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BEFORE THE WASHINGTON UTILITIES AND

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TRANSPORTATION COMMISSION

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4 In the Matter of the Complaint) Docket No. UT-991292
and Request for Expedited) Volume IV
5 Treatment of AT&T) Pages 137 - 158
Communications of the Pacific)
6 Northwest, Inc. Against US)
WEST COMMUNICATIONS, INC.)
7 Regarding Provisioning of)
Access Services.)
8 _____)

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A hearing in the above matter was

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held on December 2, 1999, at 8:42 a.m., at 1300

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Evergreen Park Drive Southwest, Olympia, Washington,

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before Administrative Law Judge C. ROBERT WALLIS.

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The parties were present as

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follows:

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AT&T, by Letty S.D. Friesen,
Attorney at Law, 1875 Lawrence Street, Suite 1575,
17 Denver, Colorado, 80202.

18

US WEST COMMUNICATIONS, INC., by
Lisa A. Anderl, Attorney at Law, 1600 Seventh Avenue,
19 Room 3206, Seattle, Washington 98191.

20

THE COMMISSION, by Shannon Smith,
Assistant Attorney General, 1400 Evergreen Park
21 Drive, S.W., P.O. Box 40128, Olympia, Washington
98504-0128.

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Barbara L. Spurbeck, CSR
Court Reporter

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1 JUDGE WALLIS: Let's be on the record,
2 please. This is a prehearing conference in the
3 matter of Commission Docket UT-991292, which is a
4 complaint filed by AT&T Communications of the Pacific
5 Northwest, Inc. against US West Communications, Inc.
6 This conference has been scheduled pursuant to due
7 and proper notice to all interested persons.

8 Let us begin this December 2, 1999 session
9 at Olympia, Washington, by having the participants
10 introduce themselves. I'm going to begin with the
11 Complainant, and because the representative for the
12 Complainant has not been with us before, I'm going to
13 ask her to state and spell her name for the record
14 and also to state her business address and pertinent
15 numbers, if you would, please.

16 MS. FRIESEN: Good morning, Your Honor. My
17 name is Letty Friesen, L-e-t-t-y F-r-i-e-s-e-n, and
18 I'm here today on behalf of AT&T Communications of
19 the Pacific Northwest. I will be replacing Mary
20 Tribby in this proceeding, as she's about to give
21 birth. My address is 1875 Lawrence Street, that's in
22 Denver, Colorado. My zip code is 80202. My
23 telephone number is area code 303-298-6475, and my
24 fax number is 303-298-6301. Anything else?

25 JUDGE WALLIS: How about an e-mail address?

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1 MS. FRIESEN: My e-mail address is
2 lsfriesen@att.com.

3 JUDGE WALLIS: All right, thank you very
4 much. The Respondent.

5 MS. ANDERL: Thank you, Your Honor. Lisa
6 Anderl, representing US West Communications, Inc.
7 All of my previous contact information remains the
8 same.

9 MS. SMITH: Shannon Smith, representing
10 Commission Staff.

11 JUDGE WALLIS: All right. We have talked a
12 little bit about the tasks that we have to look to
13 today, probably the principal of those is scheduling.
14 There is a question regarding the effect of the
15 protective order and its application or protective
16 elements in prior Commission orders, questions
17 regarding process having to do with the latest
18 Commission order.

19 And in addition, a matter in a recent AT&T
20 pleading leads me to make a statement for the record.
21 In its petition for reconsideration or clarification
22 of the most recent order, AT&T, in a footnote, has
23 stated that I gave Mrs. Tribby advice.

24 Now, by definition -- by any definition I
25 am aware of, giving advice constitutes a violation of

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1 ex parte rules and basic rules of fairness. And
2 because the question has arisen, I believe that I'm
3 required, by RCW 34.05.455, to place a response to
4 the allegation on the record. I am conscious of ex
5 parte concerns. The APA is specific in authorizing
6 conversations of the sort that are necessary for the
7 administration of hearings. It is not and has not
8 been my intention to go beyond that in any
9 conversation.

10 I want to make it absolutely clear what my
11 understanding of the law is, the parameters under
12 which I may properly operate, so that I do not
13 mislead any of the participants into believing that I
14 am giving them advice.

15 Ms. Tribby cites to -- and hers is the
16 signature on the pleading -- cites to a telephone
17 conversation, and she and I did speak. I do not
18 recall verbatim the nature of the conversation. It
19 is my practice, when people call with procedural
20 questions -- and this did relate to a question of
21 procedure, that is, the filing of a potential motion
22 to compel production of discovery information -- my
23 practice is to ask questions and let counsel come to
24 their own conclusions as a result of those questions.

25 If I departed from that practice, and I do

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1 not remember that I did, it certainly is a signal to
2 me that I need to be more careful. And I do want to
3 thank AT&T for bringing this to our attention.
4 Professionalism is a matter of concern. I believe
5 that all parties need to be able to rely on the
6 integrity of the people who are involved in the
7 system and to be assured that those people are not
8 violating any trust, whether legally required or not.

9 AT&T employs very capable, highly
10 professional counsel, and I am not paid to advise
11 them. I will not advise them and I will not advise
12 any party to the proceeding. I am paid to deal with
13 the procedural aspects of the proceeding, and I do
14 that to the best of my ability and to the best of the
15 fairness standards that I am able to comply with.

16 I did also receive a telephone call from
17 Ms. Tribby on Monday, November 29, asking for an
18 interpretation of a recent order. In light of the
19 allegation in AT&T's complaint, I did not respond
20 personally to that and I did ask that the message be
21 transcribed, and I have copies for the participants.

22 I am not asking for a response to any of
23 this today. The procedure for responding is set out
24 in RCW 34.05.455, and I think that concludes my
25 comments, except for, number one, emphasizing that

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1 neither I, nor any other Commission employee, are
2 empowered to advise parties, that I attempt to be
3 conscious of the need to avoid giving the impression
4 that I am giving advice, and again to thank AT&T for
5 voicing this concern so that we can all be aware of
6 the potential as to those proceedings.

7 All right. Let's move on to -- I think,
8 probably in light of our earlier discussions, if we
9 jump right into scheduling, that might be the most
10 efficient way to proceed. And I believe that Ms.
11 Friesen has some comments as to scheduling. Ms.
12 Friesen.

13 MS. FRIESEN: I do. Thank you, Your Honor.
14 As I'm sure you're aware, AT&T is between a rock and
15 a hard place. We need to meet the needs of our
16 customers here in Washington by getting this heard in
17 an expedited manner, but we also need due process.
18 That is, we need to obtain sufficient discovery. So
19 you recognize the position that we're in.

20 While we did ask not to have to choose
21 between those two, we recognize the position that
22 that puts you and the Commission in. Therefore, AT&T
23 proposes the following. We cannot meet the proposed
24 schedule in the Fifth Supplemental Order, because I
25 don't have witnesses that are available on December

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1 3rd for hearing -- or January 3rd, excuse me, for
2 hearing. Those witnesses are key to my case.
3 Charlotte Field, for example, is not available.

4 So what I would propose is I will give you
5 some dates that I've checked with my clients and my
6 witnesses, and I think that Mary Tribby may have
7 talked to US West Counsel about some of these dates,
8 but I'll give you a scope of dates and perhaps we
9 could pick a hearing out of those dates and then work
10 backwards on the procedural schedule from there.

11 Having done that, what I would then propose
12 is, with respect to discovery, we would follow what
13 is outlined in the Fourth Supplemental Order in terms
14 of allowing a hearing later out and US West would
15 produce the discovery in accordance with what is
16 required herein and we would figure out the timing
17 based on when the hearing falls. If that meets with
18 your approval, I'll proceed to give you the dates.

19 JUDGE WALLIS: Very well. Let me ask if,
20 in fact, Counsel for US West is aware of the request
21 and has communicated with Ms. Tribby?

22 MS. ANDERL: Yes and no. Ms. Tribby and I
23 spoke yesterday. One of the things we both agreed
24 upon was that neither one of us had any witnesses
25 available during the week of January 3rd, so I

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1 certainly knew some of this. We didn't discuss
2 specific proposed hearing dates. We did discuss
3 generally -- for example, I said, Well, I believe the
4 Commissioners are available, if they want to preside
5 on this, during the week of January 18th, because
6 they'd previously been scheduled to hear the merger
7 that week, and now they're not. I also suggested the
8 week of March 13th as a week that Judge Moss had
9 proposed as being available for the Commissioners to
10 hear the merger, which is not a week that we
11 selected, but again leads me to believe their
12 calendars are open then.

13 Beyond that, we didn't get anywhere, and I
14 have honestly not been able to communicate with all
15 of my witnesses about this. One of them was in Salt
16 Lake Monday through Wednesday this week. The other
17 one was in Minnesota. Both of them were attending
18 workshops or hearings, so we've only been just kind
19 of exchanging voicemails, and I would have to firm
20 things up with them.

21 JUDGE WALLIS: Ms. Smith.

22 MS. SMITH: I don't have any comment on
23 scheduling.

24 JUDGE WALLIS: Let me ask if, at this
25 point, Commission Staff is planning to present a case

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1 in this proceeding?

2 MS. SMITH: Commission Staff is not
3 planning to present a case in this proceeding. We're
4 not going to have a witness in this case. However,
5 Staff does reserve the right to brief this issue
6 following the hearing that we have.

7 JUDGE WALLIS: Are you intending to
8 cross-examine witnesses?

9 MS. SMITH: Probably.

10 JUDGE WALLIS: I'm going to suggest that,
11 with that introduction, we can go off the record and
12 engage in some informal discussions without burdening
13 the record. When we return to the record, one of us
14 -- I, if my memory serves me, or a designee, if it
15 does not -- will summarize those discussions and
16 every representative will have the opportunity to
17 amplify, comment, correct, and so on. So with that,
18 let's be off the record.

19 (Discussion off the record.)

20 JUDGE WALLIS: Let's be back on the record,
21 please, following a discussion regarding scheduling
22 and other matters. Let's address scheduling first.
23 As to scheduling, we are now considering two
24 potential dates for the hearing. Based on the
25 parties' availability and the Commission calendar,

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1 we're looking at scheduling the hearing in the period
2 January 19 to 21 or, in the alternative, the week of
3 March 27, and I believe we were looking at the
4 Tuesday, Wednesday, Thursday of that week.

5 MS. SMITH: I also believe, Your Honor,
6 that Friday was asked to be held open in case there
7 was some --

8 JUDGE WALLIS: Yes, and Friday. Thank you
9 for reminding me. Friday would be held open, as
10 well, because of the open Commission meeting on
11 Wednesday of that week, to assure that we have
12 sufficient time. We will not know until likely later
13 today which of those dates will ultimately work for
14 everyone, and I am going to ask that parties advise
15 us as soon as you know whether, in fact, the January
16 dates will work. I think we're agreed that the March
17 dates will work.

18 MS. FRIESEN: May I state for the record
19 that AT&T's witnesses are available on the January
20 dates.

21 JUDGE WALLIS: Yes.

22 MS. FRIESEN: Okay.

23 JUDGE WALLIS: And there's a question only
24 as to one of the US West witnesses.

25 MS. ANDERL: That's right, Your Honor,

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1 although I'm going to call them all and double check.
2 JUDGE WALLIS: Okay. Very well. If we do
3 schedule a hearing for January 19th, then we have
4 agreed that there will be a single rebuttal filing,
5 which AT&T will make on December 17th. There is a
6 slight caveat to that, and that is that if some
7 discovery from US -- discovery responses from US West
8 are not available on the scheduled date and if the
9 delay in receiving those responses means that they
10 cannot be incorporated in the December 17th filing,
11 then AT&T may file a supplemental rebuttal response
12 no later than January 3rd.

13 If the hearing is scheduled for January
14 19th, we will have a prehearing conference on January
15 14th. And the purpose of the conference will be to
16 consider the order of witnesses, the numbering of
17 exhibits, and any procedural matters that the parties
18 may raise.

19 If the parties are intending to file a
20 motion that could affect the course of the
21 proceeding, I would ask that any such motion be filed
22 at least one week prior to January 14th, which will
23 probably be January 7th.

24 Now, the alternate dates, that is, the 28th
25 through the 31st of March, would call for a single

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1 rebuttal filing that would be due on February 22 of
2 the year 2000. We will hold our prehearing
3 conference on March 21, and again, any motion
4 affecting the course of the hearing must be filed no
5 later than one week before, which would be March
6 14th. Does anyone have any further comments relating
7 to scheduling?

8 The parties had agreed that if we do have a
9 January 19 hearing, that materials will be provided
10 to each other on the date filed with the Commission,
11 and that if we have the March hearing date, that at
12 least the rebuttal testimony need not be provided on
13 the date filed, so long as it is served on that date.

14 Let's move next to the questions relating
15 to the most recent Commission order and the petition
16 that AT&T filed. AT&T has agreed that it appears to
17 be moot in light of the agreements of the parties
18 today, and that their petition may be considered
19 withdrawn; is that correct?

20 MS. FRIESEN: That's correct, Your Honor.

21 JUDGE WALLIS: The next matter we have to
22 attend to is the protective order. The Commission,
23 in its discovery-related orders in this docket, has
24 directed that the parties use a super-protective
25 process that would provide additional protections

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1 beyond those of the customary and presently effective
2 general protective order to information provided by
3 US West.

4 The order -- orders directed that the
5 information be provided to AT&T's attorney, but that
6 the information might not be disclosed to any AT&T
7 employee, that meaning any other employee than an
8 attorney working on this docket.

9 In the meantime, the Commission, in Docket
10 UT-991358, has entered a protective order
11 supplementing the original protective order which
12 addresses a similar set of circumstances and provides
13 specifically for access by a consultant and provides
14 additional restrictions upon the consultant's use of
15 the information.

16 I had brought that to the parties'
17 attention and have offered it as a means to clarify
18 the Commission's discovery orders in this docket and
19 to provide a specific process by which the
20 super-protective protection may be afforded to US
21 West's information.

22 My understanding, based on the discussions,
23 is that AT&T is amenable to adopting similar
24 provisions in this docket, but that US West has
25 reservations about that and wishes to state those on

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1 the record. First of all, Ms. Friesen, is that
2 correct as to AT&T?

3 MS. FRIESEN: That is correct. May I make
4 one clarification? This document, as I read it, does
5 refer to designated outside counsel. For the record,
6 I'd like to clarify that there are no outside counsel
7 in this particular proceeding, and that the outside
8 -- the term outside counsel should be substituted --
9 in-house counsel should be substituted for outside
10 counsel.

11 JUDGE WALLIS: Yes. Ms. Anderl.

12 MS. ANDERL: Thank you, Your Honor. We
13 think both the Commission's order in this docket and
14 the Commission's order in the merger docket are
15 reasonable responses under the circumstances. And
16 while they're not exactly the same response to the
17 highly confidential data, I think they fit what is
18 demanded in each case.

19 In the merger docket, the synergies
20 documents are ones which are perhaps more susceptible
21 of a need for analysis by an outside consultant in
22 order that there be meaningful contribution to the
23 hearing process and in order that that discovery have
24 value to those parties, and I would imagine that that
25 is why the judge ordered it the way he did in that

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1 docket.

2 The highly confidential documents in this
3 docket are quite different from that data. They
4 contain trunking information, US West-specific
5 network proprietary data with regard to forecasting
6 and other things. Some of them are technical; some
7 of them are not. An in-house attorney who practices
8 in the telecommunications arena, in my view, should
9 find them useful for purposes of cross. Would not,
10 in fact, under the terms of the AT&T protective
11 order, be permitted to have their own witness sponsor
12 them, but could, in fact, have them useful during
13 cross-examination of US West's witnesses and even
14 potentially admitted as exhibits during that
15 cross-examination.

16 So I think that the use afforded to AT&T
17 under the current terms of the protective order in
18 this docket is meaningful and appropriate to the
19 nature of the documents that are being produced, and
20 we would suggest that no change to the protective
21 order is necessary.

22 MS. FRIESEN: May I respond? To clarify
23 the record, I believe Ms. Anderl would allow only me
24 to see what she or US West designates as highly
25 confidential information, and while I have been a

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1 telecommunications lawyer for some time, I am not
2 necessarily qualified to look at the kind of
3 information she has just suggested as coming through
4 in confidence, in confidential documents.

5 I might also point out that her request is
6 not supported in law or logic, and therefore, I think
7 it has to be rejected out of hand, because it
8 violates my client's due process right. In discovery
9 -- the point behind discovery is to seek the truth
10 and bring forth all issues that are to be litigated.
11 I cannot do that merely on cross, nor should US West
12 be allowed to circumscribe my case and limit me to
13 cross-examination, particularly when their witnesses
14 are quite capable of denying any knowledge about any
15 of the documents that she may designate as highly
16 confidential, thereby completely eviscerating my
17 ability to use any of those documents should they be
18 useful in my case.

19 So I would say that because neither law nor
20 logic supports their position, I would ask that you
21 reject US West's position; that you allow AT&T, in
22 fact, to have inside counsel and the outside
23 consultant witness look at the documentation such
24 that it can be employed in any way that AT&T deems
25 fit for its case.

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1 JUDGE WALLIS: Ms. Smith, do you have any
2 comments for the record?

3 MS. SMITH: No, we don't have comments for
4 the record, although I would note that both the
5 protective order in this case, I believe, and the
6 protective order in the Qwest case would permit
7 Commission Staff to look at the information that's
8 submitted under -- so long as that Commission Staff
9 person has signed a protective agreement in this
10 case.

11 JUDGE WALLIS: Is that correct?

12 MS. ANDERL: In our view, we wouldn't
13 object to that interpretation. I don't know that it
14 was clear in this case, because the dispute was
15 really between US West and AT&T, but we don't have
16 the same competitive concerns with Staff attorneys or
17 Staff witnesses looking at the documents as we do
18 with a party, so that's fine.

19 MS. SMITH: Then if it's not clear from the
20 protective order in this agreement, I would like it
21 to be made clear on the record that Commission Staff
22 may review any and all documents that come in under
23 the super-protective agreement, so long as that Staff
24 member has signed a confidentiality agreement in this
25 case.

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1 JUDGE WALLIS: And of course, US West has
2 the opportunity to object in the normal fashion.

3 MS. SMITH: Certainly.

4 JUDGE WALLIS: Yes.

5 MS. ANDERL: That's fine with us.

6 JUDGE WALLIS: Very well. Ms. Anderl, do
7 you have a response to Ms. Friesen?

8 MS. ANDERL: No, Your Honor.

9 JUDGE WALLIS: Very well. Considering the
10 nature of the information and the status of this
11 docket, I believe that it is important for AT&T to
12 have access beyond access by its attorney to these
13 documents, and I will, in the prehearing conference
14 order, so rule. It is also understood that any
15 expert desiring to have access to the documents would
16 be required to sign an appropriate confidentiality
17 agreement and submit that, and US West would have the
18 opportunity to file any objection to that.

19 MS. ANDERL: Thank you, Your Honor. If I
20 might ask Counsel for AT&T if she would provide me
21 with a curriculum vitae or resume of any of the
22 experts she intends to produce these documents to or
23 wishes to produce these documents to, I could review
24 that in advance. It would give me a head start on
25 knowing whether I would object or not, and maybe

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1 streamline the process of allowing her to timely give
2 those documents to her expert.

3 MS. FRIESEN: I certainly can give you a
4 CV. Can I ask one other question for the record,
5 just a point of clarification?

6 JUDGE WALLIS: Ms. Friesen.

7 MS. FRIESEN: I assume that this
8 super-protective order is a two-way street. That is
9 to say, I assume that if AT&T perceives that it has
10 to turn something that's highly confidential over to
11 US West or US West should ask for it in the
12 intervening discovery time period, that we too could
13 seek the same protections allowed to US West under
14 this?

15 MS. ANDERL: Your Honor, I understood that
16 discovery was closed in this docket and there would
17 be no further document production other than what we
18 still owe to AT&T under the Commission's prior
19 orders, so I don't know that the point is moot.

20 MS. FRIESEN: We have -- may I ask --
21 deposition? Did you want to take any more
22 depositions?

23 MS. ANDERL: Of Mr. Wilson.

24 MS. FRIESEN: Then are you going to expect
25 him to produce anything during his depositions?

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1 MS. ANDERL: It wasn't my expectation to
2 issue anything other than subpoena for the attendance
3 of the witness, not a subpoena duces tecum.

4 MS. FRIESEN: Okay.

5 JUDGE WALLIS: If, in the unlikely event
6 that anything does arise, I would ask Counsel to, if
7 you wish super-protective status, to apply for it.
8 And given the background of the proceeding, I would
9 expect that the Commission would be able to respond
10 to that quickly.

11 MS. FRIESEN: Okay.

12 JUDGE WALLIS: Is there anything further to
13 come before the Commission? Any party have any other
14 matters you would like to address or anything on the
15 record so far that you would like to correct or
16 supplement?

17 MS. ANDERL: Your Honor, just the matter of
18 the correspondence between myself and Ms. Tribby that
19 had been copied to the Commission. It is my intent
20 to respond to Ms. Tribby's most recent November 29th
21 letter. Whether I do that orally or in writing, I
22 haven't determined yet. I will -- I already have
23 spoken to Ms. Tribby about the subjects contained in
24 the letter, and it is my intent to discontinue the
25 practice of copying the Commission on this

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1 correspondence, but I wanted it clear on the record
2 that there was not a kind of unresponded-to letter
3 hanging out there, if that's acceptable to Your
4 Honor.

5 JUDGE WALLIS: From the Commission's
6 standpoint, it is very acceptable. The documents are
7 not part of the record that the Commission would
8 consider in this docket, and it would actually suit
9 the Commission's purposes better to have parties not
10 submit those unless they are relevant to a pleading
11 or to an evidentiary matter and are required for the
12 Commission to consider in making a decision. So to
13 summarize, they will not be considered in the
14 Commission's decision unless the parties call the
15 Commission's attention to it.

16 MS. ANDERL: Okay.

17 MS. FRIESEN: Okay.

18 JUDGE WALLIS: Very well. Anything
19 further?

20 MS. ANDERL: No, Your Honor. I would just
21 indicate -- yes, Your Honor. I would just indicate
22 for the record, if it's permissible, I'll contact Ms.
23 Friesen, Ms. Smith, and you by telephone or in person
24 today, since I'm going to be here for the rest of the
25 day, and let you know whether it's January or March.

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1 JUDGE WALLIS: Very well. Thank you very
2 much. Let's be off the record for just a moment.

3 (Discussion off the record.)

4 JUDGE WALLIS: Let's be back on the record
5 following a brief procedural discussion, and let's
6 conclude the prehearing conference at this point and
7 state that an order will be entered at an early date.
8 Thank you very much.

9 MS. FRIESEN: Thank you, Your Honor.

10 (Proceedings adjourned at 10:25 a.m.)

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