to the agreement would want to have
20 something to say about when they believe the agreement
21 expires.

22 JUDGE BERG: Does ATG have a position as to
23 the expiration date of the Televerse U S West
24 Agreement?

25 MR. KOPTA: ATG was not a party to the

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1 discussions between Televerse and U S West. All ATG
2 can go by is the agreement that was approved and what
3 does the Commission say in its order approving the
4 agreement. To the extent that the Commission
5 interprets the agreement and its approval as approving
6 an agreement that extends for two-and-a-half years
7 beyond June 9th, 1999, then ATG would certainly want to
8 take advantage of that decision.

9 If the Commission doesn't take any position
10 on that, then I don't know that it's appropriate for
11 ATG to interpret, necessarily, Televerse and U S West's
12 Agreement without at least Televerse at least also be
13 being here, so I think we only get to this issue if
14 there is a definitive cutoff or expiration or whatever
15 you want to call it date for the MFS Agreement, and I
16 think in addition to these other agreements that the
17 Nextlink/U S West Agreement presents unique issues as
18 well because it was the result of a Commission order
19 enforcement proceeding, and that should be subject to
20 the same kind of constraints, and certainly from
21 Nextlink's perspective, although they are not party to
22 this proceeding, I would have a better indication of
23 what their interpretation of the agreement would be.

24 JUDGE BERG: Ms. Anderl, I know we're
25 covering some ground here, and you may have something

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1 to say, but let me just follow up with Mr. Kopta a
2 little bit further. Mr. Kopta, to the extent that the
3 reciprocal compensation arrangement, the MFS
4 arrangement is the reciprocal compensation arrangement
5 contained in the MFS/U S West Agreement is also the
6 reciprocal compensation arrangement in the Level 3
7 Agreement and in the Televerse Agreement and in the
8 Nextlink Agreement, is it ATG's position that it would
9 need a determination on the question of whether or not
10 the termination date of the MFS/U S West Agreement is
11 ambiguous before it would expand its request to receive
12 the reciprocal compensation arrangement out of the
13 Level 3 Agreement or the Televerse Agreement or the
14 Nextlink Agreement?

15 MR. KOPTA: ATG's position is basically that
16 it is entitled to the same reciprocal compensation
17 provisions that are provided to other carriers.

18 JUDGE BERG: But you don't get to do that.
19 You have to make request and arrangement from a
20 specific agreement.

21 MR. KOPTA: I understand that, and to the
22 extent that the Commission determines or agrees with
23 U S West's position that the agreement, No. 1, expired
24 in July of this year, and No. 2, that all other
25 carriers opting into that agreement, their agreements

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1 also expired as of that date, then the issue
2 disappears. It only becomes an issue if the Commission
3 were to determine that, based on the circumstances in
4 existence at the time that agreements entered into
5 subsequent to the MFS Agreement that incorporated some
6 or all of the terms from the MFS Agreement extended or
7 had their own termination date, that was different than
8 the MFS Agreement.

9 JUDGE BERG: To the extent that that might
10 put ATG in a position where it would be precluded from
11 receiving the reciprocal compensation arrangement in
12 the MFS/U S West Agreement because by its own term it's
13 expired, but that the reciprocal compensation
14 arrangement in the Level 3 or Televerse Agreement would
15 not be precluded, based upon a whole lot of other
16 factors solely on the basis that those -- not solely,
17 but including the basis of the fact that those
18 agreements have not terminated, seems to be where we
19 are headed, and all I'm trying to do is get a sense
20 from ATG's perspective whether we need to nail down
21 that threshold issue first before ATG would essentially
22 step up and seek to amend its petition or the
23 Commission would amend the pleadings to conform to the
24 evidence that those reciprocal compensation
25 arrangements are identical. ATG just wants the

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1 reciprocal compensation arrangement effective for as
2 long a term as it could possibly be made available, not
3 to exceed the term of its own agreement, but that there
4 are other issues to be resolved first.

5 MR. KOPTA: Sure. And I understand what you
6 are trying to grapple with, and I don't know that we
7 can completely resolve that just because of the nature
8 of the dispute, and we almost get into an intellectual
9 exercise here, because the bottom line is that from
10 ATG's perspective, the reciprocal compensation
11 provisions in all of the agreements that you've listed
12 with the exception, obviously, of the ATG/U S West
13 Agreement, are the same, with the possible exception of
14 the date by which they are no longer in effect. ATG,
15 if it had its preference, would choose the same
16 provision from whatever agreement that would allow ATG
17 to have the reciprocal compensation provisions that
18 they requested through the end of their current
19 agreement.

20 JUDGE BERG: I understand that these are
21 issues that the parties will be rethinking and briefing
22 and rearguing, but would it be ATG's position that the
23 term of the MFS/U S West Agreement is ambiguous but
24 that on the date that the MFS/U S West Agreement ceases
25 to exist that the MFS reciprocal compensation

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1 arrangement would no longer be available as we know it
2 now?

3 MR. KOPTA: That's again one of the
4 difficulties with the language as it's currently in the
5 MFS Agreement because it essentially allows the parties
6 to replace the current agreement once they've
7 negotiated a replacement and obtained Commission
8 approval for that replacement. Certainly from ATG's
9 perspective, they would not want to tie the
10 effectiveness of their provision to the actions of U S
11 West and a third party.

12 JUDGE BERG: My concern is that if you --
13 again, whether it's an intellectual exercise or not,
14 you start going down the road, and where it leads to is
15 a conclusion that the MFS reciprocal compensation
16 arrangement exists in perpetuity, and that seems to be
17 contrary to the guidelines that were approved by the
18 Commission in its interpretive policy statement, so
19 that is just my concern. I'm not looking for a
20 response now. I appreciate the fact that you
21 understand what I'm struggling with. Ms. Anderl, any
22 comments on this little go-around?

23 MS. ANDERL: I don't know. I've bitten my
24 tongue so many times. All I wanted to say throughout
25 was that in terms of the decisions that you have to

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1 make, you may be putting the cart before the horse in
2 terms of deciding the effective date or termination
3 date or expiration date of agreements with carriers who
4 are not parties to this proceeding, and I was tempted
5 to make a little joke and say it would be okay anyway
6 because I'm sure Mr. Kopta represents them all.

7 Seriously, I think you can first decide the
8 question of whether or not 252(i) arrangements or
9 agreements are available for opt-in, and if you say
10 yes, they are, which we think would be wrong, but in
11 any event, if you say yes, they are, then you look at
12 what is the expiration date of Level 3 or Televerse. I
13 think that that would be the better approach because I
14 think we can convince the Commission not to allow
15 opt-ins to opt in, and then you don't have to deal with
16 the issue of the termination date or expiration date of
17 any of these other carriers' agreements, and obviously,
18 if we don't convince you, then it is a hurdle that you
19 do have to clear, but at least you set up a
20 decision-making process where you don't have to answer
21 those questions at all.

22 JUDGE BERG: I've also acknowledged to the
23 parties that I recognize this is thin ice, and for the
24 time being, I am going to set that aside and not ask
25 the parties to deal with that expressly, but we may

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1 wind up coming back there either on a general basis or
2 on a more specific basis.

3 I'll also kind of lean on the parties a
4 little bit to help me consider these other issues in
5 that context. The next issue was Issue No. 4, whether
6 the interpretive policy statement, particularly
7 Principle 8, applies to agreements previously approved
8 by the Commission, and without trying to weave that
9 into the fabric that we have, again, the idea behind it
10 was that there may be other interconnection agreements
11 that have been approved that have terms different than
12 the MFS/U S West Agreement, but yet we have a guideline
13 in place now that, in fact, agreements or arrangements
14 that are adopted carry with it the termination date of
15 the underlying agreement.

16 Mr. Kopta, is that something you could
17 respond to in a more abstract level again from the
18 point of view of, should guidelines apply to previously
19 approved agreements?

20 MR. KOPTA: I will make a more concrete
21 comment which is that this issue is really a variation
22 on Issue No. 2. It's something that the Commission has
23 only recently adopted, and it raises the same practical
24 concerns that are raised by what happens when the FCC
25 issues a decision after the Commission has approved

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1 agreements.

2 JUDGE BERG: I do see that point. So to the
3 extent that the parties would be presenting some
4 analysis with regards to Point 2, they should also
5 discuss Issue 4, and I think for the time being, we'll
6 pass over Issue 5. We will also pass over Issue 6.
7 We'll pass over Issue 7, and by passing over these
8 issues, I'm passing over them with the idea that these
9 are issues that are linked to a determination of what
10 the effective term of other agreements might be, and we
11 may need to come back to that if any of the parties
12 think that these issues that I'm passing over, in fact,
13 are not related or should be dealt with at this point
14 in time, please let me know, and likewise, if I'm going
15 too fast and you want to think things over, likewise,
16 let me know.

17 Issue 8 would be passed over. Issues 9 and
18 10 relate to the ATG position that it should be
19 entitled to exercise pick and choose rights over
20 previously approved agreements, because when it made
21 its election, it was only allowed to pick and choose an
22 agreement in its entirety, so I still see these two
23 issues as being relevant and requiring resolution based
24 upon that argument by ATG. I'd like to hear both
25 parties' comments in response to that; Mr. Kopta?

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1 MR. KOPTA: At least with respect to Issue 9,
2 I think as a pure matter of law, the FCC rule did not,
3 once again, become effective until the Eighth Circuit
4 Order on remand. I believe we discussed this issue
5 somewhat in prior proceeding, and I don't know that
6 there is any disagreement on that, but obviously,
7 Ms. Anderl can correct me if I'm mistaken.

8 JUDGE BERG: My understanding in some prior
9 discussion was actually that Ms. Anderl was contending
10 that the rule would not be reinstated until ordered by
11 the Eighth Circuit, and, in fact, that was a discussion
12 that occurred prior to the 6/10/99 while the Nextlink
13 Petition was pending, and Nextlink was arguing that,
14 Well, in fact, the FCC had reinstated it, and the issue
15 was ripe for decision, and there was some implication,
16 at least in my mind, that, in fact, the rule was
17 reinstated on the basis of the Supreme Court decision
18 and not as a matter of the Eighth Circuit.

19 MS. ANDERL: That's what I remember Nextlink
20 arguing as well. I was surprised to hear Mr. Kopta say
21 June 10th, 1999, because I didn't think we had agreed
22 on that before, but we do now.

23 JUDGE BERG: That just goes to show that ATG
24 and U S West have a lot more in common than Nextlink
25 and U S West have in common.

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1 MS. ANDERL: Only the T in our names.

2 MR. KOPTA: To clarify somewhat, the position
3 in the earlier case was that as a technical, legal
4 matter, the Supreme Court left it up to the Eighth
5 Circuit to withdraw its prior decision, and the
6 position that Nextlink took at the time was that as a
7 practical matter, as opposed to a strictly legal
8 matter, it was a ministerial act by the Eighth Circuit
9 that that was not going to affect the substance of the
10 rule, and that under applicable precedent, once a rule
11 is reinstated, it is treated as though it were always
12 in effect.

13 JUDGE BERG: This is very interesting because
14 I can see the parties both reversing the field here,
15 because the issue under No. 10 is if, in fact, that
16 entitlement for parties who had previously opted into
17 an agreement in its entirety, if they should now be
18 allowed to exercise those pick and choose rights over
19 arrangements and other agreements that had previously
20 been approved, if there is only to be a reasonable
21 period of time within which those parties are to be
22 allowed to do so, what should the length of time be and
23 when do we start counting?

24 Now, I would expect U S West to look for the
25 earliest possible date to start counting and Nextlink

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1 to look for the most recent date to start counting, so
2 that's sort of the issue, so I'll let both parties
3 rethink the issue and reargue on what date should be
4 used as ground zero if the Commission were to adopt a
5 state requirement specifying a reasonable period of
6 time, and along with that in Issue No. 10 is the sort
7 of base issue as to whether or not such a requirement
8 would be not inconsistent with the Telecom Act and FCC
9 regulations, and we look at Section 261(c) of the
10 Telecom Act, additional state requirements, what it's
11 looking for is a test of whether or not the additional
12 state requirement is not inconsistent with the Act or
13 FCC regulations. It doesn't necessarily make reference
14 to FCC orders and other proceedings or, for that
15 matter, orders at all, and that sort of leads me back
16 to that point again when we look to the regulations, is
17 the state Commission also bound to look to the FCC's
18 interpretation of its regulations as expressed in its
19 orders. I'm not directing the parties to go there, but
20 its, again, one of those intellectual finer points that
21 seems to defy some kind of clear resolution.

22 Anything that the parties would like to
23 comment in response to me or on their own with regards
24 to 9 and 10?

25 MR. KOPTA: Only that I understand from our

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1 discussion that those are points that we should include
2 in additional briefing.

3 JUDGE BERG: Ms. Anderl?

4 MS. ANDERL: No, nothing further, other than
5 what we'll submit in written briefs.

6 JUDGE BERG: Thank you. Issues 11 and 12 go
7 towards the argument or the position as previously
8 discussed that ties into the Global NAPs order and
9 possibly other orders as to the interrelationship
10 between 252(i) and 252(e), and as the parties know, the
11 Commission has for some time required that opt-in
12 agreements be presented to the Commission for approval,
13 and the Commission is required that opt-in arrangements
14 as amendments also be presented to the Commission as if
15 a new agreement was being entered into.

16 The Commission in making that requirement has
17 never as a formal matter, to the best of my knowledge,
18 expressed the rationale or legal basis for requiring
19 parties to do so, or if it has, the basis has been that
20 the Commission regards joint requests for approval of
21 opt-ins under Section 252(i) to be the product of a
22 negotiated agreement the same way that negotiated terms
23 and conditions are the product of an agreement between
24 the parties.

25 Now, from more than one front, we have

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1 parties appearing before the Commission telling the
2 Commission that agreements that are established under
3 252(i) are not negotiated nor arbitrated. That's
4 reflected in comments filed by CLEC's in the 99055
5 proceeding as well as the position of U S West, and I
6 expect we'll see similar comments in the Commission's
7 rule making in UT-990391, initial comments being due on
8 December 3rd.

9 So, in considering that issue and
10 excepting -- assuming arguendo that that analysis is
11 correct, that being the relationship between 252(i) and
12 252(e), and that agreements under 252(i) are neither
13 negotiated nor arbitrated; therefore the arrangements
14 contained in agreements approved under 252(i) need not
15 be made available at the request of other carriers, we
16 get to Issue 11 and Issue 12, and Issue 11, bottom
17 line, is a state requirement that Section 252(i)
18 requests be submitted to the Commission for approval,
19 not inconsistent with the Act or FCC regulations, and I
20 would like the parties to brief that, and Issue 12 is
21 the next step. If, in fact, the state requirement that
22 those agreements be submitted for approval is not
23 inconsistent, there is a further state requirement that
24 arrangements approved in those agreements be made
25 available to other carriers also not inconsistent.

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1 Any comments or questions about those two
2 issues? Let me start with U S West this time.

3 MS. ANDERL: Thank you, Your Honor. With
4 regard to 11, I think I need to research to be able to
5 answer specifically the question of whether or not the
6 Commission requiring that they be submitted for
7 approval would be inconsistent with the Act or the FCC
8 regs. It occurs to me though that if the Commission
9 were simply to require that those agreements be
10 submitted to the Commission from an administrative
11 standpoint so that the Commission can kind of keep
12 track of and know from a local standpoint what was out
13 there, I think that would, at least in my mind, be
14 clearly permissible than the Commission saying they had
15 the right to approve those, given the pretty clear
16 language of 252(e).

17 JUDGE BERG: That's just the kind of thing I
18 would be looking to have developed, and when looking at
19 the orders that the Commission has entered when
20 approving those opt-in agreements, what you see is in
21 the findings of fact and conclusions of law are
22 standards that are consistent with the approval of
23 negotiated agreement under 252(e) to (a), which states
24 the grounds for rejection, so that if, in fact, it were
25 to turn out that the Commission did not have authority

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1 to -- whether or not the Commission has the authority
2 to approve those agreements also calls into issue
3 whether or not, in fact, the statement of that standard
4 in such an order approving is appropriate.

5 We've got to this place in time through sort
6 of a gradual evolution, and I think we're at a
7 crossroads where it's time to step back and question a
8 lot of the details and the way that things are framed
9 up and presented and done, and this is all part of that
10 process. I think, Mr. Kopta, insofar as you seem to
11 attract those ground-breaking clients, I'll just state
12 that I remain committed to providing an expedited
13 resolution to the issues in this case, but I think at
14 this point in time, it would be difficult to grant ATG
15 relief without, at least, considering these issues or
16 having some kind of a briefing by the parties.

17 MR. KOPTA: I appreciate that, Your Honor;
18 although I would query whether this is not the kind of
19 issue that should be dealt with a little bit more
20 broadly than in this particular proceeding, at least
21 Issue 11. And certainly it is not ATG's intent to
22 challenge the Commission's authority to require
23 approval of agreements that are entered into under
24 252(i). I'm not sure, unless the intent is to circle
25 back and again grapple with the issue of are opted-in

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1 agreements available, it seems somewhat tangential, and
2 I would hesitate to spend a lot of time and effort
3 dealing with an issue that really hasn't been raised
4 and is one that would be a more global interest and
5 proper resolution than in this more limited proceeding.

6 JUDGE BERG: With regards to Issue 11, Issue
7 11 is one that bears directly upon this proceeding
8 because ATG would be making an election under 252(i)
9 that the Commission would be, at least, tentatively
10 requiring the parties to file request for approval, so
11 I think a response to 11 is appropriate, but with
12 regards to 12, we'll put 12 on hold. Ms. Anderl?

13 MS. ANDERL: Your Honor, it seems to me
14 though that 12 is the only place that tees up the issue
15 of if you can opt in to an opt-in, and that's squarely
16 an issue if the only way to get ATG what they want is
17 to let them have Televerse or something else --

18 JUDGE BERG: But what I understand is that at
19 this point in time, ATG is not requesting the
20 arrangement out of Level 3 or Televerse at this point
21 in time. ATG is hanging its hat on getting the
22 arrangement out of the MFS Agreement, and it's only in
23 the event that the MFS arrangement is not available but
24 that the same arrangement and some other agreement
25 might be do we get to a point where ATG is seeking to

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1 actually request the arrangement from another opt-in
2 agreement.

3 ATG is pointing to Televerse and Nextlink in
4 support of its argument that it would be discriminatory
5 for it not to receive the same arrangement, but at this
6 point in time, they are not requesting the arrangement
7 from any agreement other than MFS; is that correct,
8 Mr. Kopta?

9 MR. KOPTA: That's the way the petition is
10 styled at the moment, as I explained earlier. It's
11 ATG's position that they should be able to obtain those
12 provisions, whether out of the MFS Agreement or another
13 agreement. In fact, I would say that Issue 12 would be
14 at least closer to relevant as raised in this
15 particular proceeding than 11, unless one party or the
16 other is going to challenge the Commission's legal
17 authority to require that these agreements be submitted
18 for approval.

19 The fact is that the Commission has required
20 them to be submitted. I don't know that anyone has
21 challenged that. It may be that they have and I'm
22 simply not aware of it. It's certainly not ATG's
23 intention to challenge that, nor is it their intention
24 to challenge any requirement that if it is granted the
25 relief it has requested that that agreement be

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1 submitted as revised to the Commission for approval.

2 JUDGE BERG: Let me respond in reverse order.

3 First of all, I consider implicit in U S West's
4 position regarding the relationship between 252(i) and
5 252(e) that the Commission does not have authority to
6 approve agreements, but as Ms. Anderl indicated, that's
7 something that she wants to brief, and she ventured
8 that it might be U S West's position that the
9 Commission has the right to require parties to submit
10 those agreements but does not have the authority to
11 actually approve them, so it's something that is very
12 much on the table, I think, in this proceeding.

13 With regards to the other representation that
14 ATG says it feels entitled to the MFS arrangement
15 without any of the agreements, it seems to me that
16 that's all based upon the position that the termination
17 date in the MFS Agreement is ambiguous or unambiguous
18 and remains effective in a way that the termination
19 date is a losery or otherwise would set up that MFS
20 arrangement such that it is still available, but if
21 that argument is to prevail with regards to Televerse
22 or Level 3, it's also going to prevail with regards to
23 MFS. I understand there are other arguments, such as
24 the discrimination issue.

25 JUDGE BERG: Off the record for a moment.

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1 (Discussion off the record.)

2 JUDGE BERG: We'll be back on the record. So
3 my concern here, Mr. Kopta, is you are saying that the
4 termination date of these other agreements are not an
5 issue but they are an issue.

6 MR. KOPTA: I understand what you are saying,
7 and I think the other concern that we have is trying to
8 address all of the issues some in one fell swoop and
9 not do it in series, so to the extent it's implicit in
10 U S West's position that the Commission doesn't have
11 authority to require agreements developed as a result
12 of Section 252(i), then I don't have any problem with
13 including that in an overall discussion of whether
14 opt-in agreements may be available for further opting
15 in because I do think that that issue is one that needs
16 to be resolved, and while it may be one that in the
17 decision-making process either you or the Commission
18 doesn't get to, I would rather see it developed at this
19 point so that all the information can be presented at
20 one time to you for determination as opposed to a
21 series of determinations of, We'll brief these issues,
22 and if the decision is X, then we don't need to go any
23 further, but if the decision is Y, then we need to go
24 on to another set of issues. That's really my primary
25 concern.

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1 JUDGE BERG: I think we're going to have to
2 go there, but I'm not going to let any time flow under
3 the bridge. It's still my target to take care of this
4 petition as expediently as possible. I will go ahead
5 and ask that both parties brief 11 and 12 with the
6 understanding that that doesn't necessarily mean that
7 you will be getting a decision on those issues in this
8 proceeding, but I think it will provide some other
9 perspective that will be valuable in addressing
10 whatever issues are resolved.

11 Mr. Kopta, what we have here is sort of a --
12 I think of the house that I spent most of my life
13 growing up in, and it was what was called "split
14 level." It was on a slight grade, so there was really
15 no single house of cards, but there was a basement on
16 one level and then stairs came halfway up to a garage,
17 which came halfway up to a kitchen and living room
18 which went halfway upstairs to a room over the garage,
19 which then went halfway up the stairs to bedrooms over
20 the living room and dining room area, and I feel we
21 have that same situation here. I have several houses
22 of cards that are set up as a result of this petition
23 and the guidelines that the Commission has adopted, and
24 I'm finding it very difficult to discreetly say, Well,
25 let's just deal with that house of cards and see where

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1 they fall and then we'll deal with this house of cards.
2 If we were to take care of this in one fell swoop, I
3 think it would require addressing the issue of
4 termination dates for those agreements, which I would
5 prefer to stay away from if I can get to that point.

6 In the course of presiding over these Telecom
7 Act proceedings is that they seem to be as much an
8 issue of policy as they do of law, and I'm trying very
9 much to retain my credibility as a lawyer and a judge
10 and to try and structure things so that they come up in
11 a way that makes sense as a matter of law.

12 JUDGE BERG: Off the record.

13 (Discussion off the record.)

14 JUDGE BERG: We'll be back on the record. In
15 looking at Issue 13, Issue 13 was the one issue that
16 was clearly raised by the parties, by ATG that I found
17 the most troubling because it did appear to be a
18 factual dispute. It seemed to me that in all those
19 other cases where we've made decisions that one party
20 or the other was entitled to a tandem rate, there was
21 some sort of a record of what the network configuration
22 was, and I haven't looked at the underlying ATG/U S
23 West Agreement to see if there was anything in that
24 agreement that could be interpreted as a conclusion and
25 fact that the ATG network would qualify for a tandem

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1 rate, but otherwise, I don't know anything about the
2 ATG network.

3 MR. KOPTA: The provision right now in the
4 agreement does not characterize the network one way or
5 the other. It simply references compensation at the
6 end-office rate. In light of the Ninth Circuit's
7 decision in the MFS appeal, it certainly is our belief
8 that this shouldn't be a disputed issue but that maybe
9 U S West does dispute it, in which case we could
10 certainly provide an affidavit from the Company that
11 describes its network as network coverage and what its
12 switch does. I suspect you would find it remarkably
13 similar to evidence presented by other facilities-based
14 CLEC's, but if that's something we need for a complete
15 record, we would certainly be happy to provide that.

16 JUDGE BERG: Ms. Anderl, the lines that the
17 Commission have drawn over this issue are probably not
18 going to shift much in terms of looking at the type of
19 sonic ring network configurations that the Commission
20 has found constituting some functional equivalent of a
21 hub and spoke network, and the fact that, for example,
22 the AT&T wireless network and the Airtouch paging
23 network were considered outside that parameter, I
24 really don't expect that's going to change too much
25 with regards to ATG.

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1 Does U S West have a position on whether or
2 not ATG would be entitled to a tandem termination rate
3 if it were to receive the MFS arrangement? Is this an
4 issue that, in fact, requires some additional factual
5 development, and if so, how do we get there?

6 MS. ANDERL: May I have just a moment?

7 JUDGE BERG: Yes. Let's take a five-minute
8 break.

9 (Recess.)

10 JUDGE BERG: We'll be back on the record. I
11 believe when we went off the record, there was some
12 discussion pending regarding the configuration of ATG's
13 network and whether U S West would dispute its
14 entitlement to obtain a termination rate in the event
15 that ATG is entitled to the MFS arrangement as it's
16 understood; Ms. Anderl?

17 MS. ANDERL: I tried to get Mr. Kopta to
18 agree that 15 and 17 are no longer issues if gave on
19 Issue 14. I think our conclusion is that consistent
20 with our position that if you are going to opt in to a
21 piece of an interconnection agreement, you have to opt
22 in to kind of all the related terms and conditions and
23 that that would include the entire interconnection
24 section in MFS, which includes the tandem rate. We are
25 not going to dispute Issue 14 for this proceeding.

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1 JUDGE BERG: You mean Issue 13?

2 MS. ANDERL: Sorry, 13.

3 JUDGE BERG: It's understood that that's all
4 contingent on whether or not ATG is entitled to the
5 arrangement?

6 MS. ANDERL: Right.

7 JUDGE BERG: With regards to Issue 14, I feel
8 I understand the positions of the parties as presented
9 in both Exhibit A and Exhibit B to ATG's petition.
10 It's even possible that the Commission has resolved
11 this issue in other proceedings. I'm thinking in
12 particular of -- I think we had some variation of this
13 issue in the Airtouch, although I don't know that it
14 was based on a 252(i) request.

15 If the parties choose to respond further to
16 Issue 14, that's certainly acceptable, but I think that
17 it's a pretty clear-cut position, as I understand it.
18 From Exhibit A, Page 1 to 2 and Exhibit B, if you look
19 at those documents and decide that, in fact, the
20 party's position is more involved than is simply set
21 forth in those documents, then go ahead and expand on
22 that. Otherwise, I think that that certainly is
23 sufficient to address the issue. Likewise, with
24 regards to Issue 15, I'll just remind the parties that
25 this was a list of potential issues requiring

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1 resolution, not necessarily potential issues requiring
2 further briefing. I believe I have sufficient
3 arguments from the parties to address Issue 15, but if
4 either party felt it necessary to present additional
5 arguments, I would request that they inform me so
6 before submitting those additional arguments.

7 MR. KOPTA: We don't see any reason to
8 include any additional discussion on that issue.

9 MS. ANDERL: Neither do we.

10 JUDGE BERG: Likewise, with regards to Issue
11 16, I think the position of the parties as presented in
12 their pleadings was sufficiently clear to address the
13 issue, but again -- you don't need to speak up -- if
14 either party feels it necessary to submit additional
15 briefings, this would be a good time to say so.

16 MR. KOPTA: I think we have said what we want
17 to say on that issue.

18 MS. ANDERL: And so have we.

19 JUDGE BERG: And the same goes for Issue 17.

20 MR. KOPTA: Same response.

21 MS. ANDERL: Yes. Your Honor, one kind of
22 little interesting thing that came up and probably just
23 occurred to me that we might want to discuss in our
24 briefs that I just thought I'd mention now is kind of
25 this issue of -- even if assuming the Commission

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1 doesn't have authority to require 252(i) agreements or
2 arrangements to be submitted for approval, how does
3 that play against amending an existing agreement that
4 the Commission approved with the express condition that
5 amendments to that agreement be submitted for approval,
6 which is kind of an issue in Nextlink of what the
7 effective date of the amendment was and is kind of
8 maybe just a little bit of an interesting twist on the
9 whole 252(i), 252(e) Commission approval issue. We may
10 want to develop a little bit more fully.

11 JUDGE BERG: Can that be addressed as part of
12 the response to Issue 11?

13 MS. ANDERL: Yes, I think so.

14 JUDGE BERG: I think that's a good point to
15 make. Again, the fact that that has not been
16 challenged to date has led to the perpetuation of that
17 ordering provision, and it may be something that the
18 Commission wants to further address using this
19 proceeding as a vehicle, and it may be directly
20 relevant and require resolution as well.

21 Are there any other issues that the parties
22 feel should be identified and presented? If other
23 issues occur, we'll deal with them at a later time.

24 MR. KOPTA: Let me ask one thing at this
25 point. We had reserved Issues 5 through 8, and I would

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1 like some clarification on what you contemplate as
2 whether those issues are things that need to be
3 addressed in our additional comments or how they are to
4 be dealt with or what exactly is the status?

5 JUDGE BERG: Based upon the discussions we've
6 had here, I see all of the issues that have been teed
7 up for additional briefings to more or less be
8 threshold issues; that is, based upon the issues that
9 are being briefed, it is possible that based upon the
10 outcome that it will be unnecessary to consider the
11 issues in 5 through 8, but that it would be my
12 expectation -- and now I'm kind of making it up as I
13 go. It would be my expectation that after having an
14 opportunity to consider the arguments presented in
15 briefs, I consider it necessary to have the parties
16 state their positions with regards to 5 through 8. I
17 will notify the parties.

18 One of the procedural sticking points that
19 developed in the Nextlink Agreement was the
20 ramifications of making substantive determinations on a
21 partial basis as opposed to reserving all substantive
22 determinations to be presented at one time, and it
23 didn't appear that, number one, that the rule provided
24 for that process, and in triggering other requirements
25 under the rule, such as presentation of a report and

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1 Commission review, it created as many problems as it
2 attempted to resolve, so I think that the way we are
3 going to have to proceed is that if I'm not convinced
4 by the arguments of the parties of an outcome that
5 resolves all issues, then I'm going to have to notify
6 the parties either through a notice of another
7 prehearing conference, most likely, or some other
8 means, that, in fact, arguments on these other issues
9 are necessary in order to render a final decision, but
10 I would not make any substantive findings related to
11 Issues 5 through 8 without giving the parties notice
12 and some opportunity to take whatever action they deem
13 necessary, including the filing of further arguments
14 and briefs.

15 MR. KOPTA: Fair enough.

16 JUDGE BERG: Let's go off the record.

17 (Discussion off the record.)

18 JUDGE BERG: We'll be back on the record. An
19 off-the-record discussion ensued between the parties
20 regarding scheduling for filing briefs in this matter.
21 The following dates have been established: Briefs are
22 due on 12/17. If the parties determine prior to that
23 date that they need additional time, the cutoff for
24 request for extension shall be 12/14, and any extension
25 would only be until 12/20. By providing for a request

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1 for extension cutoff date and a limitation on the
2 extension that would be considered is not intended to
3 convey to the parties that such a request would
4 necessarily be granted. As in all instances, if there
5 is no objection by opposing counsel or if there is a
6 joint request, it will be more likely to be approved by
7 the Commission. If after reviewing opposing party's
8 brief, counsel determines that they desire to request
9 an opportunity to file a response, such requests must
10 be made no later than 12/21, and both counsel shall be
11 available for a teleconference on 12/22 if necessary.

12 JUDGE BERG: Off the record.

13 (Discussion off the record.)

14 JUDGE BERG: Back on the record. Parties
15 shall be entitled to both file with the Commission and
16 serve on opposing party their briefs by facsimile
17 transmission so long as a paper copy of the pleading is
18 delivered to the Commission and to counsel on the next
19 business day. Anything else that the parties can think
20 of that needs to be addressed before we adjourn?
21 Hearing nothing at this time, we are adjourned.

22 (Prehearing conference concluded at 3:50 p.m.)

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