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BEFORE THE WASHINGTON

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UTILITIES AND TRANSPORTATION COMMISSION

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In the Matter of the Second)	UT-043007
Six-Month Review of)	Volume III
QWEST CORPORATION'S)	Pages 72-110
Performance Assurance Plan.)	

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A pre-hearing conference in the

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above-entitled matter was held at 10:05 a.m. on

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Monday, June 28, 2004, at 1300 South Evergreen Park

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Drive, Southwest, Olympia, Washington, before

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Administrative Law Judge ANN E. RENDAHL.

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The parties present were as follows:

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QWEST CORPORATION, by Douglas N. Owens,
Attorney at Law, 1325 Fourth Avenue, Suite 940,
Seattle, Washington 98101.

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COMMISSION STAFF, by Gregory J.
Trautman, Assistant Attorney General, 1400 S.
Evergreen Park Drive, S.W., P.O. Box 40128, Olympia,
Washington, 98504-1028.

21

ESCHELON TELECOM, INC., by Ray Smith
and Karen Clauson, Attorneys at Law, 730 Second
Avenue South, Suite 1200, Minneapolis, Minnesota
55402-2456 (via teleconference bridge.)

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Barbara L. Nelson, CCR

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Court Reporter

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1 COVAD COMMUNICATIONS COMPANY, by Karen
2 Shoresman Frame, Attorney at Law, 7901 Lowry
3 Boulevard, Denver, Colorado 80320 (via teleconference
4 bridge.)
5 WORLDCOM, INC., d/b/a MCI, INC., by
6 Michel Singer Nelson and Chad Warner, Attorneys at
7 Law, 707 17th Street, Suite 4200, Denver, Colorado,
8 80202 (via teleconference bridge.)
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1 JUDGE RENDAHL: Let's be on the record.
2 Good morning, I'm Ann Rendahl, the Administrative Law
3 Judge presiding over this proceeding. We're here
4 before the Washington Utilities and Transportation
5 Commission this morning, Monday, June the 28th, for a
6 pre-hearing conference in Docket Number UT-043007,
7 captioned In the Matter of the Second Six-Month
8 Review of Qwest's Performance Assurance Plan.

9 As I stated off the record, the purpose of
10 this pre-hearing this morning is to discuss the
11 issues list, discuss Qwest's SGAT filing in this
12 docket, the latest one filed on Friday, the timing of
13 the SGAT filing, and modifying the procedural and
14 hearing schedule and any other matters the parties
15 identify for discussion.

16 Before we get started, let's take the
17 appearances of the parties, beginning with Qwest.
18 And you don't need to stand. That's okay.

19 MR. OWENS: Thank you, Your Honor.

20 JUDGE RENDAHL: And just, since you've made
21 your -- all of you have made appearances before,
22 please just state your name and the party you
23 represent. That's sufficient.

24 MR. OWENS: Thank you, Your Honor. Douglas
25 N. Owens, Attorney at Law, appearing on behalf of

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1 Qwest Corporation.

2 JUDGE RENDAHL: Thank you. For Covad.

3 MS. FRAME: Yes, Your Honor, Karen Frame on
4 behalf of Covad Communications Company.

5 JUDGE RENDAHL: Thank you. For MCI?

6 MS. SINGER NELSON: Michel Singer Nelson,
7 and with me today is Chad Warner.

8 JUDGE RENDAHL: Okay. For Eschelon?

9 MS. CLAUSON: Karen Clauson, for Eschelon,
10 along with Ray Smith.

11 JUDGE RENDAHL: Okay. And Ms. Clauson,
12 could you spell your last name, please?

13 MS. CLAUSON: C-l-a-u-s-o-n.

14 JUDGE RENDAHL: Thank you. For Commission
15 Staff?

16 MR. TRAUTMAN: Greg Trautman, Assistant
17 Attorney General, along with Tom Spinks, for
18 Commission Staff.

19 JUDGE RENDAHL: Okay. I'll note that there
20 are Staff here in the room, and on the line, there
21 are staff for Qwest listening in, Mr. Reynolds, Ms.
22 Burke and Mr. Buhler.

23 So on Friday, Qwest filed both the final
24 issues list that the parties have been discussing and
25 also some proposed changes to the SGAT in Exhibits B

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1 and K, so I thought we should discuss those first.

2 First, the issues list, in particular, it
3 looked like all the issues need to go to hearing at
4 this point. It looked like there wasn't any
5 elimination of issues that need to go to hearing. Am
6 I wrong?

7 MR. OWENS: There were a couple of issues
8 that had appeared on the initial issues list, Your
9 Honor -- this is Doug Owens -- that do not appear on
10 the final issues list, so to that extent, those
11 issues don't need to go to hearing. However, all the
12 issues that are listed on the final issues list, at
13 least in Qwest's view, do require a hearing. I
14 understand that's a view that's not shared by all the
15 other parties, anyway.

16 JUDGE RENDAHL: Okay. Well, kind of going
17 to the SGAT, they kind of go together in some way.
18 Having looked over the SGAT filing, it appears that
19 most of the issues are uncontested, with the
20 exception of the PO-20 issues. Is that a correct
21 summary of what's in the -- of what's been agreed to
22 and what's contested in the SGAT filing?

23 MR. OWENS: I think that's correct, yes, in
24 terms of the manner in which the new -- what's called
25 the expanded PO-20 is made a part of the SGAT. We

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1 have an existing PO-20 in Exhibit B-1, and so the
2 proposal that Qwest made addresses how to fold the
3 new PO-20 into Exhibit B, it proposes a staged
4 implementation schedule with some aspects of that in
5 Exhibit K, and then there's, I think, a proposal at
6 the end of the first implementation phase of the new
7 PO-20 that there would be a compliance filing to
8 eliminate the Exhibit B-1 that contains the existing
9 PO-20, plus there would have to be some changes in
10 the wording of Exhibit K to address the fact that the
11 existing PO-20 is sort of a unique tier two
12 measurement. I mean, it's not unique. There are six
13 or seven that have the same type of payment, but it's
14 not what you would consider a normal tier two
15 measurement and it's not a tier one measurement.

16 And the proposal is -- at least all parties
17 proposed that there be some tier one payment
18 obligation for the new PO-20. There is a dispute
19 over what level that is and then also whether there
20 should be tier two for the new PO-20.

21 MS. SINGER NELSON: Your Honor, this is
22 Michel Singer Nelson. If I may, I just wanted to let
23 you know that I have not seen Qwest's filing from
24 Friday, the SGAT filing, so we're not prepared to
25 discuss whether or not we have issues with what they

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1 filed. We just haven't seen it yet.

2 MR. OWENS: I understand that, Your Honor.
3 We mailed it out, and I expect that it may arrive
4 today or tomorrow for those parties. It was supposed
5 to be a two-day delivery.

6 JUDGE RENDAHL: Okay. Well, I'll let you
7 know what my biggest concern is. The PO-20 issues
8 are raised to go to hearing in this docket, and by
9 filing the information in the SGAT, that triggers a
10 60-day time line. And my thought is either they can
11 -- you can pull them out of the SGAT and bring them
12 back into the hearing, or we address the PO-20 issues
13 not in the hearing phase, but on a paper record under
14 the SGAT, because I don't think there's any way,
15 under my schedule -- I'm handling several
16 arbitrations, as well as other cases, and given the
17 press this summer, there's no way I can do a hearing
18 on PO-20 and get the issues out at the same time.

19 So I think -- I understand parties may not
20 be able to comment on the substance of what was in
21 there, but it appears to appear both in the SGAT and
22 in the issues list; is that correct?

23 MR. OWENS: Yes, Your Honor, it does. And I
24 think you raised a good point. I think we felt that
25 there was a need to address how mechanically we deal

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1 with the fact that we have an existing PO-20, as well
2 as an agreed on PO-20, and to meet commitments to
3 file the agreed on PO-20, that is, the PO-20 that was
4 agreed on in the LTPA by the end of June, however,
5 there's no intent by Qwest to short-circuit the
6 process in the six-month review of considering the
7 issues that we raise with regard to the
8 implementation -- phased implementation and burn in
9 period and the exception for low volumes and how and
10 when the existing PO-20 is eliminated, and so I think
11 we would be happy to do what's necessary to remove
12 those issues from the SGAT filing.

13 JUDGE RENDAHL: Okay. Well, I think I'd
14 like to know the thoughts of the other parties, but I
15 can't do it now, because they haven't had time to
16 review it. But I think before we end today, I'll set
17 a response time for -- or maybe let you all discuss
18 amongst yourselves, because having looked at the act,
19 under Section 252(f), one of the options is for
20 either an extension of time by the party, by the
21 carrier that proposed the SGAT to extend the 60-day
22 period, but if they're agreed upon issues, you know,
23 one way of doing it is to allow those issues to go
24 into effect and then pull out the PO-20 from this
25 SGAT.

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1 You know, there's lots of different ways to
2 skin the cat, and I appreciate Qwest's interest in
3 bringing it to the Commission, but it seems we've got
4 to do it one way or the other, either do it in an
5 SGAT filing or do it in the hearing, and that's kind
6 of how I see it at this point.

7 Any comments from the parties before we move
8 on to the issues list? Because it did appear, aside
9 from the PO-20 issues from Qwest's filing, it did
10 appear that they were all agreed-to or administrative
11 issues that shouldn't be a problem to pursue through
12 an SGAT filing. I'm just a bit concerned about the
13 60-day time line triggered by the PO-20 issues.

14 Okay. Going to the issues list, Mr. Owens,
15 do you want to make a brief statement about the
16 issues list and where you stand on this?

17 MR. OWENS: Thank you, Your Honor. Yes.
18 Per the discussion that we had in, actually, the
19 first pre-hearing conference, and then again in the
20 second pre-hearing conference, Qwest acted as the
21 scrivener of this list without really exercising any
22 editorial control over how issues were stated or what
23 issues were included.

24 There are, I think, nine issues listed in
25 here, and there are some of them that fit within the

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1 category of issues that were impasse issues at the
2 LTPA; there are some that, like the PO-20, that are
3 generated by agreements reached at LTPA that
4 indirectly result in the need to consider issues
5 here; and then there are some that are in the
6 category of issues that weren't considered by LTPA
7 that some party to the six-month review has
8 requested. And there would -- one was added on
9 Friday, at the request of Eschelon. That was Issue
10 Nine.

11 And Qwest has taken the position that it
12 does not agree that some of the issues should be
13 considered in this case, because it believes that
14 they're outside the scope of the six-month review.
15 And that would be, I think, Issues Six, Eight and
16 Nine. And I don't know whether you want to have
17 briefs on that or want to hear argument on that at
18 this point, but that is kind of an overview.

19 The way the issues list is portrayed is as a
20 result of discussions among the parties where each
21 issue contains a description of the issue, a
22 statement of what party or parties raised the issue,
23 a statement of the position of the party, and whether
24 it's disputed, whether Qwest believes at hearing, and
25 then whether -- what factual disputes exist.

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1 And I believe in the transmittal letter we
2 indicated that the request for a listing of factual
3 disputes was not something that Qwest agreed should
4 be part of this list, but it was a request by the
5 CLECs and so it was included. And it was also, I
6 think, the case that, given the timing of that
7 request and not having access to some of our key
8 personnel who have been participants in this process,
9 we weren't able to represent that this is a complete
10 or comprehensive list. It was a list of factual
11 disputes that we were able to identify in the several
12 days that we had, I think between Tuesday of last
13 week and Friday. So subject to the right to
14 supplement this, it's as complete as we could make
15 it.

16 I think, with regard to the issues that we
17 don't consider as proper, it seems to us that the
18 issue of whether Qwest should be required to publish
19 aggregate payments is not within the scope of Section
20 16.1 of issues having to do with performance
21 measurements, changes, additions or modifications to
22 those that are supposed to be considered in a
23 six-month review. If it's proper to be considered,
24 it should be in a biennial review.

25 And I think the same is true with perhaps

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1 some additional issues, Issues Eight and Nine, having
2 to do with the continuation or renewal or further
3 participation by Qwest in a similar function to what
4 has been conducted under the auspices of the LTPA.
5 Those were raised by Staff and Eschelon. That is,
6 they're not within the scope of Section 16.1 as
7 addressing specific changes, modifications and
8 deletions in performance measurements. If they are
9 properly to be considered at all, they are structural
10 and should be considered in a biennial.

11 We have some problems with the notion that
12 this is something that could be considered in one of
13 these review cases necessarily, unless there's some
14 claim that an obligation to participate is actually
15 contained within the scope of the SGAT, and we don't
16 agree that there is.

17 And this is not to say that Qwest is saying
18 that there will not be any opportunity for parties or
19 Commissions to participate in future changes or
20 discussions to address modifications of the
21 performance measurements. We're simply saying that
22 the way that it was chosen to do this the first time
23 is not something that Qwest feels has been
24 successful, and so Qwest is not willing to
25 participate in it after the expiration of the current

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1 agreement, which I understand was at the end of May.

2 JUDGE RENDAHL: Okay. Ms. Singer Nelson, I
3 guess what I'd like to hear from you are, first,
4 going through the issues, which issues, as with
5 Qwest, do you feel should appropriately be on the
6 list, and secondly, which issues do you believe need
7 to go to hearing or not?

8 MS. SINGER NELSON: Okay. Your Honor, as
9 far as the issues that should be on the list, MCI
10 believes that all nine of the issues listed should be
11 on the list. The ones that Qwest is opposing be on
12 the list are still issues that are important to the
13 administration of the Performance Assurance Plan, and
14 this Commission has jurisdiction over the issues that
15 are contained there, and it's important that the
16 parties have some clarity on the process going
17 forward, particularly with regard to the LTPA
18 process.

19 If there's not going to be an LTPA process,
20 then what is going to be available for parties to
21 resolve some of these issues going forward? So I
22 think with -- because all parties entered into this
23 process, the QPAP process and the six-month review
24 process with some kind of regional collaborative in
25 mind, it would be unfair and inappropriate for Qwest

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1 to just simply refuse to continue to participate in
2 that regional collaborative, which Qwest originally
3 agreed to, without having some alternative agreed to
4 by the parties and under the Commission's
5 jurisdiction so that we know that we can have some
6 forum for the issues to be resolved.

7 Now, as far as the hearing, which issues
8 should go to hearing, I think that the positions that
9 we stated in our written objection to Qwest's request
10 for a hearing still stands. It's really
11 disconcerting that all of the efficiencies and the
12 judicial economies that we got out of the LTPA
13 process would be lost by our relitigating all of the
14 issues presented by the parties here that were
15 already addressed in the LTPA process.

16 I think that what's instructive is the
17 process that the Commission used in the 271 docket,
18 which -- and this docket is just simply a
19 continuation of the 271 docket. In the 271 docket,
20 it was Qwest's original proposal to have a workshop
21 format where the parties could come together, discuss
22 the issues, come up with some agreements if they
23 could agree under the direction of a mediator-type
24 person, and then, to the extent the parties could not
25 agree in a workshop format, have the mediator or

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1 arbitrator resolve the issues that the parties could
2 not agree to. That's what happened in the LTPA
3 process, just like what happened in the workshop
4 process.

5 What happened after that, in the 271 docket,
6 in the workshops, was, to the extent the parties
7 disagreed with the initial order of the arbitrator,
8 the parties briefed those same issues to the
9 Commission and there was an oral argument before the
10 Commission and there was a final decision made.
11 There was not another hearing. There was not another
12 factual fight between the parties in a hearing
13 setting.

14 The hearing, really, if we have to go
15 through a hearing in this proceeding to resolve these
16 issues again, issues that were already addressed in
17 the LTPA process, we're just wasting everybody's time
18 and resources. We've already done that. So we
19 suggest that the Commission continue to use the SGAT
20 process as the model for this proceeding and treat
21 the LTPA process as we treated the workshop process
22 in the 271 docket, take the initial order of the LTPA
23 facilitator and ask the parties to comment on the
24 issues that were already debated in that forum and
25 then go from there.

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1 I think -- as I was thinking about it this
2 morning, the only reason that we would need, I think,
3 a hearing would be to the extent that parties need to
4 cross-examine the witnesses or cross-examine the
5 comments that are contained in whatever we file, the
6 papers that we file with the Commission, and we can't
7 make that determination at this point in time. So if
8 the Commission feels it's necessary to go forward and
9 schedule a hearing, I would ask that the Commission
10 ask the parties before the hearing whether
11 cross-examination is required and whether a hearing
12 is really necessary.

13 I think that the CLECs are -- they have --
14 we have less and less money to spend on litigation,
15 and we've already spent a lot of resources in the
16 LTPA process. We would ask the Commission to
17 seriously think about that and consider the lack of
18 resources that we have these days and only require us
19 to participate in a hearing if it's absolutely
20 necessary.

21 And then the final thing I would say is that
22 the delay in this proceeding that would be caused by
23 having a hearing and having more than a paper process
24 only benefits Qwest. It hurts the CLECs. And so we
25 would ask the Commission to consider that seriously

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1 when it determines whether or not a hearing is
2 necessary.

3 JUDGE RENDAHL: Thank you. Ms. Frame?

4 MS. FRAME: Your Honor, I concur completely
5 with MCI and Michel Singer Nelson's comments. I
6 don't think we have anything else to add.

7 JUDGE RENDAHL: Thank you. For Eschelon?

8 MS. CLAUSON: This is Karen Clauson, for
9 Eschelon. We also agree with MCI. We'd just add
10 briefly that we agree all nine issues need a
11 decision. With respect to Issues Eight and Nine, Mr.
12 Owens, from Qwest, said earlier that they should be
13 part of the biennial review. And I think it's
14 important, when you look at it in that context, to
15 understand that Qwest is the party seeking a change.
16 They are the ones seeking to eliminate LTPA.
17 Therefore, if a biennial review is the appropriate
18 forum, then LTPA should be continued until Qwest
19 properly requests the elimination of LTPA in the
20 biennial review and that request is granted. We are
21 not seeking that change, we are not seeking to
22 eliminate it, so we should not be the ones having to
23 do biennial review after Qwest has acted
24 unilaterally.

25 So if, as Mr. Owens suggested, that is the

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1 appropriate forum, then that is where Qwest should
2 bring their desire to eliminate it and continue it in
3 the meantime.

4 With respect to Issue Six, the aggregate
5 reporting, Eschelon believes that's a legal issue,
6 based on the language of the PAP, that can be decided
7 and, to the extent that if the Judge wanted to take
8 comments on that, that you may be able to decide not
9 only that it should be addressed in the -- it is
10 within the scope, but that no hearing is needed on
11 that. The parties are basically arguing about the
12 language of the PAP, and parties should -- if you
13 want to know, want to address Qwest's concerns about
14 the scope of that, address it in briefing where you
15 address not only the scope, but what issue would be a
16 fact in dispute factually. Because to us it appears
17 it would be a difference of the language of the PAP,
18 which could be done on a legal brief.

19 With respect to the hearing itself, we also
20 echo the comments MCI made and seek, you know,
21 acknowledgement of sort of these issues, after we've
22 already been through these issues once, we've already
23 had a facilitator recommendation.

24 If you choose to go the hearing route, I
25 think there are things that can be done to eliminate

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1 the burden of the hearing for all the parties, such
2 as asking the parties to stipulate in advance, as
3 much as they can, to the authentication of documents,
4 telling us that there are documents that are already
5 admitted, for example, the documents that the judge
6 received, for them to require -- you know, for
7 example, the facilitator's report already in the
8 record, if that had to be submitted, if we could
9 limit that to the extent there is a hearing.

10 Also, allow participation as parties are
11 able to participate, which may include phone
12 participation or, for example, a party may not want
13 to present its own witness and rely on briefing and
14 comments based on what other parties do, and that
15 should be allowed. To the extent they -- you know,
16 if the parties feel their issues are legal issues and
17 they don't need to put in evidence, they shouldn't be
18 required to spend the resources on the hearing if
19 they can make their case in the brief. Thank you.

20 JUDGE RENDAHL: Thank you. Mr. Trautman.

21 MR. TRAUTMAN: Thank you. Commission Staff
22 agrees with the comments of Ms. Singer Nelson, for
23 MCI. As to the issues in the list, we agree that all
24 of the issues are appropriate for the list and we
25 especially agree that the parties do need to know

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1 about what the process will be going forward. If
2 it's not the LTPA, what will that process be and how
3 will it work.

4 As to the need for a hearing, Staff has
5 reviewed the list of issues that Qwest provided on
6 Friday, and Staff also agrees that these issues, all
7 of which have been dealt with in the LTPA process, do
8 not require additional hearings. We did take note of
9 Ms. Singer Nelson's suggestion that the parties might
10 perhaps submit briefing or comments at this stage,
11 and if any cross-examination were needed, it might be
12 of those comments that are submitted to the
13 Commission at this stage, but we may not know that
14 yet at this time. So the best procedure might be to
15 start by filing briefing and comments on all of these
16 issues that have been dealt with at the LTPA and
17 then, only if it is shown that cross-examination is
18 needed, that that be invoked.

19 JUDGE RENDAHL: Anything further?

20 MR. TRAUTMAN: No.

21 JUDGE RENDAHL: Okay. Mr. Owens?

22 MR. OWENS: Thank you, Your Honor. I guess
23 I understood your initial inquiry of me only to
24 describe the issues list and not to address the
25 broader question of the procedures. However, I guess

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1 I'll respond to the comments that have been made on
2 the latter topic.

3 JUDGE RENDAHL: Please do.

4 MR. OWENS: Thank you. Ms. Singer Nelson
5 said that all parties entered into the PAP process
6 with a regional collaborative in mind. Your Honor, I
7 think it's clear from the face of the document
8 itself, that is, the PAP, that there isn't any
9 requirement of anyone, let alone Qwest, to
10 participate in a particular regional forum, regional
11 collaborative. There is a conditional statement, and
12 it's in Section 16.1.1, that says certain things
13 happen if agreements are reached in a particular kind
14 of regional cooperative, that is, one that's overseen
15 by the regional oversight committee.

16 There isn't anything else in the PAP to
17 support the statement that all parties entered into
18 the PAP with this assumption in mind. If there isn't
19 a perception of the CLECs and the Staff that an
20 alternative forum is needed if the LTPA is not going
21 to continue, that can be addressed, but it doesn't
22 need to be addressed in the six-month review. If
23 anything, to address the concern of Ms. Singer Nelson
24 about the delay of this process, that very open-ended
25 inquiry threatens more delay than anything that I can

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1 see that's on this issues list.

2 The claim that there were lost efficiencies,
3 it seems to me, Your Honor, that you've reviewed the
4 response to the bench requests. You know from that
5 review that what went on at the LTPA was not a
6 hearing. Mr. Trautman says that we don't need
7 additional hearings. Well, that assumes that there
8 were hearings to start with, and there weren't. The
9 claim of lost efficiencies, it seems to me, is also
10 not well-taken because of that same fact. There has
11 not been a judicial or quasi-judicial process similar
12 to what Ms. Singer Nelson alluded to in the original
13 Section 271 case.

14 It is simply not true that the same process
15 that occurred with evidentiary hearings, witnesses
16 under oath in the multi-state collaborative has
17 occurred in the LTPA. That is what you were asked to
18 assume and believe by the statement that the same
19 process occurred as occurred in the Section 271
20 docket. That simply didn't occur.

21 The LTPA process was variously described by
22 Ms. Singer Nelson as involving a mediator and
23 arbitrator. Well, certainly, the facilitator, and
24 that was the title on his contract, may have been
25 properly considered a mediator. He certainly was not

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1 an arbitrator. An arbitrator, as you know, has the
2 power, the authority to resolve disputes, and that
3 simply didn't occur. His documents were called an
4 initial order. Well, they certainly aren't orders.
5 They are recommendations. And that's significantly
6 different.

7 Ms. Clauson said that I said that if the
8 issues with regard to the continuation or renewal,
9 since there really isn't anything right now that
10 constitutes LTPA, should be part of the biennial. I
11 said if at all, this issue should be discussed in the
12 biennial. And since there isn't anything right now,
13 the facilitator's contract having expired, and no
14 provision in the PAP binding Qwest to participate in
15 any continuation or existing procedure like this, the
16 suggestion that the status quo is the LTPA and that
17 any change in the status quo has to be considered in
18 the biennial is simply not well-taken.

19 What I was saying was that if a provision to
20 engraft a requirement to participate in the LTPA is
21 to be considered as a modification to the PAP, that
22 is the type of structural change that should occur,
23 if at all, in the biennial, not in a six-month
24 review.

25 And finally, Your Honor, with regard to the

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1 complaint by Ms. Singer Nelson that all the factual
2 disputes that Qwest provided at MCI's request in this
3 issues list shouldn't be considered again, MCI seems
4 to want it both ways. At first, MCI said, Well,
5 Qwest hasn't identified any factual disputes that
6 require a hearing. We've identified a number which
7 we believe are disputed issues of fact and as to
8 which there has been no hearing yet. And now the
9 claim is they've already been considered and they
10 shouldn't be considered again.

11 Well, they may have been considered in the
12 context of a collaborative. A collaborative is not a
13 litigation forum; it's an attempt, according to its
14 name, to reach an agreement. If the parties aren't
15 able to reach an agreement, they don't give up their
16 right to have a judicial or quasi-judicial tribunal
17 to make that authoritative decision, and yet that's
18 what it seems the parties', other than Qwest's,
19 positions are on these disputed issues of fact. We
20 don't think that's reasonable.

21 We also point out that, as we stated
22 earlier, the Commission overruled Qwest's position
23 that the Commission lack the legal authority to
24 modify the PAP over Qwest's objection by relying on
25 its statutory power under RCW 80.36.140, and that

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1 statute requires a hearing. So if the Commission
2 intends to alter the PAP over Qwest's objection,
3 Qwest's position is that it is entitled to a hearing.

4 JUDGE RENDAHL: Well, thank you, all of you.
5 Is there any party that believes we need to have a
6 separate round of written argument or comment on the
7 issue of which issues need to be included, or is that
8 something that you feel comfortable with me deciding
9 today? Mr. Owens.

10 MR. OWENS: Your Honor, I think we've stated
11 our position that the Issues Six, Eight and Nine are
12 outside the scope of Section 16.1, and we also have
13 additional legal grounds on which Issues Eight and
14 Nine should not be considered, which we could address
15 in a brief, and those essentially would be First
16 Amendment grounds, that is, that the Commission can't
17 compel Qwest to engage in a specific form of
18 association as part of its regulatory authority, but
19 if you -- having said that, I think we're comfortable
20 with you deciding what issues should be on the issues
21 list today, unless you would like us to further
22 elaborate those legal arguments.

23 JUDGE RENDAHL: Let me hear from the other
24 parties, and I may need to come back to you. Ms.
25 Singer Nelson.

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1 MS. SINGER NELSON: Your Honor, I don't see
2 a need for a briefing.

3 JUDGE RENDAHL: Covad?

4 MS. FRAME: Neither does Covad.

5 JUDGE RENDAHL: For Eschelon?

6 MS. CLAUSON: No, we don't see a need for
7 briefing, either.

8 JUDGE RENDAHL: And Staff?

9 MR. TRAUTMAN: No.

10 JUDGE RENDAHL: Well, at this time, as
11 troubling as it is that Qwest has chosen to
12 discontinue the LTPA process, I don't believe it's
13 appropriately a six-month review issue. I think it
14 is an issue that the Commission would be interested
15 in working with the parties to develop an alternative
16 process. It doesn't sound as if Qwest is opposed to
17 discussing issues, but that the form of the
18 collaborative did not work for Qwest, is what I'm
19 hearing.

20 So at this point, the Commission can't force
21 Qwest to participate in a process which is not
22 included as a requirement under the QPAP. I think it
23 was intended that there be some sort of regional
24 collaborative process that was part of the discussion
25 in the Section 271 proceedings and the SGAT

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1 proceedings, and the Commission later stated that it
2 wanted to participate in those types of proceedings
3 and felt that there were efficiencies in them, but I
4 do not believe the Commission itself is wedded to
5 exactly the LTPA process if there is another process
6 that would work for all parties.

7 So I would encourage Qwest, in particular,
8 to identify what sort of a process may work for
9 Qwest, and that there are efficiencies in dealing
10 with this not on a state-by-state basis, but on more
11 of a regional basis. That said, I don't think
12 they're appropriate for the six-month review. So I
13 don't think that Issues Eight and Nine are
14 appropriate, although I do appreciate the parties
15 bringing it to my attention, and if there's anything
16 the Commission can do in any sort of a mediation role
17 in getting the parties together and figuring out
18 another process, that's something the Commission
19 would be willing to do.

20 As to Issue Six, I tend to agree with
21 Eschelon that this is not an issue that necessarily
22 needs factual presentation, but I think what would be
23 helpful is to have the parties, at least at this
24 point, in whatever initial filing we have, is to
25 address their concerns, and at that point we can tell

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1 whether it's appropriate for hearing and whether, in
2 fact, it is an appropriate issue for the six-month
3 review. At this point, I'm not willing to eliminate
4 it as an issue, but we'll reserve that issue for
5 later.

6 So that brings us to the other six issues,
7 which, again, not eliminating Qwest's request for a
8 hearing on these issues, and I think Mr. Owens is
9 correct that the Commission does need to have a
10 hearing, I think it's what form of hearing and to
11 what extent all of these issues need to be addressed.
12 The Commission can have a hearing that is, in a
13 sense, an argument on the legal issues if that is all
14 that is involved. It doesn't necessarily require an
15 evidentiary hearing if there are no -- there's no
16 factual evidence, necessarily, that needs to be
17 resolved.

18 So I think it is appropriate for the parties
19 to, at whatever date we set up for filing, is to
20 identify their case, and whether that be in the form
21 of pre-filed testimony or, as was done in the Section
22 271 proceeding, by affidavit or verified comments,
23 which would be subject to cross-examination -- if a
24 party filed verified comments by a witness, then
25 those would be subject to cross-examination, but they

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1 wouldn't necessarily be in the Q and A format that
2 the Commission has done in other proceedings. It
3 makes things move a little more smoothly and get the
4 same information in, but it's not necessarily in a Q
5 and A. Mr. Trautman?

6 MR. TRAUTMAN: Yeah, what's the difference
7 between an affidavit and a -- because that wouldn't
8 be Q and A, either, and verified comments?

9 JUDGE RENDAHL: And verified comments?
10 None, really. It's just the form, I think. And
11 those were used in the Section 271 process. And
12 again, as to the Section 271 process, this process is
13 different. Having looked at what was filed in the
14 bench request, there were no transcripts of
15 proceedings, there was not -- you know, the
16 facilitator was a facilitator, although it appeared
17 he was intended to be a mediator. I think that is
18 one criticism, maybe, of the LTPA process, that if it
19 was intended to create some formalities that state
20 commissions could use, it didn't necessarily do that.
21 It didn't create a formal record that we could then
22 use, as we did in the QPAP. When the Commission
23 participated in the multi-state QPAP process, there
24 were hearings by a -- well, I can't remember whether
25 he was a facilitator, but he performed the mediator

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1 role. The hearing -- there were actual hearings,
2 transcripts taken, exhibits marked, and an order
3 generated that was then sent on to the states, and
4 that does not appear to be the process that actually
5 occurred in this proceeding, which makes it difficult
6 for me to consider what happened as a formal record
7 that the Commission could then move from.

8 It does inform the decision and I think it
9 may eliminate the need for some factual evidentiary
10 hearing, depending on what's admitted and what's not.

11 So I think what I'd like to have is the
12 parties file their cases and then, from there, I
13 think it will be clear whether there are actually
14 legal issues or substantive, factual issues that need
15 to be developed on cross-examination. Any thoughts
16 on that?

17 MR. OWENS: No, that's acceptable to us,
18 Your Honor. I would point out that we attempted, in
19 listing in the far right column, to limit our listing
20 only to factual disputes. We do have a number of
21 what we would consider to be legal issues which we
22 did not include. We attempted to be very circumspect
23 about not including any legal or mixed questions of
24 fact and law.

25 JUDGE RENDAHL: At this point, I'm not

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1 saying there are no factual issues, but I think those
2 can be developed in the parties' presentations. Mr.
3 Trautman.

4 MR. TRAUTMAN: Do you envision two rounds of
5 comments, or how do you envision that to work?

6 JUDGE RENDAHL: I think that would be
7 useful, is to have initial round for both, a
8 simultaneous initial round, and then a simultaneous
9 responsive round. Because all parties have positions
10 on these issues, I don't think there's properly
11 necessarily an initial round by Qwest and response,
12 because it gets a little mixed up, because some of
13 the parties are requesting the issues, and by this
14 point I would expect that all parties know what
15 Qwest's position is and that Qwest knows what the
16 other parties' position is, having been through the
17 LTPA on these issues. So I don't think there will be
18 any element of surprise by having each party file a
19 simultaneous initial and then a response. Mr.
20 Owens, any thoughts?

21 MR. OWENS: No, that's certainly what we had
22 in mind, Your Honor, is two rounds, simultaneous.

23 JUDGE RENDAHL: Okay. Any comments on that
24 from parties on the bridge?

25 MS. FRAME: Your Honor, this is Karen Frame,

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1 with Covad. Are we looking at also a (inaudible)
2 position at the end of the simultaneous filings?

3 JUDGE RENDAHL: I'm sorry, I missed you
4 there. What at the end of the simultaneous filings?

5 MS. FRAME: At the end of the simultaneous
6 filings, are we looking at briefing the respective
7 testimonies by a take no position or are we -- I
8 mean, are we looking at -- I guess you're going to
9 determine whether or not we need to have an
10 evidentiary hearing at the end of the simultaneous
11 filings; correct?

12 JUDGE RENDAHL: Yes, and as you raised that,
13 I think you raise a good point, which is it may be
14 useful to, if there are -- to know what the legal
15 issues are, if it's possible to do pre-hearing -- you
16 know, a pre-hearing brief, and then whatever -- you
17 know, if there is a witness that the party is -- or
18 there's a person that a party is offering an
19 affidavit or verified comments or pre-filed
20 testimony, you know, they can file both of those. In
21 a sense, I'd get the entire case up front, know
22 what's going on and see whether there are issues that
23 are fully resolved on the legal issues. And I don't
24 know if that helps at all. I mean, that's just one
25 -- that's one possibility.

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1 MR. OWENS: We'd be happy to submit a
2 pre-hearing brief along with the testimony, Your
3 Honor.

4 MS. FRAME: And Your Honor, just for
5 clarification purposes, are we looking at possibly
6 submitting a pre-hearing brief before we submit the
7 testimony?

8 JUDGE RENDAHL: No, I would think
9 simultaneously with the initial round.

10 MS. FRAME: Okay.

11 JUDGE RENDAHL: So that if you are proposing
12 to have -- you know, my idea of the affidavit or
13 verified comments is not a legal brief, per se, but
14 addressing the substantive issues, but if there are
15 just purely legal arguments, then those should be
16 raised in the brief. You know, there's some issues
17 that involve the TRO, and you know, those are the
18 sorts of things I'm thinking of in terms of legal
19 arguments, you know. It implicates many of these
20 issues.

21 So there are, as we all know, changes in
22 what's going on in the market and obligations, and
23 those continue to be in flux, which makes life
24 difficult for everyone at this point. So that's what
25 I'm thinking of in terms of the legalities, but if

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1 there are factual, substantive issues -- factual may
2 not be the best word, because I think some of these
3 issues are -- you know, they're -- many of them are
4 policy arguments, as well as factual issues, so those
5 are the sorts of things that can be raised in the
6 verified comments.

7 MR. OWENS: We agree, Your Honor. We sought
8 to raise policy issues. We didn't consider them
9 legal issues, unless -- I mean, as I said, we tried
10 to keep the two very separate, but we would consider
11 policy as sort of a separate category within factual
12 disputes.

13 JUDGE RENDAHL: So again, what I'm
14 contemplating are simultaneous filings of either
15 pre-filed testimony, verified comments, or affidavits
16 addressing the policy issues and the factual issues
17 raised by the -- I guess we're now at seven issues,
18 the seven issues remaining, with pre-hearing briefs
19 addressing the legal issues addressing those, and
20 what that does is that gives us somewhat of a paper
21 record to figure out what issues need to be fully
22 fleshed out in cross-examination. I'm assuming there
23 will be some.

24 And so what I'd like to do is we'll go off
25 the record and talk about scheduling, timing for

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1 those rounds of filing, and then establishing some
2 hearing dates to have them out there, because we'll
3 need to have something reserved. It's hard to
4 schedule late. Once you think you need a date,
5 sometimes there's not a date available. So I'd like
6 to do that. But I am also going to need some further
7 response on the PO-20 issues in the SGAT, and so what
8 I'm going to suggest is that we go off the record and
9 have these discussions and then put them back on the
10 record. So we'll be off the record.

11 (Discussion off the record.)

12 (Recess taken.)

13 JUDGE RENDAHL: Let's be on the record.

14 While we were off the record, we had some discussions
15 about scheduling, including how to handle Qwest's
16 SGAT filing on -- from Friday. Mr. Owens offered two
17 options. One is based on Qwest not considering the
18 QPAP or Exhibit K to be technically a part of the
19 SGAT, said that we could -- the Commission could make
20 that decision and then we wouldn't have to address
21 that.

22 The second option was to have Qwest offer to
23 extend the 60-day time line pending the outcome of
24 the six-month review proceeding for the PO-20
25 implementation issues. And that latter option is the

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1 one I thought would be best -- most appropriate,
2 because the Commission does consider the QPAP to be a
3 part of the SGAT. So Qwest has offered to file a
4 letter as to that effect tomorrow. That's my
5 understanding.

6 I've asked any parties to file comments with
7 the Commission on this SGAT filing that was made on
8 the 25th by July 16th. In particular, if there are
9 any issues aside from the PO-20 implementation issues
10 in Exhibit K, if there are any issues the parties
11 object to, and then Qwest will have an opportunity to
12 respond on July 23rd, and then an order will be
13 prepared for the consent agenda on August 11th,
14 consistent with other SGAT filings made with the
15 Commission.

16 Then those PO-20 issues would be addressed
17 in the main part of this proceeding, and the parties
18 have agreed to the following schedule: An initial
19 filing -- simultaneous initial filing of pre-filed
20 testimony or verified comments or affidavits,
21 whichever format the parties choose, addressing the
22 policy and factual issues raised in Issues One
23 through Seven in the final issues list; a responsive
24 filing date for pre-filed testimony, verified
25 comments, affidavits, et cetera, on August 13th, with

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1 a briefing date addressing the legal issues raised by
2 Issues One through Seven to be filed by August 27th.

3 Parties agree to two hearing dates on
4 September 13th and 14th. Those will be here in Room
5 108, and as I've explained, there is a rate case
6 going on that will require us to be in this room,
7 Room 108, and we'll probably need to have a separate
8 conference bridge. There will be a pre-hearing
9 conference in this room, Room 108, on September 8th,
10 and we will determine the schedule for post-hearing
11 briefs at the hearing.

12 And I believe that summarizes all the
13 scheduling discussions we've had. Is there anything
14 I've left out? Okay. Is there anything else we need
15 to discuss this morning?

16 MR. SMITH: Your Honor, this is Ray Smith,
17 with Eschelon. Ms. Clauson was going to ask about
18 documents produced by Qwest in response to a bench
19 request.

20 JUDGE RENDAHL: You'll have to speak up a
21 bit.

22 MR. SMITH: Sure. Ms. Clauson asked about
23 the documents produced by Qwest in response to the
24 bench request, whether they were already in the
25 record or whether they would be needed to be

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1 submitted by the parties in their verified comments
2 or pre-filed testimony?

3 JUDGE RENDAHL: Okay. The bench request --
4 there are many subparts to the bench request, number
5 one, and bench requests are not admitted into
6 evidence unless either the Commission or a party
7 requests that they be admitted. So at this point, I
8 have not made them an exhibit, so it may be
9 appropriate to consider -- considering how voluminous
10 the response to the bench request was, it may be
11 appropriate for the parties to take portions of the
12 response as they need to use them, and we'll admit
13 those portions separately. Does that help?

14 MR. SMITH: Yes, thank you.

15 JUDGE RENDAHL: Lastly, is there any party
16 on the bridge who would like a transcript of today's
17 proceeding? Okay.

18 Anything else we need to address before we
19 adjourn? Hearing nothing, we'll be adjourned. Thank
20 you all for attending this morning, and I'll be
21 probably getting out a pre-hearing conference notice
22 sometime next week.

23 MR. OWENS: Thank you, Your Honor.

24 JUDGE RENDAHL: Thank you all. We're off
25 the record.

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(Proceedings adjourned at 11:47 a.m.)

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