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BEFORE THE WASHINGTON UTILITIES AND

2

TRANSPORTATION COMMISSION

3

In the Matter of the)
Investigation into)

4

U S WEST COMMUNICATIONS, INC.'s) Docket No. UT-003022

5

) Volume XXXVIII

6

Compliance with Section 271 of) Pages 5696 to 5812

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the Telecommunications Act of)
1996)

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In the Matter of)

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) Docket No. UT-003040

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U S WEST COMMUNICATIONS, INC.'s) Volume XXXVIII

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) Pages 5696 to 5812

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Statement of Generally)

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Available Terms Pursuant to)

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Section 252(f) of the)

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Telecommunications Act of 1996)

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A hearing in the above matters was held on
September 21, 2001, at 1:30 p.m., at 1300 South
Evergreen Park Drive Southwest, Room 206, Olympia,
Washington, before Administrative Law Judge ROBERT
WALLIS and Chairwoman MARILYN SHOWALTER, Commissioner
RICHARD HEMSTAD, and Commissioner PATRICK OSHIE.

The parties were present as follows:

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST,
INC. XO WASHINGTON, INC., and ELECTRIC LIGHTWAVE, INC.,
by GREGORY J. KOPTA, Attorney at Law, Davis, Wright,
Tremaine, LLP, 1501 Fourth Avenue, Suite 2600, Seattle,
Washington 98101.

Joan E. Kinn, CCR, RPR
Court Reporter

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1 MCI/WORLDCOM, INC., by MICHEL SINGER NELSON,
Attorney at Law, 707 - 17th Street, Suite 4200, Denver,
2 Colorado 80202.

3 QWEST CORPORATION, by LISA ANDERL, Attorney
at Law, 1600 Seventh Avenue, Suite 3206, Seattle,
4 Washington 98191, and via bridge line by JOHN MUNN,
Attorney at Law, and CHARLES W. STEESE, Attorney at Law,
5 1801 California Street, 49th Floor, Denver, Colorado
80202.

6 COVAD COMMUNICATIONS COMPANY by BROOKS E.
7 HARLOW, Attorney at Law, Miller Nash LLP, 601 Union
Street, Suite 4400, Seattle, Washington 98101.

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

2 JUDGE WALLIS: This hearing will please come
3 to order. This is a session in the matter of Commission
4 Dockets UT-003022 and 003040 involving Qwest
5 Communications and its application for approval under
6 Section 271 of the Telecommunications Act and its
7 presentation of a matrix called an SGAT.

8 Let's begin the session this afternoon by
9 identifying the people on the Bench. My name is Bob
10 Wallis, and I'm the presiding Administrative Law Judge.
11 Immediately to my right is Commission Chairwoman Marilyn
12 Showalter. To her right is Commissioner Richard
13 Hemstad. And to his right is Commissioner Patrick
14 Oshie.

15 Let's get appearances from the parties. If
16 your address and other information is as previously
17 stated, you need not restate it now. Please begin with
18 the proponent.

19 MS. ANDERL: Thank you, Your Honor. Lisa
20 Anderl representing Qwest Corporation. I have
21 previously stated an appearance for the record, and we
22 do also have in-house counsel on the conference bridge.
23 I don't know if you want --

24 MR. STEESE: This is Chuck Steese and John
25 Munn, both on the conference bridge, and in-house on

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1 behalf of Qwest.

2 JUDGE WALLIS: Thank you.

3 MR. KOPTA: Gregory Kopta of the law firm
4 Davis Wright Tremaine, LLP, on behalf of XO Washington
5 and Electric Lightwave, and I'm also making a special
6 guest appearance for AT&T Communications of the Pacific
7 Northwest since Mr. Walters was not able to attend
8 today. I have not appeared on behalf of AT&T in this
9 docket prior to today and don't anticipate that I would
10 be after today, but I'm filling in for him today.

11 MS. SINGER NELSON: Michel Singer Nelson on
12 behalf of MCI/WorldCom, and I'm taking the place of
13 Annie Hopfenbeck who has previously entered her
14 appearance on behalf of MCI/WorldCom.

15 JUDGE WALLIS: Do you expect to have a
16 continuing involvement in this docket?

17 MS. SINGER NELSON: Yes, I do, Judge.

18 JUDGE WALLIS: And is your contact
19 information the same as Ms. Hopfenbeck's?

20 MS. SINGER NELSON: It's the same, even the
21 phone number is the same. The only thing that's
22 different is the E-mail address.

23 JUDGE WALLIS: And yours is?

24 MS. SINGER NELSON: My E-mail address is
25 michel.singer underscore nelson@wcom.com.

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1 JUDGE WALLIS: Thank you.

2 MR. HARLOW: Thank you, Your Honor. Brooks
3 Harlow appearing today on behalf of Covad
4 Communications.

5 JUDGE WALLIS: Thank you very much.

6 Is there any person on the bridge line who
7 has not previously identified yourself who is intending
8 to appear in a representative capacity for a party and
9 state comments or argument this afternoon?

10 Let the record show that there is no
11 response.

12 As we were organizing our session earlier,
13 the parties indicated that they viewed the issues being
14 grouped in four general areas, and I'm going to
15 paraphrase here. One is obligation to build, one is
16 EELs, another is retail service standards, and a fourth
17 is commingling. The parties agree that Qwest is
18 challenging the initial order on the first three and
19 Mr. Kopta's clients on the third. The parties have
20 agreed to split the time approximately on the following
21 basis, that is 90 minutes for the first issue, 30
22 minutes for each of the remaining 3, and to divide the
23 time between proponents and opponents equally, and if
24 there is more than one person on a side to divide it as
25 they agree amongst themselves. Is that satisfactory to

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1 folks?

2 MR. HARLOW: Yes, Your Honor.

3 MS. ANDERL: Yes.

4 JUDGE WALLIS: Very well, let's begin with
5 Ms. Anderl then and the obligation to build issues. I
6 am going to ask you to identify clearly as you begin
7 which issues you are addressing. And as you go through
8 your argument or comments, please identify the paragraph
9 in the order and the paragraph or page in your brief so
10 that we may follow along. Thank you.

11 MS. ANDERL: Thank you, Your Honor. Good
12 afternoon, Commissioners. Before I get started today, I
13 would like to distribute a packet of material. I have
14 had excerpted some relevant portions of some FCC
15 decisions to the extent that it makes it easier to
16 reference those and follow along during the argument. I
17 have also obtained or prepared copies for counsel.

18 These FCC decisions are in reverse
19 chronological order in the sense that the most recent
20 decision from just two days ago, which is the Verizon
21 Pennsylvania decision, the excerpt from that is on the
22 top, and then the oldest is on the bottom. It's not
23 necessarily organized in the order in which I'm going to
24 refer to them, but I will try to point you clearly to
25 the sections when we get there.

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1 As Judge Wallis described at the beginning of
2 the session today, there are three issues that Qwest has
3 briefed that are very important to Qwest in connection
4 with this initial order on Workshop III issues. Right
5 now we will be talking about the obligation to build
6 issue. I will be spending most of my time on that issue
7 as that, I believe, is the most critical issue for
8 Qwest, and there are a number of sub issues contained
9 within that broad overall description. They are
10 discussed generally in Qwest's brief at pages 2 through
11 25. And as I walk through the argument in more detail,
12 I will narrow down the brief pages and also the order
13 paragraphs that I'm referring to as we go through this.

14 As noted earlier, Mr. Munn and Mr. Steese are
15 on the conference bridge, and because of their
16 familiarity with events in other states, which is
17 somewhat greater than mine, I may consult with them from
18 time to time. However, let me begin now with the
19 discussion of the obligation to build issue.

20 The issues from the issues log that are
21 encompassed within this overall issue are the UNE, the
22 CL2-15, UNE-C11, and EEL-5, which are grouped together
23 in the initial order at Paragraphs 65 through 80. Then
24 there is the CL2-18 issue, which is discussed in the
25 initial order at Paragraphs 81 through 88. There is the

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1 issue TR-14, which is discussed in the initial order at
2 Paragraphs 152 through 157. And those latter two
3 issues, CL2-18 and TR-14, both concern the obligation to
4 add electronics to fiber, so they're related in that
5 way, although they did come up in different contexts
6 within the workshop. And then UNE-C21, which is in the
7 initial order at Paragraphs 89 to 93.

8 As a broad summary of the argument before I
9 go into the details, generally Qwest believes that the
10 initial order expands the scope of its obligations to
11 provide UNEs to beyond that which is required by the
12 Act, the FCC rules, and even this Commission's prior
13 decisions to the extent that this Commission has made
14 decisions that have touched upon that issue. Qwest
15 believes that this result potentially thwarts the public
16 policy goals of the Act and the State of Washington.
17 Additionally, as will be discussed in more detail later
18 in the argument, the result is inconsistent with the
19 result reached or preliminary result reached in nine
20 other Qwest jurisdictions.

21 Qwest will construct facilities in a number
22 of instances, and I want to make sure that that's clear
23 up front before we go into the detail. Qwest will
24 construct facilities where it will be required to do so
25 in order to meet its carrier of last resort obligation

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1 to serve its retail customers, and it will also
2 construct facilities for a CLEC if under the same
3 circumstances it would construct facilities for itself
4 or one of its retail or interexchange customers.
5 However, there is some language in the initial order
6 which appears to expand the scope of Qwest's obligation
7 to construct facilities even beyond that which I have
8 just described, and that is what we take issue with.

9 What we are asking for you to do here is to
10 modify the initial order in such a way as to approve
11 SGAT language that imposes an obligation on Qwest to
12 build for CLECs that is the same as but not greater than
13 the obligation Qwest has to build for itself and its own
14 customers.

15 Let me just point you briefly to some
16 examples of language in the initial order that were
17 troubling to Qwest and that led to the petition for
18 administrative review on this issue. In Paragraph 79,
19 which is on page 18 of the initial order, and it's a
20 lengthy paragraph, and I don't know that I can briefly
21 quote, but let me paraphrase and summarize what we
22 believe that this paragraph holds. The initial order --

23 CHAIRWOMAN SHOWALTER: Ms. Anderl.

24 MS. ANDERL: Yes.

25 CHAIRWOMAN SHOWALTER: Can you just give me

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1 that -- oh, I see, I'm in an FCC order instead.

2 MS. ANDERL: This is not in what I
3 distributed.

4 CHAIRWOMAN SHOWALTER: No, no, I've got our
5 order here.

6 MS. ANDERL: Okay.

7 CHAIRWOMAN SHOWALTER: It's just that I was
8 looking at the wrong order.

9 MS. ANDERL: Page 18.

10 CHAIRWOMAN SHOWALTER: And it was paragraph?

11 MS. ANDERL: Paragraph 79. That is the
12 discussion and decision section on the first three
13 issues concerning obligation to build. It appears from
14 the language in that paragraph that the initial order
15 holds that the terms, existing facilities or existing
16 network, which are used frequently in both the initial
17 order and in the FCC and Eighth Circuit decisions on
18 this point, that those terms, existing facilities and
19 existing network, mean the geographic scope of the
20 network rather than the actual facilities that are
21 deployed in the ground or over the air. We believe that
22 this interpretation of the terms, existing facilities or
23 existing network, is overly broad and imposes an
24 obligation to build that exceeds the requirements of the
25 Act, and I will get into the legal framework and what we

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1 believe the Act and the FCC's orders hold in just a
2 minute.

3 Let me just point you to one other paragraph
4 in the initial order, which potentially in our minds
5 expands the scope of Qwest's obligation, and that's
6 Paragraph 87. It's at page 20 and 21. This is in
7 connection with the question of whether Qwest must add
8 electronics to dark fiber in order to light the fiber.
9 It's a kind of a subset of the obligation to build
10 issue. And the initial order holds that Qwest must add
11 electronics and notes there towards the end of the
12 paragraph that the capital outlays required by the
13 decision are no different from outlays that Qwest is
14 currently required to make when its own customers
15 request additional capacity.

16 If this means, if this language in the
17 initial order means that Qwest just treat CLECs the same
18 as other customers, we're fine with that. Qwest will do
19 that. However, Qwest does not always add capacity upon
20 request for its retail customers or its interexchange
21 customers. It's infrequent that we're unable to meet a
22 service request because of a lack of facilities, but it
23 is correct that sometimes it does not happen that the
24 service is provided or that capacity is added, and thus
25 the order is broader than Qwest's current obligations

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1 and appears to be premised on an erroneous assumption.
2 So it's kind of that's the context of what brings us
3 before you today asking for relief.

4 CHAIRWOMAN SHOWALTER: Ms. Anderl, I might be
5 jumping in here too soon, so just tell me if I am.

6 MS. ANDERL: Okay.

7 CHAIRWOMAN SHOWALTER: But it sounds as if
8 you're saying there are times when Qwest in its
9 discretion does not respond to a request from a customer
10 or would be customer, and so likewise it should be able
11 to act in the same way if a CLEC makes that request.

12 MS. ANDERL: Precisely.

13 CHAIRWOMAN SHOWALTER: But then my question
14 is, if it is, in fact, discretionary, how is that
15 discretionary decision made? Obviously sometimes Qwest
16 will build, so how do you get at the issue of Qwest
17 exercising its discretion in one way for itself and in a
18 different way for others?

19 MS. ANDERL: Well, typically the -- I mean
20 the threshold issue has to be are there any facilities
21 there that are available to be put into service for this
22 customer, CLEC or end user. And if the answer is yes,
23 we'll do it. I mean there's no discretion there. If
24 the question is, there's no fiber in the ground or the
25 electronics are out of capacity, then we may, depending

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1 on what the provisions are in our special construction
2 tariffs or the special construction provisions of the
3 SGAT, and I will get to that in just a minute, offer to
4 construct for either the end user or the interexchange
5 carrier or the CLEC with a commitment from that customer
6 that they will pay for the construction.

7 And in the SGAT, that special construction
8 section is Section 9.19, and that was appended to our
9 August 23rd brief, all of SGAT Section 9. We call those
10 the SGAT Lites, which are just the pieces of the SGAT
11 that are relevant to the particular discussion.

12 CHAIRWOMAN SHOWALTER: So is what you're
13 saying is that because the situation, whether it was one
14 of your customers or Qwest or a carrier, everybody, in
15 fact, would be put in the same boat, that is you pay?
16 Or would there be some other time where Qwest said,
17 well, you know, I guess we sort of need to take this
18 little area on, let's build?

19 MS. ANDERL: Well, we do have -- I mean one
20 of the things that we have agreed to do in the context
21 of this question of will we build is that we will share
22 our network construction plans with the CLECs to some
23 extent for some period in the future. So there isn't
24 any danger of us saying to the CLEC, well, you know,
25 gee, we're not planning on going there, you better pay

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1 us, and then all along we had been planning on going
2 there. So the CLECs have some visibility toward what
3 our future construction plans are, and if there is no
4 plan to add facilities in an area and there are no
5 facilities in the area and then the CLEC chooses to ask
6 us to construct, I think that that provides some pretty
7 significant safeguards that neither side is really
8 gaming the system to their advantage.

9 Okay, so now you know why we're before you in
10 terms of what the initial order says. Let me just lay
11 out briefly what we believe to be the relevant legal
12 framework that we need to consider when we analyse these
13 issues. I think the most relevant interpretations of
14 the Telecom Act that we have on this issue are the
15 Eighth Circuit decisions in the Iowa Utility Board
16 cases. We do cite from and quote from those decisions
17 fairly extensively in our brief, primarily at pages 5
18 and 6, but we believe that the Eighth Circuit in both
19 Iowa Utilities Board decisions has stated unambiguously
20 that the Act only mandates access to the ILEC's existing
21 network. In other words, when the Act said, you must
22 provide unbundled access to network elements, the Act
23 only meant, and the Eighth Circuit has affirmed that it
24 only meant, the copper and the fiber and the electronics
25 that you have in place at the time that the request is

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1 made.

2 For example, in the first Iowa Utilities
3 Board case, the court held that Subsection 251(c)(3) of
4 the Act implicitly requires unbundled access only to an
5 incumbent LEC's existing network, not a yet unbuilt
6 superior one. I know we have heard that, not a yet
7 unbuilt superior network, a lot, but it -- I don't want
8 it through overuse to have lost its meaning. I think
9 it's still significant language. I know we have used it
10 a lot in the cost docket and probably a lot in these
11 SGAT proceedings but -- Mr. Kopta is barely able to
12 conceal his mirth but --

13 MR. KOPTA: Unable to conceal his mirth.

14 MS. ANDERL: But that's language from the
15 Eighth Circuit. That's the law. We think it's
16 important, and we think it does have meaning, and we
17 think that it provides a significant limitation and a
18 significant definition of what the ILEC's legal
19 obligations are. That was I guess back in 1997.

20 And then later in the order on, I'm not even
21 sure, I have lost the context, the next Iowa Utilities
22 Board decision at 219.F3rd, the court discusses the need
23 for access to an ILEC's network. And in two paragraphs,
24 it uses the term existing facilities or existing network
25 four times. I don't think that those are accidental

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1 references, and I do believe that the court meant what's
2 there, not what a CLEC might want an ILEC to provide,
3 but that you, the CLEC, get exactly what the ILEC has
4 for itself, and the court said that Congress knew it was
5 requiring the existing ILECs to share their existing
6 facilities and equipment. Congress did not expect a new
7 competitor to pay rates for a reconstructed local
8 network, but for the existing local network it would be
9 using in an attempt to compete. This to me speaks
10 clearly that there is no new construction involved for
11 the CLECs unless CLECS wish to pay for it themselves or
12 wish to have a third party do the construction.

13 Going on discussing the cost and pricing
14 standards that the Act imposes, the Eight Circuit said
15 that:

16 It is the cost to the ILEC of providing
17 its existing facilities and equipment
18 that is relevant and that the competitor
19 must pay.

20 And finally, the new entering competitor in
21 effect piggybacks on the ILEC's existing facilities and
22 equipment. It is the cost to the ILEC of providing that
23 ride on those facilities that the statute permits the
24 ILEC to recoup.

25 CHAIRWOMAN SHOWALTER: Is this the decision

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1 from the Eighth Circuit that's on appeal to the U.S.
2 Supreme Court now?

3 MS. ANDERL: Yes, it is, although I don't
4 believe that the question of whether it's an existing
5 network or whether construction might be required by the
6 ILEC is perhaps squarely at issue to the Supreme Court.

7 COMMISSIONER HEMSTAD: I lost track, on
8 appeal, cert has been granted in front of the court?

9 MS. ANDERL: (Nodding head.)

10 CHAIRWOMAN SHOWALTER: You say cert has been
11 granted, but not on this issue or what?

12 MS. ANDERL: I don't think the issue of an
13 ILEC's obligation to build is squarely teed up in that.
14 And, of course, the first Monday in October when the
15 court is back in session is just a couple of weeks away,
16 so I don't know, I don't have any real visibility to
17 when the Supreme Court gurus expect a decision on this
18 issue. I think we're all hoping this term.

19 CHAIRWOMAN SHOWALTER: Well, I guess I mean I
20 can see what the Eighth Circuit is saying, and then when
21 I see certs granted, you say, well, all right, I wonder
22 what the U.S. Supreme Court is going to say, but you're
23 saying they may say nothing on this issue?

24 MS. ANDERL: That's right.

25 CHAIRWOMAN SHOWALTER: So then there we are

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1 with the Eighth Circuit issue, and, of course, it isn't
2 our circuit, but.

3 MS. ANDERL: Well, and as I continued through
4 the discussion of the legal framework, I think what you
5 will see is that we believe that there are guiding and
6 controlling FCC orders on this subject as well that
7 reaffirm that that is a correct interpretation.

8 CHAIRWOMAN SHOWALTER: All right.

9 JUDGE WALLIS: Ms. Singer Nelson, did you
10 wish to address the question of cert?

11 MS. SINGER NELSON: No, I didn't, thank you,
12 Judge.

13 JUDGE WALLIS: All right.

14 MS. ANDERL: And while the Eighth Circuit
15 decisions are, of course, important and not to be
16 discounted, I think that it is important to go back and
17 remember the context that we're in right now, which is
18 the 271 proceeding, and this State Commission is going
19 to be asked to make a recommendation to the FCC, and
20 it's the FCC who is going to ultimately determine
21 compliance. And so I therefore think that the FCC
22 decisions on this same issue are at least as important
23 as the Eighth Circuit decision, and let me just talk to
24 you briefly about some of the decisions from the FCC
25 that we believe are very consistent with and perhaps

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1 even more clear than the Eighth Circuit's decision that
2 it is access only to the existing network that is
3 required.

4 All the way back to the First Report and
5 Order, August 8th, 1996, and this excerpt is provided as
6 the backmost tab in the pamphlet that I handed out to
7 you, Paragraph 451 of the First Report and Order, and
8 there the FCC is specifically discussing the obligation
9 to provide the unbundled network element that is the
10 transport element. And they say very clearly there in
11 the last sentence of that Paragraph 451:

12 In this section, for example, we
13 expressly limit the provision of
14 unbundled interoffice facilities to
15 existing incumbent LEC facilities.

16 Now I know that --

17 COMMISSIONER HEMSTAD: I'm sorry, I don't
18 want to lose the point, point me again to from where you
19 were reading in the material you gave us.

20 MS. ANDERL: In the material I gave you, it
21 should be the absolute last page, and there should be a
22 Paragraph 451 on there.

23 COMMISSIONER HEMSTAD: And read again the
24 sentence, I didn't find it.

25 MS. ANDERL: I'm sorry, I said it was the

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1 last sentence, it's not, it's the middle sentence in
2 that paragraph.

3 In this section, for example, we
4 expressly limit the provision of
5 unbundled interoffice facilities to
6 existing incumbent LEC facilities.

7 COMMISSIONER HEMSTAD: Thank you.

8 MS. ANDERL: And that unbundled interoffice
9 facilities is what we're referring to in this docket as
10 the transport rate element or transport unbundled
11 network element.

12 Now I know that when we hear from AT&T later,
13 AT&T will say that this sentence by expressly saying you
14 don't have to build transport means that you have to
15 build everything else. We don't think that's the case,
16 but we will get to that in just a minute.

17 Subsequent to this First Report and Order
18 over five years ago, the FCC, of course, issued a new
19 order defining the UNEs, the UNE Remand Order. That is
20 in your tab entitled UNE Remand Order. There's an
21 excerpt there that's released November 5th, 1999. And
22 Paragraph 324 in that order speaks also to the transport
23 element. Twice in that paragraph, the FCC clearly
24 defines the obligation to provide that unbundled network
25 element as limited to existing facilities. The

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1 Commission refers back and says:

2 In local competition, First Report and
3 Order, the Commission limited an
4 incumbent LEC's transport unbundling
5 obligation to existing facilities.
6 And then later in the last sentence of that

7 Paragraph 324:

8 We do not require incumbent LECs to
9 construct new transport facilities to
10 meet specific competitive LEC point to
11 point demand requirements.

12 We believe that this is very clear that on
13 the transport element, and we will explain how it
14 extends to other elements as well, that there is no
15 obligation to add facilities. That means that there's
16 no obligation to place additional fiber in the ground,
17 and there's no obligation to add electronics.

18 Finally, in the collocation remand order that
19 the FCC just entered on August 8, 2001, also provided
20 for you as an excerpt in your materials, the FCC in
21 Paragraph 76 towards the latter half of that paragraph
22 references that:

23 Incumbent LECs are not required to
24 provide competitors with better
25 interconnection or access to the network

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1 than already exists.

2 And they go on to explain that the
3 requirement that they have imposed in that paragraph
4 relative to collocation:

5 Merely allows the collocater to use the
6 existing network in as efficient a
7 manner as the incumbent uses it for its
8 own purposes.

9 Now clearly this is not a decision on the
10 obligation to build, and so I'm not suggesting to you
11 that this is language that is determinative. But I
12 think it's persuasive that when the FCC talks about this
13 in this context, it's almost implicit there's this
14 underlying assumption that it is the existing network.
15 And you hate to say, you know, it's so clear that it
16 almost goes without saying, but when you hear the FCC
17 discussing it like this, it seems that that is the base
18 line from which they're operating. And that coupled
19 with the other FCC decisions and the Eighth Circuit
20 decisions makes it clear at least to us that there is no
21 obligation beyond that which Qwest has already committed
22 and which is to provision that which we have and to add
23 facilities under certain circumstances, including when
24 necessary to meet the carrier of last resort obligation
25 and when a CLEC or a customer is willing to pay special

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1 construction charges.

2 Let me talk then briefly about what Qwest is
3 willing to do in order to build when it is required to
4 do so in order to meet its carrier of last resort
5 obligations. This is not so much of an issue in this
6 docket or in this phase of the proceeding, because I
7 think that where the carrier of last resort obligation
8 really comes into play is when we're discussing loops,
9 and loops are in Workshop IV, and we're not there yet.
10 But in Qwest's SGAT Section 9.1.2.1, which again was
11 appended to our August 23rd brief, Qwest makes it clear
12 that it will construct in circumstances where it is
13 necessary to do so in order to meet its carrier of last
14 resort obligation for an end user.

15 COMMISSIONER HEMSTAD: What was that
16 reference again?

17 CHAIRWOMAN SHOWALTER: Maybe you could give
18 us the page number of the SGAT to start with.

19 MS. ANDERL: Sure, it's the SGAT Lite that
20 was filed with our brief, and it is Section 9.1.2.1.
21 It's on page 2. It starts, if facilities are not
22 available, Qwest will build facilities.

23 And the reason I mention it is because I
24 think it's important for you to have that context now
25 and then also because it is here in Section 9, which

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1 covers unbundled network elements in general. It just
2 so happens that we pulled one of those unbundled network
3 elements, loops, out and considered that in Workshop
4 Number IV instead of here in this Workshop Number III.

5 In Washington, this SGAT section means that
6 if Qwest would be required by the Commission to
7 construct facilities to serve an end user for the
8 provision of local exchange service, Qwest will
9 construct those same facilities to allow a CLEC to serve
10 that end user. Qwest's obligation to build facilities
11 is also set forth in its build policy, which is
12 something that I believe was made referenced or made a
13 part of the record in Workshop IV, but I can't be sure
14 of that, because I don't recall. But what I do want you
15 to know is that that build policy which memorializes
16 Qwest's obligation is one that can not be unilaterally
17 changed by Qwest and can not be changed at all unless
18 and until it goes through the CICMP or the carrier
19 change management process where all CLECs have a chance
20 to be involved. And that CICMP process was also
21 discussed in Workshop Number IV.

22 In Washington specifically, the carrier of
23 last resort obligation was addressed by this Commission
24 in a docket that was opened four or five years ago,
25 Docket Number 961638. The Commission order in that

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1 docket was issued on January 16th, 1998. There the
2 Commission refused to decide either the broad policy
3 issues connected with the carrier of last resort
4 obligation or specific carrier obligations in connection
5 with that issue. One of the reasons that the Commission
6 stated for declining to decide those issues at that time
7 was, and I will quote here:

8 Because of the Commission's strongly
9 held belief that critical public policy
10 issues of this magnitude, breadth, and
11 impact are not appropriate for
12 resolution in the context of formal
13 adjudication.

14 Yet that is exactly what the CLECs would have
15 you do here is resolve those same issues by imposing an
16 obligation to build of what we believe to be a greater
17 magnitude than is required in an adjudication such as
18 this.

19 After the tariff docket was concluded in '96,
20 the 961638 docket, the Commission determined that the
21 carrier of last resort obligations ought to be
22 considered in a rule making docket. They deferred the
23 issue into a then open docket, which was Docket Number
24 970325, and then transferred the question to a docket
25 for that issue alone, which was Docket 990301. That

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1 docket remains open, and no rule or order on the issue
2 has yet been adopted or entered. Qwest believes that if
3 the Commission does wish to wrestle with this issue,
4 that would be the more appropriate forum to deal with
5 it.

6 Finally, kind of along the same lines, the
7 FCC has repeatedly stated that 271 dockets are not the
8 right place to resolve or decide new interpretive
9 disputes, and I believe they have said that in virtually
10 every order that they have entered in the 271
11 proceedings, most specifically and most recently in the
12 Verizon Pennsylvania order, which is at the top of your
13 packet. In Paragraph 92 of that decision, the FCC
14 states:

15 As we have stated in other Section 271
16 orders, new interpretive disputes
17 concerning the precise content of an
18 incumbent LEC's obligations to its
19 competitors, disputes that our rules
20 have not yet addressed and that do not
21 involve per se violations of the Act or
22 our rules, are not appropriately dealt
23 with in the context of a Section 271
24 proceeding.
25 Qwest believes that its current obligation to

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1 build as set forth in its SGAT and as Qwest requests be
2 approved in this proceeding is one clearly compliant
3 with the Act, and that to the extent the CLECs wish a
4 greater obligation be imposed, that is a new
5 interpretive dispute that should not be resolved in this
6 docket.

7 That's kind of globally the obligation to
8 build. Within that obligation to build issue though,
9 there is the subset of adding electronics, and that was
10 issues CL2-18 and TR-14.

11 CHAIRWOMAN SHOWALTER: Ms. Anderl, before you
12 go there, has the FCC dealt with this issue in a 271
13 proceeding explicitly, that is over someone's
14 objections, they have approved a 271, or they did not
15 approve because that was missing?

16 MS. ANDERL: Yeah, actually they have, and
17 that's --

18 CHAIRWOMAN SHOWALTER: If you're getting
19 there anyway, that's fine, you don't need to do that
20 now.

21 MS. ANDERL: I am.

22 CHAIRWOMAN SHOWALTER: Okay.

23 MS. ANDERL: But let me go ahead and respond
24 though to the question to the extent that people are
25 already looking at the Verizon Pennsylvania order. We

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1 believe it's been clear in other FCC orders prior to
2 now, but two days ago on September 19th, the FCC did
3 release this Verizon Pennsylvania order, which is a 271
4 order, which does approve Verizon's entry into the
5 interLATA long distance business.

6 And I have only excerpted the three pages for
7 you, pages 50, 51, and 52. And in Paragraphs 91 and 92,
8 the FCC addresses something that's virtually identical
9 to the issue that is raised here in terms of the
10 willingness of a carrier to add electronics. This
11 discussion here in the Verizon Pennsylvania order is in
12 the context of providing high capacity loops, but high
13 capacity loops, which are basically fiber, from the
14 central office to an end user's premises with the
15 electronics on either end are virtually the same as high
16 capacity transport. The only difference is where the
17 ends of the facilities are. On a loop, one end is at
18 the customer, and one end is at the central office.
19 With high capacity transport, each end is at a separate
20 central office. But otherwise the element is the same
21 in terms of physical construct and electronics on either
22 end.

23 Here Verizon has refused to add electronics
24 to provide high capacity loops as an unbundled network
25 element and will only provide high capacity loops as a

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1 UNE if it has all the necessary equipment and
2 electronics present on the line and at the customer's
3 premises. CLECs claimed that this violated the
4 Commission's rules and ought to mandate a finding of
5 noncompliance and a denial of entry into the interLATA
6 business. Verizon stated, no, that it would provide the
7 loops when facilities were available, and that when
8 facilities were not available, customers could
9 potentially obtain the loops out of the tariff, the
10 private line transport tariff or whatever Verizon's
11 equivalent of that was. Additionally, Verizon agreed
12 that it would place line cards, if necessary, and
13 perform cross connection work, which Qwest will also do.
14 However, at the bottom of Paragraph 91, it says clearly:

15 In the event that spare facilities
16 and/or capacity on those facilities is
17 unavailable, Verizon will not provide
18 new facilities solely to complete a
19 competitor's order for high capacity
20 loops.

21 The FCC in Paragraph 92 goes on to say:
22 We disagree with commenters that
23 Verizon's policies and practices
24 expressly violate the Commission's
25 unbundling rules.

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1 And the FCC found that the way Verizon was
2 providing service did not mandate a finding of
3 noncompliance, so the double negative there reaches you
4 to a grant of authority and finding of compliance with
5 the checklist.

6 And again, you know, to kind of go back to
7 what's the function of this docket, the function of this
8 docket is to recommend to the FCC whether Qwest's
9 performance meets what the FCC has said is required
10 under the Act, and so we believe that this latest order
11 makes it all the more clear that the obligations that
12 Qwest has stated that it will assume for purposes of its
13 obligation to provide UNEs more than satisfies that
14 requirement.

15 JUDGE WALLIS: Ms. Anderl, we are looking at
16 about 10 or 12 minutes remaining. If you want to
17 reserve some of that time to respond, you may do so.

18 MS. ANDERL: Thank you, Your Honor.

19 That really is the adding electronics issue,
20 and if I had more time, all I would probably do on this
21 issue is go back and suggest that we look again at the
22 language from the First Report and Order in Paragraph
23 451, which references that the ILEC is not required to
24 build new transport facilities, and the UNE Remand Order
25 at Paragraph 324, again suggesting that.

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1 I think one thing that is important maybe to
2 look at on this issue of adding electronics is the UNE
3 Remand Order at Footnote 292, and it is part of the
4 packet that I gave you.

5 CHAIRWOMAN SHOWALTER: What's the date of the
6 order?

7 MS. ANDERL: That's the November, let me just
8 find my tab, November 5th, 1999.

9 COMMISSIONER HEMSTAD: And what paragraph?

10 MS. ANDERL: I apologize, I may not have
11 included that particular piece. I thought that I had
12 included the page that had the Footnote 292 in it.
13 Apparently I did not. I can provide that subsequent to
14 today, or if the Commissioners have their own copy,
15 Footnote 292 in the UNE Remand Order does very clearly
16 state, and we have this in our brief, that the CLEC is
17 expected by the FCC to add the electronics to light dark
18 fiber, and let me just give you the reference there.

19 CHAIRWOMAN SHOWALTER: What number is it,
20 292?

21 MS. ANDERL: 292. I apologize, Your Honor, I
22 thought that I had captured that page to be bundled into
23 what was copied for you and bound, but I apparently did
24 not.

25 In Qwest's brief, we do cite it, and in our

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1 brief it is on page 23. And the reference is simply to
2 a footnote in an FCC decision where it states that the
3 carrier leasing the fiber is expected to put its own
4 electronics and signals on the fiber.

5 Finally just on this issue of adding
6 electronics, this is the section of the initial order
7 wherein we have the language in Paragraph 87 which
8 states that:

9 The capital outlays that Qwest is
10 expected to incur to meet the
11 requirements established in the order
12 are no different than what is expected
13 to be incurred in Qwest's meeting its
14 obligation to its retail and
15 interexchange customers.

16 And we disagree with that, because we believe
17 that the obligation imposed by the initial order appears
18 to be more ubiquitous than say what would be required
19 under Qwest's private line transport tariff. Qwest's
20 private line transport tariff in Washington is Number
21 WNU41, and I know that, Chairwoman Showalter and
22 Commissioner Hemstad, we did just have a number of
23 issues presented to you maybe a year and a half ago in
24 the AT&T access provisioning complaint that brought some
25 of these provisions into play. The provisions that were

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1 in place then when we were U S West and that remain in
2 place today when we're Qwest do limit the obligation of
3 the company to furnish private line services to where
4 facilities are available.

5 And I think that if you will recall that the
6 evidence in that case showed that there were virtually
7 no orders that didn't get provisioned. Some were
8 delayed because of a lack of facilities, some may not
9 have been provisioned at all and were perhaps canceled,
10 but the vast, vast, vast majority of private line
11 transport services were provisioned. And I think that's
12 important to remember, because I don't want the advocacy
13 in this docket to be interpreted as a, you know,
14 position by Qwest that we're going to walk away from our
15 obligations to serve our customers or our deployment of
16 a ubiquitous network. I think that the company does
17 deploy and augment as necessary. It is just that there
18 are times when the company is asked to provide private
19 line facilities where there is simply nothing there, and
20 under those circumstances, there has to be an
21 opportunity to either ask the customer to pay the cost
22 or to make a judgment about whether or not the business
23 will warrant deployment of additional capacity in an
24 environment especially where there is limited capital.

25 Let me just briefly summarize, and this is in

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1 our brief, so I don't want to spend a lot of time on it,
2 but the other states who have ruled on the obligation to
3 build issue, there are nine that we have received
4 decisions from. In the multistate docket, the
5 facilitator, Mr. Antonuk, who is deciding the issues as
6 an initial matter for seven states, and then Nebraska
7 has as well adopted that initial outcome, so we have
8 eight states there wherein the initial recommendation is
9 that Qwest does not have an obligation to build beyond
10 that which it has accepted in its own proposed language
11 in the SGAT. And then a Colorado decision is also
12 consistent with that not imposing an obligation to build
13 on Qwest beyond that which I have described to you as
14 what Qwest is willing to agree to. The Colorado
15 decision was a staff recommended decision but now is
16 also a final decision as well.

17 CHAIRWOMAN SHOWALTER: You say but only
18 Colorado is a final decision?

19 MS. ANDERL: Yes.

20 CHAIRWOMAN SHOWALTER: The other ones are
21 pending?

22 MS. ANDERL: Yes. And, of course, we're here
23 in Washington, we don't have decisions from Utah,
24 Oregon, or Arizona yet, and we are not even this far
25 along in South Dakota and Minnesota at all with the 271

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1 docket, so that pretty much covers all of our states.

2 JUDGE WALLIS: I think that's just about
3 perfect timing, at least according to my watch, we're at
4 the point where it's time to let the others speak.

5 MS. ANDERL: Your Honor, if I -- I have one
6 -- I have left out a couple of things that I wish I had
7 a chance to comment on, but I would like to add one
8 thing. And that is that the Colorado decision did
9 recommend that Qwest add a sentence to its SGAT, and
10 Qwest has agreed to do so and will, of course, do so in
11 Washington as well. That sentence states:

12 Qwest will assess whether to build for
13 CLECs in the same manner that it
14 assesses whether to build for itself.

15 Thank you.

16 JUDGE WALLIS: Thank you.

17 Mr. Kopta.

18 MR. KOPTA: Thank you, Your Honor.

19 I'm a little puzzled, because what I'm
20 hearing Ms. Anderl represent is very similar to what we
21 had asked the Commission to do to begin with, which is
22 to make sure that where Qwest has an obligation to build
23 that they build for both retail and competitor, and that
24 in those circumstances in which Qwest has the discretion
25 that Qwest build for CLECs the same as they would for

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1 end users.

2 The problem comes up, at least in practical
3 application, in circumstances in which, and there is
4 testimony on the record, a CLEC approaches Qwest and
5 orders a particular facility. Qwest says, sorry, no
6 facilities available. The CLEC goes back to the
7 customer, and the customer says, okay, I will order it
8 from Qwest directly, and they do, and they get the
9 facility. Or alternatively, a CLEC may order the
10 facility as an unbundled network element. Qwest says,
11 sorry, no facilities, at which point the CLEC can order
12 it out of the tariff, and then Qwest says, okay, here
13 you go. That's the sort of thing that we're trying to
14 prevent, and that's the sort of thing that we believe
15 that the order prevents.

16 Qwest uses the nebulous term, carrier of last
17 resort obligation. As even Qwest concedes, that's not a
18 defined term, and we're not comfortable resting on
19 Qwest's interpretation of that term, particularly given
20 practical experience that Qwest believes that that gives
21 it the right to deny facilities to CLECs where it would
22 provision them to competitors.

23 COMMISSIONER HEMSTAD: Now how does the
24 initial order -- where in the initial order is that
25 prevented? What's the language?

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1 MR. KOPTA: Well, I think if you look at the
2 paragraphs that we have been focusing on, which are
3 Paragraphs 79 and 80, what that order says is, at least
4 in our view, what I suppose Qwest would call the carrier
5 of last resort obligation, that if Qwest is providing
6 service within a particular service territory, has
7 facilities between particular locations and those
8 locations reach exhaust, that Qwest is obligated to
9 augment those facilities to provide additional service
10 in response to customer request. I don't really see
11 that as particularly controversial. I think that's been
12 Qwest's obligation and U S West's obligation in this
13 state for time immemorial.

14 And then the order goes on to say in
15 Paragraph 80, in those locations where there are no
16 facilities, where Qwest hasn't built facilities, then
17 Qwest may, you know, offer to build them but on the same
18 terms that it offers to build it to other customers.

19 COMMISSIONER HEMSTAD: Well, what is your
20 view -- how do you read the Colorado order on this issue
21 and the disagreement here for the proposed other orders
22 in the other states?

23 MR. KOPTA: Well, I think it's a little bit
24 difficult because we're dealing with different records
25 in different states. I was not involved in Colorado,

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1 and so I don't know the factual basis on which that
2 commission made that particular determination.

3 COMMISSIONER HEMSTAD: Would you concede that
4 the Colorado order is to be read as Ms. Anderl would
5 want us to read it here, or is that unclear?

6 MR. KOPTA: I can't concede or dispute that
7 interpretation. All I see is what you all see, which is
8 a snippet out of the order.

9 CHAIRWOMAN SHOWALTER: But in so far as the
10 Colorado decision resulted in an additional sentence
11 that will be in everybody's SGAT, is that sentence
12 satisfactory to you or not?

13 MR. KOPTA: Well, as I sit here and listen to
14 that sentence, and I heard it for the first time today,
15 it doesn't, and let me tell you why. When this issue
16 came up in the workshop, the discussion came about,
17 Qwest said, gee, we've got the same kind of process in
18 place to evaluate whether we're going to build
19 facilities, and when an end user customer comes in, we
20 look at those, and when a CLEC comes in, we look at
21 those, but Qwest was not willing to represent that it
22 would reach the same decision.

23 So, for example, if you're talking about a
24 customer in a particular location and the CLEC says, we
25 want a loop between the Qwest central office that serves

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1 that location and the location, and Qwest says, sorry,
2 no facilities, and the CLEC says, well, okay, let's see
3 about building them, and then Qwest looks at it and
4 says, gee, we've looked at it, there's no business,
5 okay, so we're not going to build it for you. The end
6 user could then approach Qwest. Qwest would say, sorry,
7 no facilities. The end user would say, well, how about
8 building them. Then Qwest could go through the same
9 process and come up with a different result and say,
10 okay, yeah, we'll build it for you. And that's the
11 problem that we see is that while they may say that the
12 processes are the same, they will not represent that the
13 results are the same.

14 CHAIRWOMAN SHOWALTER: What about the FCC's
15 order, if Qwest is confident that the FCC has virtually
16 decided this question already or they're confident that
17 even if it hasn't it's going to, they could simply
18 decide not to do this and file anyway with the FCC. And
19 so our insisting on this would be pointless unless we
20 thought that the FCC really hasn't decided this, and
21 then if Qwest didn't comply, then they would get kicked
22 back because this is a worthy issue. So what it really
23 boils down to is how different is this than what the FCC
24 has already decided?

25 MR. KOPTA: Well, as I read what the FCC

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1 decided in the Verizon Pennsylvania order, which is two
2 days old, and granted, I'm sort of flying by the seat of
3 my pants here, I think what the FCC said is, we didn't
4 address this issue directly in our rules, and if we
5 didn't, then we're not going to keep -- we're not going
6 to use this one little piece to keep Verizon out of the
7 long distance market in Pennsylvania.

8 CHAIRWOMAN SHOWALTER: Well, would they say
9 that again?

10 MR. KOPTA: They might, but I think we've got
11 a different situation here, because this is not just a
12 271 docket. As I look at the header, we've got two
13 dockets here. One of them is the 271. The other is the
14 SGAT. Qwest has filed an SGAT, which is a template
15 agreement that it's willing to provide. There's a whole
16 different section of the Act that deals with the SGAT,
17 and Qwest is asking for this Commission to approve that
18 SGAT, and, in fact, is relying on the legal obligations
19 that it says are in the SGAT to support its 271
20 obligation, but they're not the same thing.

21 So this Commission could certainly say,
22 sorry, we don't think you're in compliance with either
23 federal or state law on this particular point, and we're
24 not going to approve your SGAT until you modify it to be
25 in compliance. And that doesn't have to go out to the

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1 FCC. The buck stops here with this Commission about
2 whether they're going to approve that particular SGAT.
3 So it would not be a useless exercise for this
4 Commission to require that there be a modification in
5 the SGAT, at least with respect to what's happening in
6 this state.

7 Now the FCC has its own what it's looking at
8 when it's reviewing 271, which is -- I mean they're
9 related, I'm not going to say that they're completely
10 distinct, but they're looking at something different
11 than what this Commission is looking at. And basically
12 what we're talking about here are matters of state law.
13 I mean what does a carrier have to do, what do you have
14 to do to provide service, and we have state statutes
15 that say, customers are entitled to service on
16 reasonable demand and nondiscrimination, no unreasonable
17 preference, you know, all kinds of state statutes that
18 govern, we think, this issue even without looking to the
19 Act. So in Section 252(f), which is the section of the
20 Act that deals with the SGAT, it expressly says that
21 nothing in this section precludes the Commission from
22 looking to state requirements, including service quality
23 requirements.

24 And so if there, you know, regardless of
25 whether there's a federal obligation, and it seems at

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1 best, at least based on the FCC's own view of its orders
2 in the Verizon Pennsylvania decision, some confusion
3 about whether the FCC is going to require that, there's
4 certainly nothing that precludes this Commission from
5 saying as a matter of state law that that's Qwest's
6 obligation, to treat everybody the same whether they're
7 a CLEC or whether they're an end user.

8 I think that addresses really most of the
9 points or the major points. I think just to sort of
10 clean up a couple of issues. On the Eighth Circuit's
11 decision, I don't think the Commission should be left
12 with the impression that the Eighth Circuit addressed
13 the obligation to build issue. In our view, it didn't.
14 The initial Eighth Circuit order, talking about the
15 language that Qwest continues to quote, was specific to
16 providing superior service quality. It didn't have
17 anything to do with an obligation to build.

18 The language from the second order has to do
19 with how do you calculate the costs, whether you're
20 going to use the total element long run incremental cost
21 or TELRIC standard that the FCC established, or whether
22 you're going to look to I won't say an embedded standard
23 but something like that, you know, what does it actually
24 cost for what Qwest has in the ground today as opposed
25 to what it would have if it were an efficient provider

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1 on a forward looking basis.

2 So that's what the Eighth Circuit was looking
3 at in that language that's quoted in Qwest's brief.
4 They weren't looking at whether there's an obligation to
5 build. So I think we agree that there's not going to be
6 that issue presented to the Supreme Court, but we
7 disagree that the Eighth Circuit decided that issue.
8 It's an undecided issue from our perspective on the
9 federal judicial level and apparently a matter of some
10 confusion before the FCC.

11 CHAIRWOMAN SHOWALTER: Is that your euphemism
12 for when you disagree with what the FCC says?

13 MR. KOPTA: Well, I have the utmost respect
14 for the FCC, and certainly reasonable minds can differ,
15 and we would hope, given the importance of the issue,
16 that they will deal with it head on. They, as they so
17 often tend to do, are sidestepping it, because it is a
18 difficult issue.

19 Just to also address the adding the
20 electronics to the transport, I think we need to clarify
21 something here. We're not talking about just dark
22 fiber. Dark fiber is in a different workshop. It's
23 sort of in the emerging services workshop. This was the
24 UNE workshop, and what we were talking about here was
25 transport. So the issue is, if Qwest has the capacity

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1 in the existing fiber between its central offices but it
2 just doesn't have the capacity on the electronics, does
3 Qwest need to increase the capacity of the electronics
4 to be able to provide the transport? That's the issue.

5 And that's why the order says, well, if they
6 run out of capacity between their central office,
7 they're not going to be able to carry traffic between
8 their central offices either. It's going to max out,
9 and you're going to have call blocking. So what Qwest
10 is going to do in those circumstances is it's going to
11 increase the capacity. And if it's already got the
12 fiber, it doesn't need to add more fiber, it needs to
13 add more electronics. And so it's going to need to do
14 that for itself as well as for the CLECs.

15 So the order, all the order is saying is,
16 hey, you know, if you're going to have to add
17 electronics to increase the capacity, then that's what
18 you need to do, that is what exactly you would do if you
19 didn't have any CLECs and you found that you needed
20 additional capacity. So all we're saying is, Qwest, do
21 the same thing for competitors that you would do for
22 yourself.

23 So again, I think that that's a fairly
24 straightforward and what should be an uncontroversial,
25 at least from our view, ruling on the part of the

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1 administrative law judge, that that only makes sense. I
2 mean if you're going to have to add capacity, you add
3 capacity, and that's how you do it.

4 The problem with requiring the CLEC to do it
5 is that the CLEC can't just add electronics. The CLEC's
6 got to go dig up the streets and put in fiber between
7 those central offices. So to address some of the
8 arguments in Qwest's brief that Ms. Anderl didn't bring
9 up today, the CLECs are not in the same position as
10 Qwest when it comes to building the facilities. Under
11 certain circumstance, they may be. If nobody has any
12 facilities from a Qwest central office out to some
13 location, somebody builds a plant out in the middle of
14 nowhere and there aren't any telecommunications
15 facilities out there and somebody's got to build it,
16 yeah, sure, okay, we're in the same position as Qwest
17 is. But if you're talking about a housing development
18 that somebody buys a lot and builds a new house and
19 Qwest has already got all the wires out to that
20 subdivision, they just don't have a wire to that
21 particular house, or they run out of the wire from a
22 particular point in the network to that house, then they
23 can certainly add the facilities much more easily and
24 much more cheaply than can a CLEC, so we're not in the
25 same position.

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1 And I think, again, that's what the order
2 recognizes, is that it's not only consistent with
3 nondiscrimination principles, but it's consistent with
4 economic principles. I mean it doesn't -- a CLEC is not
5 going to order facilities from Qwest if it can build
6 them itself cheaper or close to the same cost. The
7 reason that a CLEC orders facilities from Qwest is
8 because it makes economic sense. And if it weren't for
9 the fact that Qwest were a competitor, Qwest I would
10 think would prefer to have the CLEC order facilities
11 from Qwest as opposed to building its own, because Qwest
12 is getting the money, is getting some money in this
13 transaction, whereas if the CLEC just provisioned the
14 facilities itself, Qwest would get nothing.

15 So again, it's not just nondiscrimination,
16 it's basic economics, that this Commission needs to step
17 in when the market is distorted, which it is when our
18 major competitor is also our major supplier, to make
19 sure that rational decisions are being made on the part
20 of Qwest in provisioning facilities.

21 And I think that's all I'm going to say, and
22 I will allow my cohorts to add whatever they would like
23 to say.

24 JUDGE WALLIS: Ms. Singer Nelson.

25 MS. SINGER NELSON: Thank you.

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1 I would echo everything that Mr. Kopta has
2 already said. I agree with his argument. Then I wanted
3 to go back and remind the Commission a little bit about
4 what the standards are that apply to the issues that are
5 before it today on access to unbundled network elements.
6 The judge, the initial order in this case recognized
7 those standards, applied them, and WorldCom believes
8 that her decision is supported by the Act, the rules,
9 and the record in this case.

10 The standards are set forth in Section
11 251(c)(3) and the FCC rules, primarily Rules 307 through
12 313. That is, 251(c)(3) requires access to unbundled
13 network elements to be provided by the ILECs on just,
14 reasonable, and nondiscriminatory terms and conditions.
15 The FCC rules further define nondiscriminatory and just
16 and reasonable. Nondiscriminatory is access to and
17 quality equal as that UNE is provided between the CLECs,
18 so all CLECs should be treated equally. The second
19 standard is the access to the UNE and the quality of the
20 UNE should be equal to what Qwest provides to itself or
21 to its retail customers. And then finally, if there is
22 not an equivalent retail service, the access to and the
23 quality should allow an efficient competitor with a
24 meaningful opportunity to compete.

25 One more overriding principle the Commission

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1 should remember when looking at these issues too is the
2 intent of the Act is to promote the development of
3 competition in the local exchange market here in
4 Washington. So if there is any ambiguity in the rules,
5 the FCC's orders on an issue, the Commission should look
6 back at that intent and apply that intent to its
7 interpretation of the words in the rules and in the FCC
8 orders.

9 Now I'm a little confused too based on
10 Ms. Anderl's opening comments. She did say generally
11 that Qwest is willing to provide UNEs on terms and
12 conditions equal to what it provides to itself. The
13 problem is when you get into talking specifics of SGAT
14 language, as everybody has done in these workshops, you
15 get into the application, specific application of those
16 principles. And the language that the judge looked at
17 in the workshop was more specific than just a general
18 principle of whether Qwest is providing access equal to
19 what it's providing to its retail customers. So we need
20 to pay attention to what the judge did in this case
21 specifically, because she had the contract language
22 before her that was being addressed by the parties.

23 There was, like for instance, on Section
24 9.1.2.1, the question on whether or not facilities
25 should be built is addressed in that section where just

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1 the opening clause saying, if facilities are not
2 available, Qwest will build, et cetera, et cetera. When
3 the parties started discussing that provision of the
4 SGAT, then they raised a question as to how Qwest treats
5 its retail customers under those same circumstances.
6 That evidence wasn't clearly in the record, so that's
7 why the issue got broadened as to it and issues whether
8 or not Qwest should have an obligation to build
9 generally. It's not clear from the SGAT language that
10 Qwest is treating, as Mr. Kopta said, that Qwest is
11 treating CLECs equal to the way it treats itself or its
12 retail customers.

13 So that's why I would caution the Commission
14 to give deference to the initial order in this case,
15 because the judge was there with the parties examining
16 the specific language at issue in the SGAT, and her
17 order applies specifically to the language that was
18 being discussed.

19 On the obligation to build, Rule 313(b) says
20 that Qwest must build UNEs for CLECs on the same terms
21 and conditions that it would build for itself or its
22 retail customers. The judge's decision in this case on
23 this issue in Paragraphs 79 and, yeah, 79 and 80 is
24 consistent with that rule.

25 CHAIRWOMAN SHOWALTER: What rule is that,

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1 whose rule?

2 MS. SINGER NELSON: It's the FCC Rule 313(b).

3 And then 309(c) of the FCC rules also
4 requires ILECs to replace UNEs provided to CLECs, and
5 this is consistent again with finding that ILECs have
6 the obligation to construct UNEs.

7 Qwest argues that Paragraph 324 of the UNE
8 Remand Order dictates that ILECs are not required to
9 build or construct facilities, but the Remand Order
10 provides a narrow exception to the rule. And in that
11 Remand Order, you can see if you examine it that new
12 transport facilities to meet specific competitive LEC
13 point-to-point demand requirements is the narrow
14 exception to the more general obligation that ILECs do
15 need to provide the facilities. And the ALJ recognized
16 the narrow exception where the judge stated that:

17 The existing network includes all points
18 that the ILEC currently serves via
19 interoffice facilities.

20 And she found that Qwest is not required to
21 extend to new points outside its service territory. So
22 she properly read Paragraph 324 and applied it to this
23 case. But then she said:

24 Qwest is still required to provide
25 access to UNEs within its existing

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1 network even if it must construct
2 additional capacity to make those UNEs
3 available.

4 This interpretation is consistent with the
5 requirement that Qwest treat the CLEC's request like it
6 would treat itself or its own customer's request, and it
7 allows CLECs a meaningful opportunity to compete. Qwest
8 provides services in its retail tariffs that require
9 Qwest to build facilities. A CLEC can purchase those
10 facilities actually under the retail tariff and Qwest
11 would be obligated to build. The Act requires that
12 wholesale customers be treated exactly the same as those
13 retail customers are treated.

14 Finally, one other point is that CLECs are
15 already paying for the build of new facilities in the
16 price that they pay for UNEs. In Washington, as in most
17 of the other Qwest states, in calculating UNE rates, a
18 fill factor is used to ensure that a sufficient capacity
19 is always available on the network. Once a certain
20 percentage is achieved, once a certain percentage of
21 fill is achieved, a new facility is built. For example,
22 if a fill factor of 50% is used in calculating the UNE
23 rates here in Washington, the CLEC pays for a whole
24 facility where only 50% is used and 50% is unused.
25 There's that extra capacity built into the prices of the

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1 unbundled network elements.

2 The reason for the fill factor is to ensure
3 that adequate capacity always exists on the network.
4 Including fill in prices means that CLECs are charged
5 for building capacity, but with Qwest's policy of not
6 adding capacity for CLECs when requested, only Qwest
7 benefits. It's getting paid in the wholesale prices,
8 and it can use that extra capacity at its discretion,
9 but with Qwest's policy, it's denying CLECs that same
10 opportunity. This is clearly inconsistent with the
11 Act's nondiscrimination provision.

12 And then in response to some of Ms. Anderl's
13 other comments, I think it's a bit of a
14 mischaracterization to say that eight other commissions
15 have already decided this issue in Qwest's favor,
16 because Judge Antonuk's decision is one decision in a
17 multistate proceeding. That decision is going to go
18 back to each of those commissions for review. It's just
19 a recommended decision of him.

20 CHAIRWOMAN SHOWALTER: I think Ms. Anderl was
21 clear on that.

22 MS. SINGER NELSON: Okay.

23 One of the other arguments that Qwest makes
24 is that requiring Qwest to build is contrary to public
25 policy, because, and it's stated in their brief, that it

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1 would discourage facilities based competition. I would
2 disagree with that statement. I think that it's -- the
3 judge's decision in this case is consistent with public
4 policy. The overarching public policy here is the
5 encouragement of the development of competition, and
6 that is not limited to competition in a facilities based
7 market. There are three different avenues for the
8 development of competition in the local exchange market,
9 resale, unbundled network elements, and facilities based
10 competition.

11 The Commission in this decision can encourage
12 the development of unbundled network element based
13 competition, and through that, it allows CLECs to get
14 into the market at a cheaper -- in a cheaper way, in a
15 way that's not as expensive as investing in a
16 duplicative network of Qwest's network, allows CLECs to
17 get in under that form of entry, allows them to get a
18 base of customers, get a revenue stream that will enable
19 it to go further and invest in the future and the
20 facilities for telecom here in Washington.

21 So I don't think that encouraging UNE based
22 competition is inconsistent with public interest. I
23 think that it's consistent with the public interest, and
24 it's consistent with Congress's intent in the 1996
25 Telecom Act.

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1 Now briefly on the --

2 CHAIRWOMAN SHOWALTER: On that point, your
3 argument is it's in the public interest, but would you
4 agree that it does not encourage new facilities, at
5 least at that point in time?

6 MS. SINGER NELSON: I would -- I would say
7 that it encourages UNE-P or it encourages entry on the
8 basis of unbundled network elements. I wouldn't
9 necessarily agree that it discourages facilities based.

10 CHAIRWOMAN SHOWALTER: That wasn't my
11 question.

12 MS. SINGER NELSON: Oh.

13 CHAIRWOMAN SHOWALTER: It was that it does
14 not encourage.

15 MS. SINGER NELSON: Does not encourage, I
16 would agree with that.

17 On the issue of dark fiber, I agree with
18 Mr. Kopta's statements on that issue. The issue as
19 framed by the judge's decision here is whether or not
20 when there is an issue of capacity Qwest is required to
21 light existing dark fiber. That's not an issue of CLECs
22 purchasing dark fiber and then asking Qwest to light it.
23 And the footnote that Ms. Anderl referenced in her
24 comments really went more to the latter issue. It went
25 to when a CLEC purchases dark fiber, does Qwest have an

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1 obligation to attach electronics to it, footnote said
2 no.

3 Here the issue is whether in the unbundled
4 transport section of the SGAT, when transport is -- when
5 facilities aren't available for transport but there's
6 dark fiber available there, whether Qwest is obligated
7 to light the dark fiber in order to expand the capacity.
8 And I would say that the FCC order and the analysis of
9 the ALJ's decision -- well, the ALJ's analysis on that
10 issue is right on point. It's consistent with the FCC
11 order. It does require Qwest to light the capacity,
12 light the dark fiber in order to add the capacity to
13 serve the customers, just as Qwest would do if its own
14 customers needed additional capacity.

15 I think that's all I needed to address on
16 those two issues, thank you.

17 JUDGE WALLIS: Mr. Harlow.

18 MR. HARLOW: Thank you, Your Honor.

19 JUDGE WALLIS: Let's let Mr. Harlow make a
20 statement.

21 MR. HARLOW: Is the microphone on?

22 JUDGE WALLIS: I believe it is.

23 MR. HARLOW: Thank you, Your Honor, and
24 Commissioner Oshie, it's a pleasure to appear before you
25 for my first time. I'm representing Covad

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1 Communications today, which is a CLEC that specializes
2 in DSL service. And Covad concurs with AT&T and
3 WorldCom, and particularly their analysis of federal
4 law, and I think that's all I need to say about it.
5 They have addressed it quite well in their briefs and
6 their oral arguments.

7 Both Mr. Kopta and Ms. Anderl alluded to
8 state law, and I would like to take that a little bit
9 further just for a few minutes, the reason being state
10 law does play in here, and this is certainly not a
11 departure from prior Commission precedents. In fact, I
12 think it's a logical extension of prior Commission
13 orders, and I have two in mind, although I think there
14 are certainly others. Commissioner Hemstad may -- was
15 around for at least one of these cases, if not both.

16 The first one was the Commission's own
17 interconnection Docket UT-941464. In the Ninth
18 Supplemental Order, the Commission ordered that Qwest
19 then U S West build sufficient facilities for
20 interconnection, and that was put into practice and
21 reaffirmed in the MCI Metro what we call the
22 provisioning complaint case, Docket UT-971063, February
23 1999 Final Order.

24 And I think the existence of that second
25 docket, the complaint case, kind of illustrates the

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1 difficulties you have in practice, which is that for
2 reasons that are probably rational from Qwest's
3 perspective, Qwest is not as motivated to build
4 facilities that are used primarily or exclusively by its
5 competitors as it is motivated to build retail
6 facilities, and that can lead to problems.

7 You know, take a look at another scenario
8 where we clearly went down the path of only, you know,
9 on a space available basis of collocation in central
10 offices. Think of all the disputes we have had where
11 Qwest reported back there's, you know, we don't have the
12 facility basically, we don't have any more space in the
13 central office, which led to contested dockets and in
14 many cases led to finding more space. And I think as a
15 practical matter, if the ALJ's initial decision is
16 overturned here, we're going to have the same practical
17 problems.

18 But in any event, the Commission has a
19 history of ordering Qwest to build facilities as
20 necessary to facilitate competition. And while this is
21 a little bit different issue, it's a logical extension
22 of those orders. Clearly under state law, and I don't
23 -- again, we agree that federal law supports the ALJ
24 decision, but to the extent that there's any question at
25 all about it, clearly under state law this Commission

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1 has the jurisdiction to order Qwest to build facilities
2 for both retail and wholesale customers. And I have in
3 mind, although there are certainly others again, RCW
4 80.36.260, which I think is entitled betterments but
5 also talks about extensions.

6 Qwest suggests that we deal with the state
7 law issues in a rule making docket, and the problem with
8 that docket, particularly if it continues at the current
9 pace, is it's unlikely to be resolved before Qwest files
10 its 271 application with the FCC, at least on Qwest's
11 timetable.

12 Finally --

13 CHAIRWOMAN SHOWALTER: Can I stop you there.

14 MR. HARLOW: Certainly.

15 CHAIRWOMAN SHOWALTER: Just trying to sort of
16 in my own mind get 271 authority distinct from SGAT
17 authority and how state authority fits into that. I
18 think I understand what the 271 process is and that it's
19 really up to the FCC, and we're an advisor. But then
20 here is this thing called an SGAT, and I understand that
21 federal law says nothing prohibits us from exercising
22 our state authority, but how is the SGAT joined? How,
23 if there were something we wanted to inject or require
24 Qwest to do under its SGAT because we said independent
25 from anything under federal law, we think this is

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1 important, tell me why it is appropriate for us to
2 inject that solely state requirement into the SGAT.

3 MR. HARLOW: Well, I think that the federal
4 requirements really set the minimum standard. At a
5 minimum, Qwest must comply with the requirements of
6 Sections 251 and 252 and the other requirements,
7 prerequisites of Section 271. But to the extent you
8 have a closed question, if you will, the overriding goal
9 is public policy, ensuring that it's in the public
10 interest to grant 271. And, of course, underlying that
11 is ensuring that the local markets are irreversibly open
12 to competition. And as we have illustrated, I think,
13 you know, you run the risk that the proper incentives
14 are not there if you don't -- if you overturn the ALJ
15 decision in this regard.

16 CHAIRWOMAN SHOWALTER: Maybe -- my question
17 really -- maybe my question is what is an SGAT in a
18 legal sense? Is it something that is pursuant to
19 federal law under federal law, and we're really only
20 looking at federal law when we're deciding what's in an
21 SGAT? And then parallel in our state at our state level
22 we can have rules that based on our own authority
23 whatever we want that is -- doesn't -- isn't preempted,
24 or what -- is an SGAT a federally authorized document,
25 or is it a hybrid?

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1 MR. HARLOW: I don't profess to be an SGAT
2 expert, but I think in this docket, and it's certainly
3 been useful, the SGAT has been used as a vehicle to help
4 us get to where Qwest can be found to have opened its
5 markets. And I -- and I think in part that's been
6 because of the limited entry that's occurred to date.
7 Some of this is being done prospectively through the
8 SGAT on the assumption that, well, we haven't tested
9 this out but that, you know, if Qwest is contractually
10 bound to certain SGAT provisions, then the market can be
11 deemed open. I guess I'm really speaking for myself
12 there rather than --

13 CHAIRWOMAN SHOWALTER: Ms. Anderl, could I
14 get your response on the relationship of 271 to SGAT to
15 independent state authority that we might have?

16 MS. ANDERL: Sure. In a wonderful show of
17 cooperation between the ILEC and the CLEC, Mr. Kopta has
18 allowed me to review his copy of the Telecom Act. In my
19 hurry to leave the office, I left mine behind.

20 The SGAT is a document authorized and
21 explicitly contemplated under Section 252(f) of the Act,
22 and it is something that the state commissions are
23 authorized to review. It is something that the state
24 commissions are authorized to add state specific terms
25 to, I believe, under the explicit provisions of the Act.

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1 It is not clear on what grounds a state commission could
2 reject an SGAT, although it does say in the Act
3 explicitly that the state commission can't affirmatively
4 approve the SGAT until they find that it's in compliance
5 with the I believe 251 requirements of the Act.
6 Alternatively, as was done here, the state commission
7 can allow the SGAT to go into effect without
8 affirmatively approving it and then continuing its
9 review of the SGAT after it becomes effective.

10 I believe that the SGAT relative to the 271
11 obligation and your recommendation to the FCC only has
12 to contain that which is mandated by Section 271. And
13 so when you're asked by the FCC, does this SGAT and do
14 Qwest's legal obligations and, you know, Qwest's
15 performance and everything else comply with the terms of
16 the Telecom Act, you can't be looking at state law when
17 you answer that question. You need to look at the
18 relevant interpretations of the Act, either by the FCC
19 through its rules and orders or the courts. And the
20 answer has to be based on what is required of the
21 incumbent under the Telecom Act, not under relevant
22 provisions of state law.

23 Now that said, can you impose additional
24 state law obligations on an ILEC? Yes. But I don't
25 know that I agree that it's appropriate to do it in

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1 conjunction with -- in the SGAT docket when that SGAT
2 docket has been consolidated with the 271 docket where
3 you're really trying to look at the two issues relative
4 to one another.

5 CHAIRWOMAN SHOWALTER: But we do have two
6 dockets, so could we say, if it came down to this, yes,
7 we think the SGAT that the company proposed meets the
8 minimum test, but we are insisting in the SGAT, not as a
9 condition of 271 approval, but because we're insisting
10 on it as a condition of our state authority to insist on
11 it that you stick another provision in the SGAT; is that
12 you just think it's inappropriate to do in this
13 proceeding because we're really 271 focused?

14 MS. ANDERL: Yes, I do, and I think that
15 really the record evidence and the analysis that the
16 parties have engaged in in terms of developing a factual
17 record and even briefing has really been more focused on
18 the requirements of the Act as opposed to specific
19 requirements under state law. And I think that there --
20 if parties were seeking to impose obligations that just
21 arose under state law, you know, some may be obligations
22 that could arise under either federal or state law, and
23 then that's fine, because we have been thinking about
24 federal law all along. But if someone wants to say, no,
25 the Act doesn't require this, but we think there's a

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1 specific provision of Washington law that does require
2 it, then I think you ought to undertake a little bit of
3 a different analysis in terms of whether that's
4 consistent with the policy goals of Washington, whether
5 that's really what the statute means given the context
6 in which the statutes were enacted, which was 1911, and
7 there was a monopoly environment and all of those other
8 kinds of things that I don't think have really been
9 brought forth in terms of engaging in a complete
10 analysis.

11 CHAIRWOMAN SHOWALTER: So you think if we
12 determine that a provision like this is allowed by state
13 law but not required by federal law that we should
14 reserve that for some subsequent SGAT proceeding or rule
15 making or some other something where we're looking at
16 state law?

17 MS. ANDERL: Yes.

18 MR. HARLOW: And I have opened Pandora's box
19 here, but I think Ms. Anderl did a good job kind of on
20 SGAT 101. I wouldn't disagree with that. I do disagree
21 with her conclusion, however, and this gets a little bit
22 ahead of ourselves, but I think this is the best place
23 to take it up anyway. And the reason is that at a
24 minimum, and there may be other reasons as well, but at
25 a minimum, if the state law has provisions or Commission

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1 precedent relating to opening up markets in this state
2 to competition, if the Commission -- and the Commission
3 finds -- either finds that Qwest hasn't complied with
4 those and its SGAT falls short of those requirements or
5 even further finds that Qwest, in fact, is violating
6 those state law requirements, then I find it difficult
7 to see how the Commission could conclude that it would
8 be in the public interest to grant or to recommend
9 granting 271 approval.

10 The states can go further. The federal
11 requirements set a minimum standard, and if this state
12 feels that those aren't sufficient with regard to Qwest
13 and this state, then I think the 271 should not be
14 recommended to the FCC. And I think this is the place
15 to deal with it since we're dealing with specific SGAT
16 provisions that we're taking up here.

17 Oh, what I wanted to say is to come back to
18 my initial point, which is we think there's ample
19 federal authority requiring the outcome that the ALJ
20 reached.

21 And then finally as far as policy, again,
22 Qwest is the carrier that because they're of the
23 ubiquitous position in their territory, which is all
24 we're talking about, Qwest is the carrier that's the
25 most likely to be motivated to either build facilities

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1 or to augment or reinforce facilities, particularly in a
2 case where you're just talking about adding electronics
3 to existing fiber routes.

4 And so the most likely scenario when you have
5 like the marginal customer or customers close to the
6 margin, if a hypothetical customer comes and asks, let's
7 say they go to the CLEC first and ask for service, the
8 CLEC says, we can't provide it because it's not
9 economical for us to build where you are. We have gone
10 to Qwest, Qwest has said they're not going to build for
11 us, so sorry. Now the customer goes to Qwest next, and
12 you've got two outcomes there. Qwest either says, no,
13 we're not going to build or augment to provide the
14 service, or, great, we're going to, you know, we can do
15 that, and they do build.

16 But because of the cart and the horse problem
17 that you get if you overturn the ALJ decision, you've
18 got a situation there where Qwest now has facilities,
19 but they're the only one that can serve the customer,
20 because the CLEC already had to say no. And the other
21 scenario is the customer doesn't get served at all. And
22 from a public policy standpoint, I don't think this
23 Commission wants to incent either of those scenarios,
24 either the scenario where the customer gets no service
25 or where the customer can only get service from Qwest.

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1 Thank you, Commissioners.

2 JUDGE WALLIS: Mr. Kopta, you looked like you
3 were anxious to add a brief point at one juncture. Did
4 you wish to do that?

5 MR. KOPTA: Yes, thank you, actually a couple
6 of brief points, both in response to the Chairwoman's
7 questions.

8 The first, sort of dovetailing again on, you
9 know, what is the nature of the SGAT, certainly Qwest's
10 view is rather myopic when it comes to 271. They filed
11 the SGAT as a means of getting 271 authority, and so
12 they don't want to be distracted by anything other than
13 what's going to allow them to get authority to provide
14 interLATA services in Washington.

15 But the SGAT itself is not so limited. It's
16 an entirely different section, it's Section 252. And by
17 filing the SGAT, Qwest essentially left open issues that
18 are legitimately included in the SGAT, which also
19 include matters of state law. This is not something
20 that is so peculiar to Washington that it doesn't have
21 anything to do with the Federal Act or even this
22 proceeding.

23 These proceedings have been consolidated
24 since the beginning. The SGAT is in form and intent
25 essentially an interconnection agreement that any CLEC

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1 could come in and sign on the dotted line and take it
2 from there. And so it needs to be a complete package
3 when it's approved by this Commission, not piece parts
4 saying, okay, well, here are all the piece parts that
5 are required for 271 authority, and all the other piece
6 parts, well, we will get around to those at some other
7 point. I think the Commission shouldn't consider
8 approving the SGAT until it feels that this is a
9 document that reasonably captures Qwest's obligations
10 under both federal and state law.

11 And so I do believe that this is the
12 appropriate proceeding to deal with this kind of an
13 issue, which, I think as we have talked about before,
14 touches on both aspects of federal and state law. It's
15 not something that's unique to the state of Washington.

16 The other issue that the Chairwoman raised
17 was whether or not this policy would encourage
18 facilities based competition as opposed to discouraging
19 it, and I have a slightly different view than Ms. Singer
20 Nelson, because my other clients being XO and ELI are
21 facilities based carriers, and AT&T is too with having
22 acquired the assets of TCG. And those carriers are
23 necessarily limited by mugging, for a better term, to
24 install only certain facilities. I mean they have fiber
25 rings, they have some facilities to customer locations,

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1 but I think you actually encourage facilities based
2 competition by making Qwest facilities more available,
3 because they can be used in conjunction with a CLEC's
4 facilities and justify the investment.

5 If you've got to build a fiber ring and also
6 every single spur off that fiber ring to a customer
7 location, then that's a much more daunting task than to
8 say, if I can build this fiber ring, if I can get into
9 Qwest's central offices and get access to unbundled
10 network elements, then I'm going to be able to serve a
11 large number of people and potentially maximize my
12 investment much sooner than I could if I have to
13 duplicate all of Qwest's network.

14 So from my point of view and my clients'
15 point of view, it does actually encourage the
16 development of facilities based competition. And to our
17 view, facilities based doesn't mean entirely your own
18 facilities. Again, going back to the economics of it,
19 it may not make sense to have three or four different
20 companies building loops to the same location.
21 Sometimes it would. I mean if you're talking about
22 building in downtown Seattle, it probably does. If
23 you're talking about a single residence out in the
24 neighborhood, maybe it doesn't. But the whole point of
25 the Act is to make the different tools available so that

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1 you can maximize the opportunities for companies that
2 want to provide competing service to the most number of
3 people in a particular area.

4 Thanks.

5 JUDGE WALLIS: Ms. Anderl, did you wish to
6 make a very, very brief rejoinder?

7 MS. ANDERL: Yes, thank you, Your Honor. If
8 I need to steal time from the third issue, I will.

9 I just wanted to say a couple of things.
10 Mr. Kopta mentioned in his argument that, you know,
11 we're in a situation here where if Qwest is out of
12 transport capacity between two central offices and Qwest
13 would add capacity to meet its own needs, then it should
14 do so for the CLECs as well. That's not exactly what
15 we're talking about here, although it certainly may be a
16 subset, but that's not all of what we're talking here.

17 If Qwest is out of capacity on its own
18 network between two central offices and needs to add
19 transport facilities for its own network, it will do so.
20 That will create spare capacity and will provide
21 facilities which CLECs will have available to themselves
22 as well. The point there though is that that is an
23 integrative planning process in terms of Qwest
24 evaluating all the needs and uses of the network, and it
25 lets Qwest make the right decisions in terms of serving

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1 its customers and utilizing both cash and facilities
2 efficiently. And so we are kind of worried about CLECs
3 being able to do that on a piece meal sort of a basis as
4 opposed to being separate from the integrated planning
5 process that Qwest uses to determine whether it adds its
6 own transport facilities.

7 But even more seriously, what we're worried
8 about is a situation where, for example, we have a DS3
9 transport facility between Renton and Maple Valley or
10 something like that. And a DS3 is the equivalent of 672
11 voice grade lines. And a CLEC comes to us and says, you
12 know, we think we're going to get a big customer out
13 there in Maple Valley, and in order for us to bid that
14 customer, and of course maybe the CLEC won't tell us all
15 this detail but, you know, just to lay out the scenario,
16 we need to have an assurance that we can provide that
17 customer service, and so we want to be able to tell that
18 customer that we can provide them with an OC-48 or
19 optical carrier 48, which if I have done my math
20 correctly is something like 32,000 plus or minus voice
21 grade lines.

22 That could entail, if we were to meet that
23 request for service, adding very expensive electronics
24 on both ends of that transport route in Renton's central
25 office and in the Maple Valley central office. Under

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1 the CLEC's advocacy today, we could be required to do
2 that, incur all of the costs, and then if the CLEC
3 doesn't obtain the customer or the customer ultimately
4 decides not to build a plant or a facility in that area,
5 Qwest would have no recourse. The CLEC could sign up
6 for that service for one month or not at all, and Qwest
7 would essentially have financed the job and be left with
8 absolutely no cost recovery.

9 And it's those types of scenarios that cause,
10 well, as well, of course, as the explicit language in
11 the FCC orders that says we don't have to build
12 transport, so it's not just the factual scenario, but
13 it's legal coupled with those types of facts that cause
14 us to say that the legal decision was a good one to not
15 require us to build transport, because these are the
16 types of things you could potentially see. And so I
17 just kind of wanted to illustrate that.

18 In response to a couple of things that
19 Ms. Singer Nelson stated, I believe that she indicated
20 that FCC Rule 313(b) states that Qwest must build
21 facilities or build UNEs for CLECs. I don't believe
22 that it does. It may well say that Qwest must
23 provision, but the rule does not use the word build, or
24 I think we would be having a completely different
25 discussion here. Furthermore, Rule 309(c) cited by

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1 Ms. Singer Nelson indicating that Qwest must replace
2 UNEs I think is clear on its face that Qwest must
3 replace UNEs, not build new ones.

4 And the analogy that sprung to my mind was if
5 you were to go to your insurance company and say, you
6 know, I have wrecked my car, now could you please
7 replace it based on the premium I have been paying you,
8 and the insurance company would say yes. Or
9 alternatively if you were to go to your insurance
10 company and say, I have been paying the premium, could
11 you just buy me a new car. And so I think there is
12 difference, the obligation to replace is very different
13 from the obligation to build anew.

14 Finally, a couple of things. Ms. Singer
15 Nelson indicated that the Act requires that wholesale
16 customers be treated exactly the same as retail. I
17 think there are a number of reasons why that's
18 incorrect, but perhaps the clearest illustration of that
19 is simply the Verizon Pennsylvania decision where when
20 Verizon refused to provide high capacity loops to
21 wholesale customers but indicated it would provide those
22 same services or facilities under tariff, the FCC said
23 that was fine.

24 And last, the fill factor issue, I don't know
25 that this is -- very brief oral argument is the right

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1 place or time to get into the whole discussion of fill
2 factor, but the cost studies that are at issue in the
3 cost docket compensate the ILEC or are designed to cost
4 and price rate elements for the ILEC to recover the cost
5 of the network that is being envisioned in the cost
6 study. And so if there's a 100 pair cable that is
7 hypothesized in the cost study and the costs are
8 established and prices set so as to recover that cost,
9 that's fine, it does that. What a fill factor doesn't
10 do is anticipate digging a trench or adding a brand new
11 100 pair cable that was never imagined or contemplated
12 or hypothesized in the cost study. And so I don't think
13 that that fill factor discussion is accurate, and we can
14 get more into that in the cost docket, and I know that
15 the issue was discussed in greater detail in the loop
16 workshop addressing the checklist item number 4.

17 Thank you.

18 CHAIRWOMAN SHOWALTER: Mr. Kopta, I just have
19 to ask you what your response is to the Maple Valley
20 situation where the client -- where the company backs
21 out, is all the risk put on the ILEC in that situation?

22 MR. KOPTA: I'm glad you asked me for my
23 response. Number one, I think that's an unusual
24 scenario. That's generally not going to happen. And
25 number two, I think we've got the cart before the horse

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1 in terms of what's going to happen in that scenario.
2 The CLEC is not going to say, gee, I'm going to put a
3 whole bunch of facilities out in some location in
4 anticipation of signing up this customer, then when I
5 have those facilities in place, go to the customer and
6 say, hey, how would you like to be served by me. I
7 think it's the other way around, and that's why there
8 have been a lot of problems from the CLECs' prospective.
9 They go out and they have a customer that says, gee,
10 sure, I would love to take your service. So they say,
11 great, okay, well, we need to get the facilities from
12 Qwest because Qwest already has facilities out to where
13 you are, because you've got phone service now in most
14 cases, so we're just talking about generally either
15 augmenting your service or replacing some or all of the
16 Qwest service. And they come to Qwest and they say, we
17 need to order these facilities to be able to provide
18 these services to that customer. Well, and that's when
19 they get the response, sorry, there aren't facilities
20 there either because the customer wants more service
21 than it has now and Qwest doesn't have the facilities to
22 do it or for whatever reason the facilities that are in
23 place are not compatible with the type of service that
24 the CLEC wants to provide that customer.

25 So the more typical situation is going to be

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1 that in which the CLEC already has the customer
2 commitment, usually by a contract if it's going to be a
3 customer of that size, and goes to Qwest to get the
4 facilities after it's made the deal with the customer,
5 not before in anticipation of being able to get the
6 customer, because there's certainly no guarantee that a
7 customer is going to sign up with the CLEC. I mean this
8 is -- that's the reality of the marketplace, there's no
9 guarantee whatsoever.

10 CHAIRWOMAN SHOWALTER: I guess the question
11 I'm asking is that the telecom company contracts with
12 some big, you know, Intel come into town. There might
13 be contractual relations, but if somebody backs out,
14 usually the contract covers for that. But is this --
15 has Ms. Anderl described a situation where someone might
16 back out and the ILEC is left holding the bag because
17 they don't have a contractual relation either with the
18 Intel or really with the CLEC in the sense that they
19 just have to build, or is there recompense there?

20 MR. KOPTA: And again, we're talking about
21 the two different scenarios. One is where Qwest already
22 has the facilities and we're just augmenting them within
23 its service area. And the other is where it's putting
24 in new facilities, the Intel example. And again, the
25 order distinguishes between those two circumstances so

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1 that if you've got a situation where there is a buildout
2 to a new area, then Qwest can do the same thing that it
3 would do to Intel, which is to say, hey, this is going
4 to cost us a lot of money, CLEC, you're going to have to
5 pay some of this up front so that we, you know, recover
6 our investment, just as they would to Intel if Intel
7 said, gee, you know, we want all of these services, but
8 we want them up and running day one when we open the
9 plant.

10 CHAIRWOMAN SHOWALTER: But what if Intel
11 wants to go to Maple Valley then instead, it decided to
12 go to -- what if it was Intel, I don't know who it was,
13 I don't know why I said Intel, but it's Intel that wants
14 the OC-48 and then decides, we can't make it. A lot of
15 these deals are put together by a number of different
16 pieces of infrastructure and governments and things like
17 that, and it seems like in general you want the company
18 that's taking on a risk to have some leverage over the
19 situation, otherwise -- you don't want someone with no
20 risk to be able to come into your -- another company and
21 impose risk. And I'm just asking, in that situation, is
22 it, is it that situation?

23 MR. KOPTA: No, it's not, I mean because in
24 that situation, Qwest is already going to cover itself.
25 If Qwest were going to serve Intel, Qwest would cover

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1 itself, I'm assuming. They're going to take a look at
2 this, the amount of money that they're going to spend,
3 and I think a reasonable company is going to say, we're
4 not going to on blind faith just put a whole bunch of
5 facilities out there and hope you guys follow through.

6 And what we're saying is, okay, do the same
7 thing with us. If we've got the deal to provide service
8 to Intel, then treat us as if, you know, we were Intel.
9 You know, impose those same kind of -- if they can do it
10 under their tariff or under whatever rules or
11 obligations that they have with respect to providing
12 service and say, you know, you've got to pay a certain
13 amount up front or you've got to pay a line extension
14 charge or whatever it is, okay, charge us that, the same
15 thing that you would charge them. So we're just saying,
16 put us in the same shoes. We're not trying to shift the
17 risk any more than what Qwest has already assumed.

18 JUDGE WALLIS: All right.

19 MS. ANDERL: Your Honor, may I briefly
20 respond.

21 I don't think that -- I don't think that
22 that's right. I don't think that the initial order
23 makes the distinction that Mr. Kopta thinks that it
24 does. Because in the Renton Maple Valley scenario, we
25 do have transport facilities between those two offices,

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1 and maybe we do have two fibers, and maybe all you have
2 to do to increase the capacity to an OC-48 is to add
3 electronics on either end of the fiber, and that is
4 exactly the issue that we're talking about here where we
5 believe the initial order would require us at the CLEC's
6 behest to add those electronics, which are not a small
7 expense, and it would be different if we were serving
8 Intel, the end user. Because you're correct, we would
9 have a contractual recourse to them. And with the CLEC,
10 we believe that we would not, and yet we do believe that
11 Paragraphs 79 and 80 would require us to respond to the
12 request and provision the electronics. And there's
13 perhaps different interpretations.

14 JUDGE WALLIS: Are there any further
15 questions?

16 All right, let's be off the record for a
17 moment.

18 (Recess taken.)

19 JUDGE WALLIS: All right, let's be back on
20 the record please after a brief recess. Let's move into
21 the second issue, which for our purposes today is EELs.

22 Ms. Anderl.

23 MS. ANDERL: Thank you, Your Honor.

24 Before I start, I would like to distribute a
25 very short presentation, a power point type presentation

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1 that Qwest has used in other contexts that just kind of
2 illustrates EELs and the relationship to special access.
3 I have already distributed these to counsel.

4 JUDGE WALLIS: It's not intended to be an
5 exhibit, but merely an illustrative guide to your
6 discussion?

7 MS. ANDERL: Correct.

8 Just to kind of set things up a little bit
9 here, EEL or E-E-L stands for enhanced extended loop,
10 and it is an unbundled network element or a UNE as a
11 result of the FCC's UNE Remand Order. They are a
12 combination of a loop and transport, and you can see in
13 the two slides that I presented to you, the first slide
14 depicts a typical special access circuit, or we could
15 also call it a private line circuit, and then the second
16 slide depicts a typical EEL. And you can see that they
17 are the same physical facilities and configurations, and
18 that becomes important as we get into the discussion
19 that we're about to have with the issues that we have
20 with the initial order in connection with EELs.

21 The FCC has spent a considerable amount of
22 time discussing EELs, and I provided to you entire
23 copies of the two orders that they issued on this topic,
24 the Supplemental Order which was released November 24th,
25 1999, and that's a very short order, and then the

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1 Supplemental Order of Clarification released June 2nd,
2 2000, which is also in FCC terms fairly brief, about 25
3 pages. There are two issues kind of under the general
4 EELs topic. One is the shorthand that we're using is
5 the local use restriction, and that issue is identified
6 as EEL-1 and EEL-4. It's discussed in the initial order
7 at Paragraphs 91 through 103, and it's discussed in
8 Qwest's August 23rd brief beginning at page 26. And
9 that's the one I'm going to talk about now. And then if
10 I have time, I would like to talk briefly about the ISP
11 traffic issue, which is the other issue under EELs, and
12 that is EEL-16.

13 The FCC's ruling with regard to EELs as an
14 unbundled network element is that they can only be used
15 if they are used to provide to the end user customer a
16 significant amount of local exchange service, and the
17 FCC states that very clearly in the Supplemental Order
18 of Clarification at Paragraph 5. The FCC has also
19 clarified that the ruling restricting the use of EELs is
20 interim while the FCC considers the fourth further
21 notice of proposed rule making. That was anticipated to
22 be resolved more than a year ago, by June 30th, 2000.
23 It is, however, still pending, and I do not have any
24 wisdom about when we might hear from the FCC on that.

25 The issue as it pertains to this case

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1 specifically with regard to EELs is whether the
2 requirement that they only be permitted to be used when
3 there is a significant amount of local exchange service,
4 whether that applies only to conversions of existing
5 special access circuits or to all orders for EELs,
6 including new EELs. Now what you can see if you look at
7 the illustrative document that I handed out to you is
8 that carriers who currently are purchasing special
9 access circuits from Qwest under the retail tariff may
10 wish to convert those to EELs.

11 Now because the physical configuration is the
12 same, it would essentially just be a billing change.
13 And because the rates are different, and as I will get
14 into in a minute, the FCC determined that there could be
15 a significant negative impact on universal service and
16 the access charge regime in its entirety, the FCC
17 limited the ability of CLECs and IXCs to convert those
18 special access circuits to the EEL or the UNE loop
19 combination.

20 The initial order appears to have held that
21 the significant amount of local exchange service
22 restriction applies only to conversion of existing
23 special access circuits. However, Qwest believes that
24 the law mandates that the significant amount of local
25 exchange service restriction applies to all EELs,

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1 whether you're converting from an existing special
2 access circuit or whether a carrier is ordering a brand
3 new EEL in the first instance.

4 Let me just point you to the paragraphs in
5 the initial order that begin to discuss this, and those
6 are Paragraphs 98, 99, and 100. It appears as though
7 the initial order's ruling is based on a belief that
8 Qwest will not provide EELs or will not combine UNEs,
9 and the discussion in Paragraphs 99 and 100 seem to
10 illustrate that point. However, this is simply
11 incorrect. Qwest will offer EELs. It is mindful of its
12 obligation to combine UNEs and has committed to do so in
13 the provision of EELs. Qwest is merely asking here that
14 the FCC's ruling in the Supplemental Order Clarification
15 be followed, and we believe that the Supplemental Order
16 Clarification of June 2nd, 2000, is on balance clear
17 that the local use restriction is more broadly
18 applicable than just to conversions of special access
19 circuits.

20 The order does in the introductory section
21 talk about conversions of special access circuits to
22 EELs. For example, in Paragraph 5, there is a sentence
23 that contains the phrase, the IXC may not convert
24 special access, and so there is a reference to the
25 conversion there. And in Paragraph 6, the FCC also says

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1 in setting up a limitation, they say, in order to
2 convert special access services to combinations, a CLEC
3 must do the following. However, I think the context is
4 important here. At the time the decision was written,
5 which was more than a year ago, conversion of special
6 access circuits to EELs was the primary issue. CLECs
7 have freely admitted, and I believe did so in the cost
8 docket here in Washington when the issue came up, that
9 they had been purchasing special access circuits from
10 the ILECs because EELs were not previously available,
11 thus they were most interested not in ordering new EELs,
12 but in converting their existing special access circuits
13 to EELs. And I believe that the FCC order simply
14 discusses the issue in that context. So those
15 references to conversion are in the introductory
16 section.

17 In the actual discussion and decision
18 paragraphs, it is clear that the local use restriction
19 applies to all EELs, including new orders. For example,
20 in Paragraph 8 of the Supplemental Order Clarification,
21 the FCC clearly states:

22 Until we resolve the issues in the
23 fourth FNPRM, IXCs may not substitute an
24 incumbent LEC's unbundled loop transport
25 combinations for special access services

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1 unless they provide a significant amount
2 of local exchange service in addition to
3 exchange access service to a particular
4 customer.

5 Later in the same decision in Paragraph 21,
6 the FCC states:

7 We now define more precisely the
8 significant amount of local exchange
9 service that a requesting carrier must
10 provide in order to obtain unbundled
11 loop transport combinations.

12 In our mind, that language where it says
13 here's what we're going -- we're going to tell you what
14 you have to do in order to obtain an unbundled loop
15 transport combination means that the restriction applies
16 equally to conversions of existing circuits and to
17 orders for new circuits.

18 CHAIRWOMAN SHOWALTER: Ms. Anderl, I'm
19 looking for that, I thought you said Paragraph 21.

20 MS. ANDERL: Yes, Your Honor, let me tell you
21 where in Paragraph 21 that is. It starts at the end of
22 the second line, we now define more precisely.

23 CHAIRWOMAN SHOWALTER: Oh, yes, I see.

24 JUDGE WALLIS: Just a word, Ms. Anderl, but
25 time is fleeting by.

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1 MS. ANDERL: Thank you, Your Honor.

2 The rationale for the FCC imposing this
3 restriction is set forth nicely in Paragraph 7, and
4 because of the time, Your Honors, I would encourage you
5 to read that. It is a very serious concern that the FCC
6 has with regard to the impact on universal service and
7 the access charge regime that could potentially occur if
8 these conversions were allowed without the local use
9 restriction. I believe that that policy consideration
10 and monetary consideration applies equally to orders for
11 new EELs as it would to conversions of existing special
12 access circuits, and I would encourage you to review
13 that prior to making your decision on this issue.

14 And, Your Honor, I apologize, we had 15
15 minutes per side on this.

16 The other issue under EELs, and I will try to
17 just take two minutes on this, is when a carrier then
18 goes to try to satisfy and prove that it has met the
19 significant amount of local usage, there's a test set
20 forth in the Supplemental Order of Clarification in
21 Paragraph 22. There's one of three ways that a carrier
22 can meet it, meet this significant amount of local usage
23 test. And the question that arose in this workshop
24 docket was whether ISP traffic or Internet services
25 provider bound traffic can count as local traffic. To

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1 really fully discuss that would take a long time. It's
2 already squarely teed up for you in the cost docket,
3 Part B, where the parties have filed two rounds of
4 briefs on that. I think that the Qwest brief of August
5 23rd on this docket or in this workshop does lay out
6 clearly why we believe that it can't count as local
7 traffic, and I will just conclude my remarks there.

8 JUDGE WALLIS: Thank you.

9 Mr. Kopta.

10 MR. KOPTA: Thank you, Your Honor.

11 I think probably the easiest thing is to look
12 at the diagram that Qwest has circulated as an
13 illustration. And we don't disagree that this is one
14 potential scenario, but I think I scratch my head a
15 little bit over the FCC orders, and I agree that I think
16 the FCC's concern was with the ILECs claiming that
17 special access would be circumvented and there would be
18 some big huge revenue loss to the ILECs and a
19 corresponding impact on universal services. But if you
20 look at this diagram, if the CLEC provides everything up
21 to Qwest's central office to, for example --

22 COMMISSIONER HEMSTAD: Now, I'm sorry, which
23 of the two?

24 MR. KOPTA: Well, either one, they're
25 basically the same.

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1 But if a CLEC were to be collocated in both
2 Qwest central office one and in central office two and
3 provide its own entrance facility and dedicated
4 transport between central offices and just obtain the
5 loop from Qwest, there would be no obligation to certify
6 that this is local. Similarly, if -- that the traffic
7 over the facilities is local. Similarly, if the CLEC
8 only obtained collocation in Qwest's central office one,
9 got the dedicated transport between the central offices
10 from Qwest as well as the loop and did its own
11 connection, then there would be no obligation to certify
12 they would be used for local service.

13 So I think that there are at best holes in
14 what the FCC's concern was, and I think that the best
15 explanation is that the FCC presumes that if you order a
16 circuit out of a special access tariff that you're going
17 to use it for special access. And if you want to change
18 that, if you want to keep that same circuit and convert
19 it into UNEs because it's really not going used for
20 special access, then you have to certify to Qwest that
21 it's actually being used for local service.

22 So that's what's going on here, which is why
23 the FCC only talks about the certification in the
24 context of conversion, because it was only natural to
25 believe that orders from the access tariff are going to

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1 be used for access. And it's only because the CLECs
2 came in and said, well, this was the only way we could
3 get them that the FCC said, well, all right, you can
4 change them over to UNEs, but you have to demonstrate to
5 the ILEC that you're going to use it for local service.

6 Now this all happened in the context of
7 restrictions on the ability of the FCC to require the
8 ILEC to actually do the combining of the elements, and
9 this Commission, as it's fully aware, decided early on
10 in the arbitrations that Qwest was obligated to do that,
11 a decision that the Ninth Circuit upheld. So since
12 before the FCC issued any of the orders in EEL dockets,
13 Qwest has been obligated in the state of Washington to
14 provide combinations of unbundled network elements and
15 without requiring any certification that they're going
16 to be used for a particular type of service. That's the
17 basis of the Commission of the initial order, is saying,
18 you know, there's been arbitration, looked at this
19 issue, the Commission already concluded that Qwest is
20 obligated to provide the combinations of unbundled
21 network elements, and that's what they have to do.

22 So I think the basis is not so much on what
23 did the FCC decide or not decide. We had originally
24 argued that the FCC orders were clear, that it was only
25 in the context of conversions that the local usage

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1 restrictions apply. Qwest says that it's equally clear
2 that it applies to both. I think the Commission said,
3 well, we don't agree with either of those
4 interpretations, and we believe that or the ALJ
5 recommends that the Commission say, we have already
6 addressed this issue with respect to new combinations
7 that are ordered initially as EELs, not converted, but
8 just like any other combination, whether it's, you know,
9 loop and transport or loop and switching or anything
10 else, that there isn't any certification requirement,
11 and therefore we're going to be consistent and require
12 Qwest to provide those combinations. I think it's as
13 simple as that.

14 CHAIRWOMAN SHOWALTER: But if we do stick
15 with the ALJ's recommendation, what effect does it have
16 on the, I don't know if gaming the system is the right
17 word, but what are the economic incentives in this
18 situation that Ms. Anderl presented? I mean all I can
19 see is two situations that look identical, and one is
20 called typical special access circuit, and the other is
21 called EEL, and I presume one is cheaper than the other,
22 which isn't terribly rational to do.

23 MR. KOPTA: Well, yeah.

24 CHAIRWOMAN SHOWALTER: So that's number one.
25 But then what is the economic incentive if we stick with

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1 this plan, in this situation, recognizing you threw some
2 other possible situations?

3 MR. KOPTA: Well, I think the economic
4 incentive is to stop buying facilities used for local
5 exchange service out of the special access tariff, and I
6 think that's what the CLECs want to do. The CLECs want
7 to obtain unbundled network elements to provide local
8 exchange service, and right now they can't in many
9 instances. So the resort is to the special access
10 tariff, which is because that's the way they can get
11 those facilities, whether it's as a new facility or
12 whether it's as an old facility.

13 And what CLECs are trying to do is to be able
14 to say, at least while the FCC has everything else on
15 hold, allow us to order new facilities that are going to
16 be used for local exchange service as UNEs as opposed to
17 out of the special access service. Don't make us keep
18 buying out of the special access service tariff.

19 CHAIRWOMAN SHOWALTER: What effect will it
20 have on universal service?

21 MR. KOPTA: It shouldn't have any, because
22 these aren't being used for access, these are being used
23 for local service, so Qwest should not be entitled.
24 It's getting, for lack of a better word, a windfall of
25 being able to charge special access prices for what

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1 should be UNEs to provide local exchange service.

2 With respect to the ISP traffic issue, we
3 have addressed this in the brief that we filed prior to
4 the initial order being addressed. I don't want to
5 repeat that. I think our main focus is that there is an
6 exemption for ISP traffic. Qwest does not provide them
7 service -- ISPs that is serviced out of the special
8 access tariff. It doesn't charge them special access
9 rates. It provides them a local exchange service or
10 service out of their local exchange tariff. And so
11 that's all that the FCC was concerned about was making
12 sure that you were using these facilities for local
13 exchange service, and service to ISPs is local exchange
14 service, however you want to define the traffic
15 jurisdictionally because of the exemption, and
16 therefore, there was nothing in this order that says,
17 oh, by the way, ISP traffic is still considered
18 interstate, and you have to provision those services
19 over special access facilities if you're a CLEC but not
20 if you're an ILEC. That just doesn't make any sense,
21 but I think we have made that point in our brief, and I
22 won't discuss it any further.

23 COMMISSIONER HEMSTAD: Well, I'm trying to
24 understand this. Some years ago, we had the issue in
25 front of us of what were then the different categories

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1 referred to as private lines depending upon who was
2 served. And depending on who was served, there were
3 different prices, and the whole issue was a line is a
4 line is a line. And we said, that's right, a line is a
5 line is a line and priced similar. I guess this is a
6 recurrence of that issue again. The elements are
7 exactly the same, but they're differently priced. And
8 apparently the argument for that is it is required to
9 protect universal services, and that's apparently what
10 Paragraph 7 of the FCC order says. And you're saying it
11 doesn't have any effect on universal service?

12 MR. KOPTA: What I'm saying is that
13 facilities that are used for special access, I mean this
14 goes back to divestiture, and these facilities were the
15 ways that the local exchange companies that, you know,
16 the RBOCs a result of the breakup of AT&T were going to
17 make up the difference in the long distance revenues,
18 they could charge access, and for the facilities they
19 could charge higher prices for traffic that's being
20 diverted interstate or interLATA.

21 And the problem has arisen because when CLECs
22 started providing service, they needed the same type of
23 facilities but couldn't get them as unbundled network
24 elements, so the only way they could get them was out of
25 the tariff. So that's really not a legitimate use of

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1 the facilities, not from a CLEC's point of view. But
2 from the ILEC's point of view, because the ILECs should
3 make them available for local service out of a different
4 set of rates, terms, and conditions than special access,
5 because this isn't special access.

6 So I think what the FCC was trying to do is
7 to say, well, gee, we're going to have to sort this mess
8 out because these are not being used the way that we
9 intended for them to, and we don't think that it's fair
10 that CLECs should pay too much, but at the same time, we
11 still have this system in place where we have special
12 access, and special access helps to fund universal
13 service, or at least that's the, you know, one of the
14 claims, and therefore, you know, we don't want to do
15 anything that's going to make sure that or that would
16 harm the ILEC's ability to obtain special access when
17 special access is being provided, and therefore we're
18 going to kind of freeze the circuits that are there now
19 and say, if you're going to convert these, you have to
20 demonstrate that they are going to be used for local
21 service, because we're going to presume that up until
22 now, you ordered these out of the tariff because you
23 were using them to provide special access.

24 But I don't think that the FCC was also
25 saying, oh, by the way, now that you can order unbundled

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1 network elements, that somehow because this one
2 particular link could be used to bypass special access
3 that you can't, that you have to somehow certify that
4 it's not going to do that. Because there are other
5 facilities that can be used. The loop, just a high
6 capacity loop without connection to transport could be
7 used to bypass special access, a combination that the
8 CLEC makes itself of loop and transport could be used to
9 bypass special access, and yet the FCC doesn't say,
10 well, every time you order a UNE, you have to certify to
11 the ILEC that you're not going to use this for special
12 access.

13 So I think it's a temporary situation that
14 the FCC was trying to split the baby as best it could.
15 It did it by talking about what's in the pot today, not
16 what's going to be in the pot tomorrow.

17 CHAIRWOMAN SHOWALTER: And just remind me,
18 where in the proposed order or the draft order is this
19 discussed, or was it 94?

20 COMMISSIONER HEMSTAD: 91 to 103, was it?

21 MR. KOPTA: I think that's right, yes.

22 CHAIRWOMAN SHOWALTER: Okay, thanks.

23 MR. KOPTA: You still look puzzled,

24 Commissioner Hemstad.

25 COMMISSIONER HEMSTAD: Well, maybe I'm mixing

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1 entirely different issues, but I recall on the argument
2 a line is a line is a line was a position of U S West at
3 the time and that it ought to be priced the same way.
4 Now why is this different? I look at your examples
5 here, and they're identical.

6 MS. ANDERL: Well, ultimately I don't
7 disagree that that may be an outcome, that like services
8 need to be priced alike. However, the Act, which came
9 after our advocacy of a line is a line is a line,
10 mandated an entirely different pricing standard, which
11 is a pure cost pricing standard. And to the extent that
12 some of these prices have historically been set at some
13 measure over cost to provide a contribution to the
14 company's joint and common costs, including to cover
15 costs to serve in high cost areas, I think you can't
16 flash cut, and that's all really the FCC is saying here
17 as well.

18 This is in many ways no different from what
19 your rule did with terminating access where the
20 Commission and, well, Qwest filed a bifurcated
21 terminating access charge where there is no cost based
22 rate element, and then there's the universal services
23 rate element, and so the total cost for terminating
24 access is greater than the switching cost to terminate a
25 call, but it allows for, it accepts the fact that there

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1 is still some universal service support in those
2 charges, and that exists for special access as well as
3 for switched access.

4 And I think that, you know, the FCC is clear
5 here that this isn't going to stay this way forever, but
6 I think that until we have kind of a more global
7 solution to who gets the universal service funding,
8 where does the money come from, how does a firm cover
9 its costs when some of its prices are set on the new
10 forward looking methodology and some of its prices are
11 set based on the historic pricing structure that we have
12 had, you know, then the right thing to do is, you know,
13 for the rate payers and the company's well being, the
14 right thing to do is to maintain the status quo while we
15 sort it out.

16 And so I guess I'm agreeing with you that in,
17 you know, in some ways, purely intellectually and
18 philosophically, the line is a line is a line argument
19 is still a good argument, but tempered by the reality of
20 the situation. I think we still need to accept the two
21 different pricing structures for now, especially when
22 there are different services and different public policy
23 goals that are affected through the different pricing.

24 JUDGE WALLIS: Ms. Singer Nelson.

25 MS. SINGER NELSON: WorldCom concurs in all

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1 the arguments that Mr. Kopta presented, and I have
2 nothing to add, just to ask that the Commission adopt
3 the initial order's recommendation on this issue, on the
4 two issues addressed.

5 JUDGE WALLIS: Thank you.

6 Any further questions?

7 Very well, let's move on.

8 MS. ANDERL: Thank you, Your honor.

9 MR. KOPTA: Your Honor, if you don't mind,
10 why don't we go ahead and do the other EEL issue now
11 since it seems to be fresh on everyone's mind.

12 JUDGE WALLIS: Very well.

13 MR. KOPTA: And I will lead off on that.

14 This has to do with EEL issues 13 and 15, and the
15 problem that we have is that at least from our review of
16 the initial order, this particular issue wasn't
17 addressed directly, so it wasn't so much taking issue
18 with what the initial order did. It's kind of saying,
19 whoops, this issue didn't get addressed in the initial
20 order, and we certainly want it to be addressed by the
21 Commission.

22 And in very simple terms, it's very similar
23 to the issue that the Commission has seen before in this
24 docket, which is when you have facilities that are used
25 for multiple purposes, how do you treat those. Or

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1 number one, do you allow it to be used, a facility to be
2 used for multiple purposes, and number two, how do you
3 treat the two different pieces that are being used on
4 this same facility. And the context here is the use of
5 the same facility to provide both an EEL and special
6 access services.

7 And by way of illustration, again, you know,
8 if we want to look at the special access circuit diagram
9 that Qwest has circulated, if you have a DS3 transport
10 between the two Qwest central offices, which would
11 include 28 DS1 circuits, and then you have a loop that
12 goes into the customer location, and let's just for
13 simplicity say that it's also at a DS3 level, the CLEC
14 wants to be able to provide both special access and
15 local services to a particular customer and wants to be
16 able to use Qwest facilities to do that.

17 And what we're saying is that rather -- what
18 we're proposing is that if you can use this same DS3
19 circuit to provide 14 DS1 circuits that are local
20 service and 14 DS1 circuits that are special access
21 circuits so that you can use the same facility for the
22 different types of service, it's much more economically
23 efficient to use one DS3 for both types of circuits.
24 They are distinct circuits within the DS3 so that you
25 can identify them. And you can price them according to

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1 the way that they should be priced, so that half of the
2 DS3s in that example would be priced at special access
3 rates, and half of the DS3s would be priced at UNE
4 rates.

5 The alternative, which is what Qwest has
6 proposed, is that you can only use that DS3 circuit for
7 one service or the other, either for special access or
8 for UNEs. So again, using the same example that I just
9 did, Qwest would say, you have to have 2 DS3s, 1 DS3
10 that has 14 DS1s for the local service, and the other
11 DS3 that has the 14 circuits for special access. So all
12 of a sudden, the CLEC is now paying for duplicate
13 facilities when it really only needs the one facility.

14 And this kind of harkens back to what we had
15 discussed earlier on the obligation to build and the
16 limitation on facilities. Not only is it economically
17 inefficient, but what happens if Qwest says, well, gee,
18 we have a DS3 that has the capacity that can take these
19 circuits, but you can't use it for this other service,
20 you would have to use a totally different circuit, but
21 we don't have another circuit, so you can't provide the
22 service. So a CLEC faced with that circumstance
23 generally in the past has said, okay, well, then we will
24 just buy the whole thing out of the special access
25 tariff and pay the full freight, because we need to

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1 provide the service even though it costs more to get the
2 facility, and we don't think that that's appropriate.

3 And this Commission in other contexts has
4 agreed and said that when facilities are used for
5 multiple purposes, that when facilities can be used for
6 multiple purposes that they are, and that the pricing of
7 the facility ought to be apportioned accordingly.
8 That's basically our position.

9 JUDGE WALLIS: Ms. Singer Nelson, did you
10 have anything to add?

11 MS. SINGER NELSON: I have nothing to add.

12 JUDGE WALLIS: Ms. Anderl.

13 MS. ANDERL: Thank you, Your Honor.

14 Commissioners, we believe that the same
15 Supplemental Order Clarification that we have been
16 talking about addresses this issue as well. And in
17 Paragraph 28, I believe the FCC has pretty much taken
18 care of Mr. Kopta's argument, where as practical and as
19 nice a solution as he would like to see put in place has
20 simply been forbidden by the FCC, maybe not forever, but
21 for now. The Commission said:

22 We further reject --

23 COMMISSIONER HEMSTAD: What --

24 MS. ANDERL: Oh, I'm sorry, Paragraph 28 of
25 the Supplemental Order of Clarification.

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1 The Commission explicitly rejects the
2 suggestion that it eliminate the
3 prohibition on commingling, i.e.,
4 combining loops or loop transport
5 combinations.

6 And remember, a loop transport combination is
7 an EEL.

8 With tariffed special access services in
9 the local usage options discussed above.

10 I think that that's clear, that this is
11 exactly what Mr. Kopta is asking the Commission to
12 order, and it's contrary to what the FCC has rejected as
13 a suggestion when it was made by WorldCom. They go on
14 to state that they believe that allowing such
15 commingling could lead to some of the same problems that
16 they identified earlier, and then they conclude that
17 it's not a determination of how the issue will be
18 resolved for once and for all, but that it is the
19 solution that must be put in place now.

20 And I think that if what the CLECs want to do
21 is buy a DS3 and put both access service or a finished
22 service and a UNE type traffic over it, I can't think of
23 a clearer example of combining finished services with
24 UNEs than that. That is exactly what Mr. Kopta's
25 clients are proposing, and I believe that's exactly what

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1 is prohibited in Paragraph 28 of the FCC order.

2 CHAIRWOMAN SHOWALTER: And because the FCC
3 has prohibited it, do you think that binds us or that
4 we're entitled to make our own determination on that
5 question?

6 MS. ANDERL: I think that it binds you on
7 this particular issue.

8 COMMISSIONER HEMSTAD: And is the rationale
9 the same here as what we just discussed?

10 MS. ANDERL: Yes, it's to maintain the status
11 quo, because even this commingling, even though it would
12 preserve some measure of special access revenue, would
13 to some extent lead to an erosion of those revenues
14 because of the combining of the revenues and the
15 ratcheting of the rates that Mr. Kopta suggests the
16 CLECs want to do, in other words, only pay for half of
17 the facility at a special access rate and the other half
18 at UNE rates.

19 COMMISSIONER HEMSTAD: I assume that it has
20 some inherent economic inefficiency to it. Does it
21 have, in that sense from the CLEC's perspective, I mean
22 providing services would be more costly than it would
23 otherwise have been. Is there any other, I guess I will
24 address this to either or both of you, is there any
25 other advantage that gives to Qwest as against the

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1 CLECs, or is it just what the FCC is saying? In other
2 words, I suppose to the extent that the CLECs are
3 economically disadvantaged, that inherently means an
4 advantage to Qwest when you're competing with them. Is
5 that a discomfitting aspect of this?

6 MR. KOPTA: Well, from our perspective, it
7 certainly is, and we disagree with the interpretation
8 Ms. Anderl has suggested in the FCC order. In our view,
9 combining means connecting. If you're talking about
10 combinations of elements, that means that a loop and a
11 transport combination, that means that they're
12 connected. These are not connected. This is like a
13 multilane highway that, you know, you have half the
14 lanes reserved for trucks and half the lanes reserved
15 for cars, and neither can go in the other's lane.
16 That's not what we believe the FCC meant when it was
17 saying combined. And, in fact, in the order, it does
18 say, it does reference, it uses the word connecting.

19 So that aside, I think assuming for purposes
20 of argument that the FCC does prohibit that sort of use
21 of facility, it disadvantages CLECs in two ways. One of
22 them is economically, which is that you can't use
23 facilities if you want to use them for multiple
24 purposes, because you essentially have to pay the
25 highest rate for that particular facility. And if you

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1 want to try and break out your traffic so that you're
2 dedicating facilities to special access and some to
3 UNEs, then not only do you increase the costs, but -- by
4 buying two facilities, but you run the risk that there
5 won't be facilities. You incur additional costs in
6 terms of grooming circuits over to the new facilities,
7 because you have to say, well, all right, if right now
8 we've got these running over the same pipe and we want
9 to pay a different rate for them, then we have to buy a
10 whole new facility, and then we're going to have to
11 switch them all over, and that causes not only economic
12 concerns, but customer disruption concerns.

13 And on a going forward basis, if you've
14 already got a facility that you're buying out of the
15 special access tariff that has capacity in it, you are
16 disincented to buy EELs, because you have -- you
17 couldn't put them on that same circuit even though it
18 has capacity, you would have to buy a whole other
19 circuit, so essentially you're locked now into using the
20 special access tariff to provide facilities to provide
21 local exchange service. So there's no way out. I mean
22 you can't get UNEs any more. You can only get them out
23 of the special access tariff, because that's the road
24 you had to go down before, and you can't get off that
25 road, so that's really the crux of the issue from the

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1 CLEC's perspective.

2 MS. ANDERL: Your Honor, may I respond as
3 well.

4 Just two things, we don't think that this
5 advantages us in any way. We think it just maintains
6 the status quo. And I would also -- and it's not just
7 us, although that's clearly the entity whose interests
8 I'm here to represent, but I would turn your attention
9 to Paragraph 18 of that same FCC order, where the
10 Commission says that they're extending, the Federal
11 Communications Commission, says that they're extending
12 the restriction on using the UNEs for special access for
13 an independent reason as well and having nothing to do
14 really with the financial interests of the ILECs, but
15 having to do with the financial interests of the
16 facilities based competitive access providers, who are
17 separate entities who rely on, for their revenues, upon
18 the provision of special access, which is already a
19 bypass of Qwest's special access, and so it's probably
20 priced somewhere less than what Qwest prices its special
21 access for but more than Qwest will price its UNEs for.
22 And if CLECs and IXCs were permitted to go wholly to the
23 use of the UNEs from Qwest at the lower rates for the
24 special access, I think the FCC recognized and described
25 in this paragraph that that could be damaging to other

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1 facilities based carriers who were in essentially a
2 mature industry and state of competition as well.

3 MR. STEESE: Ms. Anderl, may I add one point?
4 This is Chuck Steese for Qwest.

5 MS. ANDERL: It's not my call, Mr. Steese.

6 JUDGE WALLIS: Yes, please proceed.

7 MR. STEESE: Going to the point raised by
8 Mr. Kopta concerning the separate lanes, this very issue
9 was presented to the FCC in this very proceeding. And
10 if you look at Paragraph 28, Footnote 79, AT&T and
11 WorldCom both claimed, if we get a DS3, we will
12 designate specific DS1s some for tariff service, other
13 for local service, and we will make sure to treat them
14 in that fashion, we won't mix and match. And the FCC
15 specifically rejected that proposal by WorldCom and AT&T
16 in that docket. They specifically found that would be
17 inappropriate. So what Mr. Kopta is talking about was
18 exactly the issue presented to the FCC and rejected
19 outright by the FCC.

20 JUDGE WALLIS: Mr. Kopta.

21 MR. KOPTA: I think the order speaks for
22 itself. I mean Mr. Steese is referring to -- the only
23 reference in the FCC order is this footnote to these
24 comments, and they were -- the letters are rather
25 lengthy, and I don't believe that the FCC addressed that

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1 issue as Mr. Steese has outlined, and certainly the
2 order, as I say, speaks for itself, and the Commission
3 is perfectly capable of interpreting it the way that it
4 believes it should be interpreted.

5 JUDGE WALLIS: Thank you.

6 Does this conclude the discussion on this
7 issue?

8 MS. ANDERL: Yes, for me.

9 JUDGE WALLIS: Very well, Ms. Anderl, please
10 proceed.

11 MS. ANDERL: The final issue that we would
12 like to address today is the issue addressed in the
13 initial order at Paragraphs 40 through 46, and the
14 question in the order is entitled, Qwest adherence to
15 wholesale and retail quality standards. It is issue
16 WA-CL2-5(b), and in Qwest's August 23rd brief, it's
17 addressed at page 36.

18 Briefly, the initial order requires Qwest to
19 amend its SGAT to state that it will comply with all
20 State wholesale and retail service quality standards.
21 Qwest is here today asking for either a clarification or
22 a modification of this provision to the extent that it
23 imposes more than the Act requires or standards
24 different from what the Act requires. We believe that
25 the Act requires retail parity, and that retail parity

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1 issue is something I think that you will see a much
2 greater detailed discussion of when we begin to talk to
3 you about our actual performance.

4 Qwest earlier this month filed a pleading and
5 a number of attachments detailing its actual performance
6 in provisioning service under interconnection agreements
7 in the SGAT to CLECs, and we anticipate filing updates
8 on that. The real detailed discussion of whether Qwest
9 is meeting a benchmark that's set independent from
10 retail standards or whether it's meeting retail parity
11 probably is best reserved for the discussion in that
12 context. Here however, we're concerned that the
13 requirement of stating in the SGAT that we will comply
14 with all State wholesale and retail service quality
15 standards injects some confusion in terms of what
16 potentially is required and seems to be counter to the
17 retail parity or at least inconsistent with the
18 requirement that we operate at retail parity.

19 Let me just give you a couple of examples,
20 and there are I guess examples where we could be not
21 meeting the retail service quality standards but still
22 operating at retail parity, and there could be examples
23 of where we are meeting or exceeding the Commission's
24 retail service quality standards for wholesale, but yet
25 we wouldn't be at parity. In other words, if we were

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1 providing repair within 12 hours for our retail
2 customers but 20 hours for our wholesale customers and
3 the standard is 48 hours, well, we're meeting the retail
4 service quality standard clearly, but we're still
5 probably because of the, you know, an 8 hour time
6 differential not at parity. And so we're concerned that
7 the use of a standard here that requires Qwest to meet
8 wholesale and retail service quality standards where not
9 all of the UNEs have a direct retail analog or the
10 retail service standards may not be directly applicable
11 or relevant in terms of really evaluating what's
12 important under the Act, which is Qwest's performance to
13 its wholesale vis-a-vis how it is actually performing to
14 its retail customers.

15 And so while we had proposed that we state
16 that we will comply with all state wholesale service
17 quality standards, and we certainly don't mean by that
18 language to exclude a commitment to operate at parity,
19 because that is what the Act requires, we don't think
20 that necessarily inserting the words and retail capture
21 that accurately, and so we would ask that that language
22 just be removed.

23 And I guess the only other thing that I would
24 add is that the FCC has in numerous 271 decisions stated
25 that, and I'm just going to quote from the Bell Atlantic

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1 New York decision right now at Paragraph 58, the FCC
2 stated:

3 In this case, we conclude that to the
4 extent there is no statistically
5 significant difference between Bell
6 Atlantic's provisioning of service to
7 competitive LECs and its own retail
8 customers, we need not look any further.
9 Similarly, if there is no difference
10 between the Bell Atlantic provision of
11 service to competitive LECs and the
12 performance benchmark, our analysis is
13 done.

14 In other words, what the FCC was saying there
15 is Bell Atlantic and the other parties had come up with
16 a fairly complicated and detailed set of performance
17 standards, which similar to what's happened here in the
18 Qwest region, and in some cases the standard was a
19 benchmark, in some cases the standard was retail parity,
20 and to the extent that Bell Atlantic was meeting those,
21 that's what was relevant, not a separate independent set
22 of retail service quality standards that might apply in
23 terms of how a LEC provides service to an end user in
24 the state.

25 And that concludes my remarks on this issue.

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1 JUDGE WALLIS: Mr. Kopta.

2 MR. KOPTA: Thank you, Your Honor.

3 I'm again a little troubled by Ms. Anderl's
4 discussion. It sounds to me as though Qwest wants the
5 ability to say, as long as we're providing the same
6 level of service to both our wholesale and retail
7 customers, that this Commission's inquiry is at an end
8 even if that service falls below the retail service
9 quality standards that this Commission has established,
10 and I don't think that that's in the public interest or
11 in the best interest of what this Commission is trying
12 to do in the state of Washington.

13 Certainly with respect to Qwest in
14 particular, we all sat in the rule making a couple of
15 days ago and talked about the long hard road to getting
16 Qwest to the point where it's providing adequate retail
17 service, and I don't think that we want to be in a
18 position where we just say, as long as Qwest is treating
19 everybody equally badly, then that's the only thing that
20 we have to worry about.

21 Again, we come back to the distinction
22 between Section 271 and Section 252(f), which addresses
23 the SGAT. And the SGAT provision, Section 252(f),
24 expressly mentions service quality standards in terms of
25 what this Commission can do in the context of an SGAT.

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1 And I think that at a minimum for the public interest in
2 this state, Qwest should be obligated to make sure that
3 it provides wholesale customers the same level of
4 service as retail customers, and that level of service
5 should be at a certain threshold level. It's not good
6 enough that they provide everybody the same service if
7 that service doesn't meet this Commission's standards.
8 And so that's why we think that it's critically
9 important to include this language in the SGAT to ensure
10 that Qwest both provides parity and reaches a level of
11 service quality that this Commission believes is
12 acceptable.

13 CHAIRWOMAN SHOWALTER: What do you, what's
14 your comment on the FCC's, well, the language that
15 Ms. Anderl read from the New York case saying, that's
16 what we're looking at, we're the FCC, and we're looking
17 at if there's parity, case closed?

18 MR. KOPTA: Well, I would like to think that
19 the FCC isn't so sanguine as to think, well, we don't
20 care what the service level is in the state as long as
21 everybody is getting the same level of service. I think
22 the FCC is deferring to the state commissions, because
23 that's your bailiwick to decide what level of retail
24 service quality is acceptable. All the FCC is doing is
25 looking at the Act and saying, it requires parity. The

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1 Act doesn't require any particular level of service.
2 That's historically been something that the states have
3 dealt with, and so we don't need to do that. All we
4 need to assume is that whatever level of retail service
5 quality the incumbent is providing, that's the same
6 level that they need to provide to the competitors. And
7 it's up to the state commission to decide whether that
8 same level of service is where it needs to be.

9 And this Commission has certainly taken a
10 strong stance on making sure that all carriers are
11 trying to be treated not only equally with the
12 incumbent, but that the end user customers are getting
13 the level of service that the Commission believes is
14 acceptable. And so this is just an incorporation of
15 that concept into the SGAT.

16 COMMISSIONER HEMSTAD: Well, and I assume the
17 FCC was addressing the 271 only.

18 MR. KOPTA: That's correct.

19 COMMISSIONER HEMSTAD: It wasn't addressing
20 the SGAT, which goes with state law standards.

21 Ms. Anderl, wouldn't you agree with that?

22 MS. ANDERL: Your Honor, I would have to
23 defer to Mr. Steese as to whether the Bell Atlantic New
24 York decision was a combined SGAT 271 application. I
25 don't know, and I, of course, don't know what the New

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1 York retail service quality standards are, so maybe that
2 answers the question.

3 COMMISSIONER HEMSTAD: Sure.

4 MR. STEESE: I can respond, Chuck Steese on
5 behalf of Qwest. If you look, the New York standard was
6 based on a wholesale tariff, however, the same
7 provisions are in the Texas decision, the Oklahoma
8 decision, and the Kansas decision, all of which were
9 based on an SGAT, a form interconnection agreement, in
10 those states. And the exact argument that Mr. Kopta is
11 raising was specifically rejected again there. And this
12 is his words, this isn't how I would phrase it, if the
13 service is equally bad, that's not good enough, and that
14 is exactly what was rejected. You're not only looking
15 at 271.

16 For us to get 271 approval, we have to
17 satisfy the requirements of Section 251 of the Act. And
18 so it is not just a 271 issue. It is all aspects of the
19 Act. And to the extent our independent state rules, the
20 independent state rules are focused on the retail
21 standards and not dealing with wholesale standards. And
22 so we firmly believe that this is appropriate as
23 currently in our SGAT.

24 JUDGE WALLIS: Ms. Singer Nelson.

25 MS. SINGER NELSON: I guess I just have one

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1 thought to add. Focusing back on the standard that the
2 Commission's looking at on whether or not the access to
3 and the quality of the service provided, that UNEs
4 provided are equal to what Qwest provides to itself. If
5 Qwest in the state of Washington is required to satisfy
6 particular retail standards to service its customers but
7 yet it's not held to those same standards for the
8 wholesale customers, the wholesale customers are being
9 discriminated against vis-a-vis the retail customers,
10 and so that would violate that general standard of the
11 Act.

12 JUDGE WALLIS: Mr. Harlow.

13 MR. HARLOW: Thank you, Your Honor.

14 Covad concurs with WorldCom and AT&T, and I
15 think that's all I need to say given the arguments they
16 have made.

17 JUDGE WALLIS: Any further questions?

18 Further comments from the parties?

19 MS. ANDERL: No, thank you, Your Honor.

20 JUDGE WALLIS: Is there anything further to
21 be accomplished today?

22 Very well, I want to thank everyone for your
23 presentations. They have been very helpful.

24 MS. SINGER NELSON: Judge, I'm sorry, I just
25 have one kind of piece of confusion that I have. I know

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1 Ms. Anderl addressed in her briefs the issue of the
2 distinction between EUDIT and UDIT, and the ALJ's
3 decision or the recommended decision in this case, it
4 seems to me that Qwest decided to defer that issue to
5 the cost docket and seemed to imply that the carriers,
6 the other carriers agreed to defer the issue to the cost
7 docket; is that right?

8 MS. ANDERL: I don't know if we implied the
9 latter. We definitely suggested that the EUDIT-UDIT
10 distinction had a factual record that had been developed
11 in the cost docket, and we recommended that the, I think
12 in our brief, that the Commission consider the issue
13 from this initial order in conjunction with when it
14 considers the UDIT-EUDIT distinction in the Part B cost
15 docket order, and we're hopeful that they will be
16 resolved in a manner that's consistent. I don't know if
17 the other parties agreed to that or not, but there
18 definitely is a factual record for making the
19 determination in the Part B cost docket.

20 MS. SINGER NELSON: Okay, and I just want to
21 make it clear that WorldCom asks that the Commission
22 adopt the initial order's recommended decision on the
23 distinction, that there is not a distinction between
24 EUDIT and UDIT, and then carry that holding into the
25 cost docket in any pricing determinations that would be

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1 made in that docket.

2 JUDGE WALLIS: Very well, does that conclude
3 our session?

4 MR. HARLOW: Covad concurs in WorldCom's
5 comment.

6 MS. ANDERL: And the only caveat that we
7 would have is that our current prices as proposed, of
8 course, reflect the distinction, and we may in
9 subsequent phases of the cost docket if we are not to
10 prevail on this issue, we would have to redo our rates,
11 but you know that.

12 MR. KOPTA: Yeah, we don't disagree that it
13 should be consistent, it's just which comes first, and
14 AT&T concurs with WorldCom that the Commission should
15 decide it here as a matter of policy, and then we deal
16 with the cost implications in the cost docket.

17 JUDGE WALLIS: Very well, thank you all.
18 (Hearing adjourned at 4:45 p.m.)

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