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1 PUBLIC COUNSEL, by ROBERT W. CROMWELL, JR.,  
Assistant Attorney General, 900 Fourth Avenue, Suite  
2 2000, Seattle, Washington 98164.

3 THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION, by GREGORY J. TRAUTMAN, Assistant Attorney  
4 General, 1400 South Evergreen Park Drive Southwest,  
Post Office Box 40128, Olympia, Washington 98504.

5  
6 XO WASHINGTON, INC., by GREGORY J. KOPTA,  
Attorney at Law, Davis Wright Tremaine, 1501 Fourth  
7 Avenue, Suite 2600, Seattle, Washington 98101 (via  
bridge line.)

8 SPRINT COMMUNICATIONS COMPANY, LP, by WILLIAM  
9 E. HENDRICKS III, Attorney at Law, 902 Wasco Street,  
Hood River, Oregon 97031.

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1 PROCEEDINGS

2 JUDGE MOSS: Good afternoon, everyone. We  
3 are convened in our first prehearing conference in the  
4 matter of the application of Qwest Corporation  
5 regarding the sale and transfer of Qwest Dex to Dex  
6 Holdings, LLC, a nonaffiliate, Docket No. UT-021120.  
7 The first order of business, we will take appearances,  
8 and I will start with the Applicant.

9 MS. ANDERL: Thank you, Your Honor, Lisa  
10 Anderl representing Qwest Corporation. I'm an in-house  
11 attorney. My business address is 1600 Seventh Avenue,  
12 Room 3206, Seattle, Washington, 98191; telephone, (206)  
13 345-1574. Fax is (206) 343-4040, and e-mail is  
14 landerl@qwest.com.

15 There are two other attorneys who will be  
16 appearing and potentially acting in a representative  
17 capacity as the proceeding goes on. One, Mr. Sherr, is  
18 here with me today, and the other, Phil Roselli, is on  
19 the bridge. Would you like me to introduce them?

20 JUDGE MOSS: I know Mr. Sherr. He's sitting  
21 behind you, and Mr. Roselli I don't recognize. If you  
22 could spell his last name for me.

23 MR. ROSELLI: Phil Roselli, R-o-s-e-l-l-i,  
24 with Qwest, and my business address is 1801 California  
25 Street, Suite 4900, Denver, Colorado, 80202, and my

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1 phone is (303) 672-2887. My e-mail is  
2 prosell@qwest.com; fax, (303) 295-7049.

3 JUDGE MOSS: Ms. Anderl, you will be the  
4 designated counsel for purposes of service?

5 MS. ANDERL: Yes.

6 JUDGE MOSS: Then I believe, Mr. Harlow, you  
7 are representing the buyer in this proposed  
8 transaction, so I'll go ahead and take your appearance.

9 MR. HARLOW: Yes, Your Honor, and good  
10 afternoon. Brooks Harlow representing the buyer, Dex  
11 Holdings, LLC. With me in the room is William R.  
12 Connors, also with Miller Nash, 4400 Two Union Square,  
13 601 Union Street, Seattle, Washington, 98101.  
14 Telephone is (206) 622-8484. E-mail,  
15 harlow@millernash.com, and should be on the bridge line  
16 Mr. Richard Cameron of the law firm of Latham and  
17 Watkins in D.C.

18 MR. CAMERON: I'm here.

19 JUDGE MOSS: You had earlier filed a paper.  
20 I believe it was to be on an IP list. Did you have  
21 Mr. Cameron's information on that?

22 MR. HARLOW: Yes.

23 JUDGE MOSS: We don't need to have it for the  
24 record. Your fax, Mr. Harlow?

25 MR. HARLOW: (206) 622-7485.

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1 JUDGE MOSS: Proceed, please.

2 MR. MELNIKOFF: Good afternoon. My name is  
3 Stephen Melnikoff, and I'm with the Department of the  
4 Army office of the advocate general, regulatory law  
5 office. My phone number is (703) 696-1643. Fax number  
6 is (703) 696-2960. The street address is 901 North  
7 Stuart Street, Suite 700, Arlington, Virginia,  
8 22203-1837. E-mail address is  
9 stephen.melnikoff@hqda.army.mil, and I represent the  
10 consumer interests of the Department of Defense as well  
11 as all other federal executive agencies, including  
12 military and civilian.

13 JUDGE MOSS: We will be taking your oral  
14 petition to intervene, Mr. Melnikoff. Will you be  
15 proposing that intervention in the name of the Federal  
16 Executive Agencies?

17 MR. MELNIKOFF: It will be the Department of  
18 Defense and all other federal executive agencies;  
19 that's correct.

20 JUDGE MOSS: Let's just proceed around the  
21 room then from my left to my right.

22 MS. RACKNER: I'm Lisa Rackner. I'm with the  
23 law firm of Ater Wynne, and I'm here representing the  
24 Washington Electronic Business and Health  
25 Communications Coalition, for short, WEBTEC, which is

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1 formerly known as TRACER. My address is 222 Southwest  
2 Columbia, Suite 1800, Portland, Oregon, 97201. My  
3 phone number is (503) 226-1191. Fax is (503) 226-0079,  
4 and my e-mail is lfr@aterwynne.com.

5 JUDGE MOSS: Ms. Rackner, I understand that  
6 Mr. Butler will also be appearing on behalf of WEBTEC.  
7 Which one of you should be designated as the individual  
8 for official receiving service in the proceeding?  
9 That's not to say everybody can't get copies.

10 MS. RACKNER: Art Butler will be the lead  
11 counsel on the case.

12 JUDGE MOSS: I'll note his information for  
13 the record since he will be the person on the service  
14 list. He is also with Ater Wynne, LLP, at 601 Union  
15 Street, Suite 5450, Seattle, Washington, 98101. Voice  
16 mail is (206) 623-4711. Fax is (206) 467-8406, and  
17 e-mail is aab@aterwynne.com, and I'm taking that  
18 information from the WEBTEC petition to intervene which  
19 everybody should have. Let us proceed.

20 MR. ROSEMAN: My name is Ronald L. Roseman.  
21 I'm an attorney in private practice, 2011 14th Avenue  
22 East, Seattle, Washington, 98112. My phone number is  
23 (206) 324-8792. My fax is (206) 568-0138. My e-mail  
24 address is ronroseman@attbi.com, and I'm appearing on  
25 behalf of AARP.

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1           JUDGE MOSS: We probably have some other  
2 private parties who may wish to intervene today. I  
3 know, for example, Mr. Kopta is on the phone, but do we  
4 have any others in the room who are intending to  
5 intervene? Mr. Kopta, are you indeed on the phone?

6           MR. KOPTA: Yes, I am, Your Honor. Gregory  
7 J. Kopta of the law firm Davis Wright Tremaine on the  
8 behalf of XO Washington, Inc. My address is 2600  
9 Century Square, 1501 Fourth Avenue, Seattle,  
10 Washington, 98101-1688. Telephone is (206) 628-7692;  
11 fax, (206) 628-7699; e-mail, gregkopta@dwt.com.

12           JUDGE MOSS: Thank you. Do we have any  
13 others aside from Public Counsel and Staff? Apparently  
14 not. Go ahead, Mr. Cromwell.

15           MR. CROMWELL: Robert Cromwell, assistant  
16 attorney general for the State of Washington appearing  
17 on behalf of Public Counsel. My address is 900 Fourth  
18 Avenue, Suite 2000, Seattle, Washington, 98164-1012.  
19 My direct telephone line is (206) 464-6595. My  
20 facsimile number is (206) 389-2058, and my e-mail  
21 address is robertc1@atg.wa.gov, and I would ask that  
22 the service list include with my name also the name of  
23 Simon ffitich for purposes of the service list.

24           JUDGE MOSS: Who will be the primary counsel  
25 in this?

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1 MR. CROMWELL: I will.

2 MR. TRAUTMAN: Gregory J. Trautman, assistant  
3 attorney general for Commission staff. My address is  
4 1400 South Evergreen Park Drive Southwest, Post Office  
5 Box 40128, Olympia, Washington, 98504. My telephone  
6 number is (360) 664-1187. My fax number is  
7 (360) 586-5522, and my e-mail address is  
8 gtrautma@wutc.wa.gov.

9 JUDGE MOSS: Thank you. Do we have any other  
10 appearances? Apparently not. Mr. Hendricks, I note  
11 you are here, and I assume that would be for Sprint as  
12 being an interested person, and I have Ms. Judy's  
13 address information. Would that be the correct contact  
14 information, or should we substitute your name.

15 MR. HENDRICKS: At this point, I would  
16 substitute my name, please.

17 JUDGE MOSS: Why don't you go ahead -- it's  
18 the Hood River address, same address?

19 MR. HENDRICKS: Yes.

20 JUDGE MOSS: You should all have or gain  
21 access through the records center the letter with  
22 Ms. Judy's signature from Sprint, and we will  
23 substitute Mr. Hendricks' name. That's Tre Hendricks,  
24 and I had a letter from Mr. Richard Finnigan, and it  
25 appears to be on his own behalf or on behalf of his law



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1 firm, which is law offices of Richard A. Finnigan.  
2 That letter is also available through the records  
3 center, and I won't read the information into the  
4 record, but you will all wish to have that for complete  
5 files.

6 Now then, we have then several petitions to  
7 intervene that we need to take up, and I would propose  
8 to proceed essentially in the same order that we took  
9 appearances. Though we have Dex Holdings, LLC, as an  
10 interested party in a sense that they are the intended  
11 buyer, we will have to have a formal intervention  
12 there, and before we go on, I guess I have to go  
13 through the painful exercise of acknowledging that I  
14 have reached the age where I am a member of AARP, and  
15 therefore, since AARP is going to petition to intervene  
16 here shortly, I should disclose in advance of that this  
17 membership and ask if anyone is troubled by that and  
18 would ask me to recuse myself on the basis of that  
19 membership.

20 MS. ANDERL: No, Your Honor.

21 JUDGE MOSS: You will notice I did not blush,  
22 but I hide embarrassment well. I won't tell you how  
23 long I've been a member. Thank you. I don't have any  
24 other affiliations, investments, or anything with any  
25 of the other intended parties, so that brings me back

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1 to you, Mr. Harlow. Would you like to make your  
2 petition for intervention in this proceeding briefly?

3 MR. HARLOW: Yes, Your Honor, and we have  
4 provided the Bench with a copy of a written petition  
5 and have distributed to all the parties, I believe --  
6 if anyone else needs one, we have an extra copy -- our  
7 grounds for intervention and the requirements of Rules  
8 430 are stated therein. I don't know if I need to  
9 repeat them. We do move for intervention at this time.

10 JUDGE MOSS: Is there any objection from the  
11 Applicant?

12 MS. ANDERL: No.

13 JUDGE MOSS: Objection from anyone else? The  
14 petition is granted. Let's take up the individual  
15 intervenor petitions now. I have two written ones, and  
16 I think it's appropriate that I should take those up  
17 first and then we will turn back to the oral  
18 interventions.

19 So I had XO Washington filed first, so we  
20 will take you up first, Mr. Kopta, and we have your  
21 written petition. Unless there is anything to add to  
22 what you said in that, there is really no reason to  
23 repeat the bases. Do you have anything to add?

24 MR. KOPTA: Not at this time, Your Honor. We  
25 have stated the bases in our petition and will rest on

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1 that.

2 JUDGE MOSS: Does the Company have any  
3 objection to the intervention of XO Washington, Inc?

4 MS. ANDERL: I think my answer would be a  
5 qualified no, Your Honor. If you look at XO's petition  
6 to intervene under subheading Roman numeral 3, XO  
7 states two bases, and we don't object to XO's  
8 intervention for the basis stated in the first  
9 paragraph with regard to XO's interest in the  
10 publication of the White Pages directory listings. I  
11 think that that's at least an issue that they can  
12 legitimately look at through this docket and assure  
13 themselves that they are not going to be facing any  
14 issues there. I think if I wanted to go into it at  
15 length, I could explain that there is really not going  
16 to be any change, but one might rightly suggest that  
17 that could be explored in the docket.

18 So if XO's intervention were limited to that  
19 interest, we would not object. However, the interests  
20 that XO purports to have stated in the second  
21 paragraph, I do believe, are not interests that the  
22 Commission is obligated to consider in this docket. I  
23 think that those are very general interests, not  
24 particularized to this docket. I think they are at  
25 least one docket removed from the proceedings here to

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1 the extent that XO claims that there might be impacts  
2 on rates, and I think it's very clear from our  
3 application that there is no proposed rate change here,  
4 even though the Commission's division in this case  
5 might have impacts that ultimately flow out and affect  
6 rates in other dockets, and I'm not saying the  
7 Commission would or wouldn't, but I don't believe  
8 that's a significant or substantial interest in the  
9 issues that may be raised in this case.

10 I think that allowing XO or any party, for  
11 that matter, to intervene on that basis would  
12 potentially broaden the issues in this docket, extend  
13 the discovery and hearing process, and add complexity  
14 and length to the proceedings.

15 JUDGE MOSS: As I understand the situation  
16 and if necessary, I will return to you, Mr. Kopta, but  
17 first let me say, you did state, Ms. Anderl, that you  
18 have no objection to the intervention, per se. I  
19 believe you said you had a qualified no in response to  
20 my question, and you have qualified it.

21 In terms of the issues in the proceeding,  
22 certainly I can acknowledge today that this is not a  
23 rate proceeding. That matter has not been put directly  
24 before us by tariff filing, and there may or may not be  
25 a subsequent proceeding in that connection. However,

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1 having said that, unquestionably the concurrent  
2 treatment or situation with respect to the Yellow Pages  
3 operations within the company and how that might be  
4 affected by the proposed sale are issues that fall  
5 within the scope of the proceeding, so while we are not  
6 going to have a rate proceeding, per se, that broad  
7 subject area is certainly within the scope of our  
8 proceeding, as I understand it, and I'll ask you if you  
9 disagree with that, but with that understanding,  
10 Mr. Kopta, do you need to say anything about your  
11 petition?

12 MR. KOPTA: No, I don't think so, Your Honor.  
13 You've accurately characterized the scope of the issue,  
14 and I don't know whether it sets Qwest's collective  
15 minds at ease at all, but we have no intent to raise  
16 any of those issues; that we would be intending to  
17 respond to those kind of proposals that might be made  
18 by other parties, so merely to protect our interests in  
19 terms of maintaining the status quo as opposed to  
20 seeking to insert any kind of rate issues in this  
21 proceeding.

22 JUDGE MOSS: Ms. Anderl, do you want to be  
23 heard further on that?

24 MS. ANDERL: No, Your Honor.

25 JUDGE MOSS: With that, I think that we will

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1 grant the petition by XO Washington, Inc.

2 MR. KOPTA: Thank you, Your Honor.

3 JUDGE MOSS: The other one I think that was  
4 written --

5 MR. CROMWELL: I just wanted to raise one  
6 issue with regard to XO's petition to intervene.

7 JUDGE MOSS: Did you have an objection?

8 MR. CROMWELL: I didn't have an objection. I  
9 did want to make a record that part of the basis that  
10 XO predicated their petition on was the implementation  
11 of revenues and addressing that issue. I did want to  
12 make a record that I believe this Commission has  
13 addressed those questions previously by order of this  
14 Commission as well as court precedent.

15 JUDGE MOSS: Unquestionably that is true. I  
16 have read the order. All right. Now, Ms. Rackner,  
17 WEBTEC. Are we to know the former TRACER from  
18 hereforth as WEBTEC?

19 MS. RACKNER: Yes.

20 JUDGE MOSS: You did file a petition to  
21 intervene on September the 31st, and we have that  
22 before us. I think that's certainly been served to the  
23 Company and others probably have it. Do you have  
24 anything to add? We have read your petition.

25 MS. RACKNER: I think it's all in the

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1 petition.

2 JUDGE MOSS: Ms. Anderl, does the Company  
3 have any objection to WEBTEC's intervention.

4 MS. ANDERL: Yes, Your Honor, we do, and it's  
5 not qualified. First, I would seek a point of  
6 clarification, and that is a representation from  
7 Counsel as to who the WEBTEC members are, because I  
8 believe it's difficult for anyone to make a decision  
9 about the interests of an association such as is  
10 claimed by WEBTEC without understanding whether the  
11 association is indeed composed of members who have the  
12 interests professed.

13 JUDGE MOSS: You want a membership list?

14 MS. ANDERL: Yes.

15 JUDGE MOSS: I'm not going to make  
16 Ms. Rackner do that orally. If she's got one handy,  
17 I'll let her hand it to you.

18 MS. RACKNER: I don't, Your Honor.

19 JUDGE MOSS: You are familiar with TRACER,  
20 Ms. Anderl?

21 MS. ANDERL: Yes, Your Honor, but I don't  
22 believe that's on this record.

23 JUDGE MOSS: What's on this record?

24 MS. ANDERL: The TRACER membership.

25 JUDGE MOSS: And you want the membership list

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1 to be made part of the record?

2 MS. ANDERL: I would simply like a  
3 representation as to who the members are of this new  
4 organization.

5 JUDGE MOSS: Are they the former TRACER  
6 members?

7 MS. RACKNER: They are the former TRACER  
8 members. The organization is not new. Only the name  
9 is new, and I would note that TRACER is routinely  
10 granted intervention in cases before this commission  
11 and indeed has in prior Yellow Pages cases as well.

12 JUDGE MOSS: Ms. Anderl, I'm sorry if it  
13 appears I'm a little puzzled, but it's because I am.  
14 The representation in the petition is that the members  
15 include large retail customers of Qwest Corporation.  
16 Is that inadequate to your needs?

17 MS. ANDERL: Yes, Your Honor, it is. In  
18 previous dockets, we've been advised that TRACER  
19 members included companies, not such as but companies,  
20 Boeing, Weyerhaeuser, and Group Health. I don't know  
21 if that's still the case or not, and I only seek that  
22 clarification, Your Honor, because although we may sit  
23 here today knowing that, that is not information in  
24 this docket, and if there are other members or if that  
25 is not an accurate membership list, it occurred to me



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1 that it is something the Commission would want to  
2 consider to make its own assessment of whether indeed  
3 the membership is part of the retail customers of Qwest  
4 or not, and indeed, Qwest would like to be sure of that  
5 as well.

6 JUDGE MOSS: Are any of the companies that  
7 Ms. Anderl mentioned, to your knowledge, members of the  
8 organization?

9 MS. RACKNER: Yes, but I need to qualify  
10 this. I actually do not have in my mind a list of the  
11 members. One of the representatives from one of the  
12 members is here today from Boeing, but other than that,  
13 I don't think that I can give you a list as we sit here  
14 today.

15 I would also note that customer groups don't  
16 routinely have to provide a list of their members, and  
17 I guess I would ask under the circumstances that if  
18 Qwest is going to make what I view as a fairly  
19 unorthodox request, a list of our members, I would like  
20 them to do so in writing so they make a motion to  
21 compel us to do so, and that way, we will have an  
22 opportunity to consider and respond. We may be able to  
23 compromise, but as we sit here, it's an unusual  
24 request, and I'm not prepared to respond.

25 JUDGE MOSS: The issue here to the extent

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1 there is one, and I don't know there is one, with  
2 respect to the intervention by organizations is that  
3 one or more of their members have a substantial  
4 interest in the outcome of the proceeding, and I don't  
5 think there is anyone in the room who doubts that  
6 Boeing is a large commercial customer of whatever it's  
7 a customer of. It's large, period.

8           And it is the case that TRACER has routinely  
9 participated in these sorts of proceedings, including  
10 the last proceeding concerning the matter of what we  
11 generically refer to as the Yellow Pages. Is there any  
12 other possible objection to the participation of WEBTEC  
13 organization?

14           MS. ANDERL: Your Honor, that was merely a  
15 preliminary remark. I have some fairly extensive  
16 discussion with regards to the basis for our objection,  
17 and I did not think it would be so controversial to  
18 simply obtain a verification from Counsel of the  
19 information that I was asking for.

20           JUDGE MOSS: The best laid plans, Ms. Anderl.  
21 Go ahead.

22           MS. ANDERL: Assuming that WEBTEC is TRACER  
23 and TRACER is WEBTEC --

24           JUDGE MOSS: I think we had that  
25 representation, Ms. Anderl.

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1 MS. ANDERL: I think the Commission ought to  
2 in considering this petition for intervention bear in  
3 mind fundamentally intervention is not a right. It's  
4 something the Commission has the discretion to grant or  
5 deny. I understand that historically, the Commission  
6 has granted intervention to TRACER in dockets such as  
7 this. However, I don't believe that historic granting  
8 of interventions are necessarily persuasive as to  
9 whether the intervenor has a particularized interest in  
10 this case, and we would submit to you, Your Honor, that  
11 they do not.

12 WEBTEC or its member must show,  
13 quote/unquote, a substantial interest in the issues to  
14 be addressed or that its participation is in the public  
15 interest. We do not believe that in this case WEBTEC  
16 can meet this burden. This proceeding will not affect  
17 customer's rates. We believe that WEBTEC's only  
18 interest as a customer group is whether the proceeding  
19 is lawfully conducted properly held under the laws of  
20 the State of Washington and whether the Commission  
21 reach a fair and just decision. We believe that those  
22 interests are already represented by Public Counsel and  
23 Staff.

24 This view of whether intervention should be  
25 granted and whether a particular customer group or

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1 competitor states an interest has been articulated by  
2 the Commission in prior cases. The one on which I most  
3 heavily rely is in the matter of the petition of GTE  
4 Northwest, Incorporated, for depreciation of accounting  
5 changes, and that was in Docket 961632 that was in the  
6 Third Supplemental Order in 1987.

7           Their customers, including AT&T, MCI and MCI  
8 Metro, petitioned to intervene claiming a substantial  
9 interest in the outcome because the Commission's  
10 decision on matters associated with depreciation might  
11 well flow out to rate case results and in another  
12 docket impact the rates that those large customers  
13 would pay. The Commission considered that argument  
14 and held that under those circumstances, those  
15 customers did not state a substantial interest in the  
16 outcome, which was really that the Commission lawfully  
17 conduct a hearing and reach appropriate decisions with  
18 regard to the appropriate depreciation lives that GTE  
19 should use.

20           I submit to you the issues in this case are  
21 very similar and that the intervention of TRACER and  
22 some of the other customer groups we will hear from is  
23 substantially the same as that articulated by AT&T, MCI  
24 and MCI Metro wherein those petitions to intervene were  
25 denied, and therefore, we would request that the

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1 Commission look seriously at these petitions to  
2 intervene, seriously consider whether or not these  
3 parties have any substantial interest or simply a more  
4 general interest that wouldn't warrant intervention  
5 and/or whether their participation would be in the  
6 public interest.

7           We believe that view of prior dockets might  
8 lead a person to believe that the interventions, if  
9 they were granted, would extend proceedings, would  
10 extent the evidentiary issues to be addressed, and  
11 would make for more lengthy and complex discovery and  
12 hearings in this case. We believe that upon due  
13 consideration of all these issues, the Commission  
14 should reach the conclusion that these interventions  
15 are not in the public interest and deny the petitions.

16           JUDGE MOSS: You are not suggesting that the  
17 scope of this proceeding is limited to the potential  
18 downstream rate impacts, whatever disposition the  
19 Commission makes here may have, are you?

20           MS. ANDERL: No, Your Honor. I believe that  
21 if the Commission decides it has jurisdiction over this  
22 transaction under RCW 80.12 that it needs to consider  
23 whether the transaction is in the public interest.

24           JUDGE MOSS: That is the standard we are  
25 concerned with here.

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1 MS. ANDERL: I don't disagree with that.

2 JUDGE MOSS: Ms. Rackner, I'll hear from you.

3 MS. RACKNER: The one point in which I would  
4 agree with Ms. Anderl is I would also ask the  
5 Commission to take under serious consideration the  
6 point that TRACER makes in its motion to intervene.  
7 First of all, effect on rates is an issue ultimately,  
8 may be an issue in this case, and despite Ms. Anderl's  
9 representation that rates will not be affected by  
10 anything that's done in this case, I don't know as we  
11 sit here today she can do so.

12 But with respect to the public interest,  
13 TRACER does bring a unique perspective. There is no  
14 other party in this case or intervenor that is here to  
15 particularly represent the views of large users of  
16 telecommunication services. TRACER has historically  
17 provided a constructive and unique perspective in cases  
18 before this Commission and can certainly help bring  
19 light to the Commission's ultimate determination of  
20 what would be in the public interest.

21 TRACER to the extent its interests are  
22 similar or its views are similar to that of Staff or  
23 Public Counsel, we will cooperate with them and  
24 endeavor not to introduce any duplicative information  
25 or argument before the Commission, and indeed, our

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1 current plan with Public Counsel is to share an expert,  
2 so I don't believe that TRACER, WEBTEC's involvement in  
3 this case will extend the proceedings. Certainly,  
4 TRACER can and will help this Commission come to a just  
5 and fair decision in this case and would urge you to  
6 accept TRACER's intervention.

7 JUDGE MOSS: Anybody else want to be heard on  
8 this? Mr. Trautman.

9 MR. TRAUTMAN: Staff would not oppose the  
10 proposed intervention; although, we do share Qwest's  
11 concerns over the membership, knowing who the  
12 membership is in the organization and what interests  
13 each of them represent and also whether any of the  
14 members would be competitors of Qwest and  
15 telecommunications or publishing, so we would like to  
16 get that clarified. The membership and the interests  
17 that they represent is not entirely made clear by the  
18 Application.

19 MS. RACKNER: Well, the class of members --

20 MR. TRAUTMAN: The particular members.

21 MS. RACKNER: There is not a list of the  
22 particular members.

23 MR. TRAUTMAN: That's right. Staff shares  
24 that concern --

25 MS. RACKNER: That they may be competitors?

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1           MR. TRAUTMAN: That we know who the members  
2 are and what their interests are.

3           JUDGE MOSS: Is that just a general statement  
4 of interest in having that information, which, of  
5 course, if the intervention is granted, could be  
6 obtained through discovery request.

7           MR. TRAUTMAN: That is, yes.

8           JUDGE MOSS: There is not an objection on the  
9 basis that it has not been furnished, is there?

10          MR. TRAUTMAN: No, there is not, Your Honor.

11          JUDGE MOSS: Anything further?

12          MS. ANDERL: No, Your Honor.

13          JUDGE MOSS: Mr. Cromwell, did you have  
14 something?

15          MR. CROMWELL: I just wanted to state that we  
16 support TRACER's intervention. Ms. Rackner did allude  
17 to our possibly sharing a witness. That is a practice  
18 we have exercised before this Commission in previous  
19 dockets, and indeed in previous dockets involving the  
20 subject matter, so we saw no reason to vary from that  
21 practice in this case.

22          MS. ANDERL: I guess that does draw a  
23 response, Your Honor. It's hard to imagine how TRACER  
24 will lend a unique perspective to this case when indeed  
25 their witness is going to be a shared expert with



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1 Public Counsel. It does seem to me that their  
2 participation would merely be duplicative.

3           It doesn't seem consistent that TRACER can  
4 say no one else represents our interests, and yet --  
5 maybe they are going to put other witnesses on the  
6 stand, but past practice would indicate that they are  
7 not. That nobody else represents our interests, and  
8 yet, we are perfectly happy to have the same expert as  
9 Public Counsel.

10           JUDGE MOSS: Well, I think it's the case that  
11 typically -- although, the parties in large complex  
12 cases are encouraged to coordinate their efforts in  
13 litigation or adjudication, as far as the membership is  
14 constituted in part by large commercial interests, and  
15 I think we have established at least one in the name of  
16 Boeing, the Public Counsel traditionally focuses on  
17 smaller commercial interests and the residential type  
18 of consumer, so while they may coordinate their  
19 efforts, I think there may also be some substance to  
20 the suggestion that TRACER by virtue of being  
21 constituted in part by large commercial customers will  
22 bring something of a unique perspective, and we may  
23 require in terms of the efficiency of the proceeding a  
24 degree of coordination that the parties themselves do  
25 not anticipate making if that becomes necessary to

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1 promote a smooth hearing.

2           Having listened carefully to the arguments  
3 and having considered the petition, I will grant the  
4 petition to intervene. Since, Ms. Anderl, the Company  
5 has voiced what I consider to be a somewhat more  
6 elaborate objection than I have sometimes heard, I will  
7 simply remind you that -- although, I'm sure you do not  
8 need reminding because you are familiar with our  
9 rules -- that you may, if you choose -- this order will  
10 be over my signature -- you may choose to interpose an  
11 appropriate motion for what amounts to reconsideration  
12 by the Commission. I think it's probably technically a  
13 motion to dismiss a party, and it may fall within the  
14 review of interlocutory orders rule, which has a fairly  
15 short fuse. I don't like to see a party prejudiced by  
16 time lines when it's not perfectly clear what rule we  
17 are operating under, so I mentioned that for that  
18 reason.

19           MS. ANDERL: Thank you, Your Honor.

20           JUDGE MOSS: I believe that takes care of our  
21 written petitions, so I will turn now to Mr. Melnikoff.  
22 I think for the sake of brevity, if we may refer to  
23 your client as the Federal Executive Agencies, which I  
24 will later shorten to FEA, if that's agreeable to do  
25 that.

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1 MR. MELNIKOFF: That's fine.

2 JUDGE MOSS: Let us hear your oral petition  
3 to intervene, the interests of your client, and we will  
4 hear if the Applicant or others may have any objection.

5 MR. MELNIKOFF: We are not a member of  
6 TRACER. Nonetheless, we do have a unique interest and  
7 perspective that cannot be represented or protected by  
8 any other party. We are one of the largest users,  
9 whether you measure it by number of employees-wise,  
10 revenue stream in Washington Qwest territory. We are  
11 the military civilian government user and a military  
12 civilian government purpose.

13 We have tariffed as well as competitive  
14 services. We have varied requirements both in terms of  
15 sizes, technology, amounts. There are numerous  
16 substantial military installations, Fort Lewis, McChord  
17 Air Force Base, the Navy shipyard, and major presence  
18 with Federal Executive Agencies, Coast Guard, DOJ, NOA,  
19 to name a few.

20 Our interest is to minimize the impact of the  
21 sale, if it's allowed to go forward, address any  
22 conditions that may be required for the Commission to  
23 impose upon the sale, and to maintain the status quo.  
24 We have a substantial interest in this proceeding. It  
25 could significantly impact the discontinuance of

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1 imputed revenues. That could have a direct impact on  
2 tariff rates as well an indirect impact on our  
3 competitive bids.

4           The unique perspective position of the  
5 Federal Executive Agencies, its consumer interests have  
6 been recognized by this Commission. Previously, we  
7 have actively participated in numerous proceedings in  
8 this state. Among them are the U S West general rate  
9 case 950200 as well as the access charge reform 970325.  
10 It is our intention to fully and actively participate  
11 in this proceeding, including expert testimony if a  
12 full evidentiary hearing stage is reached.

13           We are interested in, as I said, maintaining  
14 the status quo. A loss of Yellow Page function, if the  
15 revenues were to actually be reputed, we are interested  
16 in making sure that doesn't adversely impact tariff  
17 services in a competitive environment through which the  
18 Federal Executive Agencies obtain telecommunications  
19 services as well as making sure that a sale, if  
20 approved, that there is a fair compensation to the  
21 large governmental business users that have supported  
22 that entity.

23           We do not intend to file duplicative  
24 testimony or participation on specific issues that I  
25 know of. We don't intend to enlarge or broaden or

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1 burden this proceeding. On that basis, we would  
2 petition for intervention.

3 JUDGE MOSS: Thank you. Ms. Anderl.

4 MS. ANDERL: Similar objection to that  
5 interposed with regard to WEBTEC. It seems as though  
6 the FEA purports to represent both consumer and  
7 business interests, and those interests would seem to  
8 me to be adequately represented by Public Counsel, and  
9 to the extent that WEBTEC is an intervenor or those  
10 interests are legitimate ones that the Commission is  
11 going to consider in this case that the FEA's  
12 intervention would appear to be duplicative.

13 To the extent not, their interests would be  
14 protected by their ability to intervene in any  
15 rate-setting proceeding, which this is not, and that is  
16 what Mr. Melnikoff's comments seem to focus on is that  
17 if rates change in any direction or there are any other  
18 rate impacts as a result of this docket, they want a  
19 say in that, and I would submit that there are or will  
20 be subsequent proceedings in which FEA could intervene  
21 and protect their interests. That would conclude my  
22 remarks on this petition.

23 JUDGE MOSS: Thank you. I'll just note for  
24 the record that while Mr. Melnikoff did mention the  
25 interests you indicated, he also mentioned the

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1 interests of whether the disposition is in the public  
2 interest or not, and I think that is a part of the  
3 case. Anybody else want to be heard?

4 MR. MELNIKOFF: I would just like to clarify.  
5 We do not represent the consumer interests in general.  
6 We represent the consumer interests of the federal  
7 government in this case, and not only the rate impact,  
8 which may be down the line, or it could be impacted  
9 directly in this proceeding. We also are interested in  
10 fair compensation on the sale of this.

11 JUDGE MOSS: Anybody else want to be heard on  
12 this matter? Then I am again going to grant the  
13 petition to intervene, Ms. Anderl, over your objection.  
14 We are to Mr. Roseman, I think, for the AARP.

15 MR. ROSEMAN: Thank you, Your Honor. AARP  
16 has 756,369 members in Washington State and offices in  
17 all 50 states. The purposes of AARP are as follows:  
18 AARP is a nonprofit membership organization dedicated  
19 to address the needs and interests of persons 50 and  
20 older. AARP in this state has had an interest in  
21 telecommunications and the access and price of  
22 telecommunications in Washington.

23 AARP has participated in the following cases  
24 dealing with Dex or Yellow Pages: In the 1995 U S West  
25 general rate case No. 9500200 and participated in that

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1 case up through the Supreme Court. In July 1999, I  
2 believe it was, AARP participated in the U S West  
3 petition for accounting order in Docket No. UT-980498.  
4 AARP has had a long history of the concern about the  
5 value of the Yellow Pages and the value to ratepayers  
6 in the sale of this ratepayer asset.

7 AARP is interested in the following issues in  
8 this proceeding: Is the sale a transfer in the public  
9 interest? Is fair value being paid? What effects will  
10 the sale have either in this case or some subsequent  
11 case on revenue? AARP will work closely with Public  
12 Counsel and Staff and does not anticipate expanding the  
13 scope of the issues in this proceeding.

14 We do intend to submit written testimony and  
15 exhibits and to call witnesses and to cross-examine  
16 witnesses called by other parties and to submit written  
17 briefs. Hopefully, during the settlement time that is  
18 allocated for this case, none of that will be  
19 necessary. AARP moves for the Commissioner to grant  
20 the petition to intervene.

21 JUDGE MOSS: Ms. Anderl.

22 MS. ANDERL: Your Honor, we would again  
23 object. In this case, we believe that AARP's  
24 participation would be simply duplicative and  
25 cumulative of the information that Public Counsel could

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1 offer. It does seem as though the interests and  
2 membership of AARP are those that Public Counsel is  
3 charged with and has previously represented and is  
4 interested in representing.

5           As the Commission observed in the cases to  
6 which I previously referred, the Commission does not  
7 allow intervention by every customer who seeks  
8 intervention, and there, the Commission said even in  
9 rate cases, the extent to which the Commission allows  
10 intervention depends on the number, complexity, and  
11 newness of the issues before the Commission and whether  
12 we believe the intervenor will provide relevant facts  
13 and arguments which are not cumulative and which will  
14 contribute positively to the Commission's understanding  
15 and evaluation of the issues.

16           Here, I think, the Commission should consider  
17 that the participation by AARP would be cumulative or  
18 duplicative of the interest that Public Counsel is  
19 representing and ought to deny the petition to  
20 intervene.

21           JUDGE MOSS: We do have, as I have noted  
22 previously, other ways to control a proceeding so we do  
23 not suffer unnecessary duplicative effort, and  
24 certainly, it would be my intention as the presiding  
25 officer to do that as we move forward.



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1           Of course, your reference to the Commission's  
2 ruling in the prior case I think is again to the GTE  
3 matter concerning depreciation, which I'll note that  
4 TRACER and a couple of other intervenors as well have  
5 indicated that they have previously been permitted  
6 intervention in matters concerning the disposition of  
7 the Yellow Pages, and this is, in a sense, the latest  
8 chapter in a long legacy of proceedings that goes back  
9 a number of years. I should make an opportunity for  
10 others to make a statement, but I'm prepared to rule,  
11 and so I would rule that the intervention should be  
12 granted in this instance.

13           I believe that concludes our petitions to  
14 intervene. Someone correct me if I'm mistaken.  
15 Apparently I am not. Our next order of business is the  
16 matter of preliminary motions and requests from the  
17 parties. I will just note for the record that it is my  
18 impression that discovery has commenced. I have been  
19 asked to manage the process of securing the entry of a  
20 protective order, which is normally something that  
21 didn't occur until people are actively in the discovery  
22 process, so I will just say certainly discovery is  
23 proper in this proceeding. We can talk about any  
24 appropriate controls that we might wish to exercise in  
25 connection with discovery, but insofar as it needs to

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1 be done formally, the discovery rule 480-09-480 is  
2 invoked.

3 I mentioned that the Commission entered a  
4 protective order on September the 12th and that  
5 Commission also entered an amendment to the protective  
6 order on October the 4th concerning the treatment of  
7 what is sometimes referred to as highly confidential  
8 material, and I think that is self-explanatory. I do  
9 understand that Public Counsel may wish to have a word  
10 with us today on the subject of the protective order,  
11 and so we will hear that, and I'll ask if there are any  
12 other preliminary matters in this area or these areas  
13 that we need to discuss. Mr. Cromwell, did you have  
14 something that you wished to share with us?

15 MR. CROMWELL: Yes, Your Honor. I did want  
16 to make a record that we received Qwest's motion to  
17 amend the protective order to receive highly  
18 confidential treatment. That motion did not have  
19 appended to it any proposed order or language  
20 suggested.

21 As a consequence at that point in time after  
22 my return last week, I saw that and I called  
23 Ms. Anderl, and Ms. Anderl and Mr. Harlow and I  
24 discussed this matter. We were, in fact, in the  
25 process of discussing it and exchanging potential draft

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1 language that we might be able to reach a common  
2 understanding that that would be acceptable. That  
3 process was ongoing at the time we received the  
4 Commission's order.

5 I do want to state for the record that it is  
6 the Attorney General's position that we do have public  
7 records acts before the State of Washington that favor  
8 open government and general policy matter with limited  
9 exceptions as governed by this Commission's statutory  
10 authority and rules governing treatment of trade  
11 secrets and materials deemed confidential.

12 I would also note that Qwest in its motion to  
13 amend the protective order did not provide any evidence  
14 supporting the need for or the basis for asserting the  
15 need for a highly confidential protective order other  
16 than the allegations contained within the motion. I  
17 also believe from reviewing that motion that Qwest's  
18 request was focused upon the possible intervention and  
19 participation in this docket of competitors. It is our  
20 position that if the Commission determines, as it  
21 apparently has with issuance of the order, that a  
22 highly confidential protective order is necessary in  
23 this docket that any provisions relating thereto should  
24 be limited to competitors only as a matter of policy.

25 I would also note for the record as we've

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1 discussed during the intervention portion of this  
2 prehearing conference that we have worked in the  
3 previous iterations in this case with other parties who  
4 are present and have intervened in this hearing, and as  
5 I mentioned before, we anticipate doing so again, to  
6 the extent that the highly confidential protective  
7 order that this Commission has entered poses an  
8 impediment to that joint participation, and we believe  
9 that impedes our ability to represent our clients and  
10 participate in this docket, and we wish to share our  
11 concern about that potential with the Commission and  
12 yourself.

13 JUDGE MOSS: The entry of protective orders  
14 is a practice that we follow to facilitate the  
15 discovery process when it appears that there is the  
16 potential that that process will call for the  
17 production of information that is considered to be  
18 commercially sensitive both under the normal concepts  
19 or ordinary concepts of those words but also within the  
20 meaning of the Washington Open Public Records Act.  
21 Commission has its own rules about what is and what is  
22 not confidential material. The protective order is in  
23 a sense a refinement of those rules that is applied in  
24 individual cases.

25 I should say that I knew Mr. Cromwell had

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1 some comments because he called me to give me a  
2 heads-up that this issue would be raised during the  
3 course of our conference, and I didn't see anything  
4 improper in him doing that. I have somewhat  
5 spontaneously noted, and I will note for the record  
6 that my spontaneous response was there is nothing in  
7 the amendment to the protective order that affects the  
8 rights of Public Counsel with respect to the handling  
9 of documents. Public Counsel and Staff are afforded  
10 special status in that regard because they are public  
11 entities, government entities, as opposed to potential  
12 competitors.

13 So I think it's clear that you are not  
14 objecting, per se, or at least I heard no objection,  
15 per se. I will say this, as I perhaps out of an  
16 abundance of caution and as a matter of surplusage in  
17 words reminded Ms. Anderl about some of our procedural  
18 rules. You do have the option of making an appropriate  
19 filing if you think there is something that should be  
20 done with respect to the protective order that has been  
21 entered. I think you've got about four days left under  
22 the Commission's rule on interlocutory orders, which is  
23 WAC 480-09-760.

24 MR. CROMWELL: I am aware of that. I think  
25 that it is fair to represent that had we anticipated

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1 that the Commission might be inclined to issue an order  
2 prior to the prehearing conference, and I will confess  
3 that was an assumption on our part, we would have filed  
4 an objection to Qwest's motion under the Commission's  
5 rules regarding responsive or answering pleadings, and  
6 I am aware about the opportunity to seek  
7 reconsideration of an intermediary order during this  
8 administrative proceeding, and we will consider that.

9 I did want to raise the concern, and I  
10 believe it does rise to the level of an objection, to  
11 the extent that the way the highly confidential  
12 amendment to the Commission's protective order is  
13 structured, it creates the potential for impediment in  
14 our ability to effectively present our case in  
15 conjunction with WEBTEC and AARP in the same manner as  
16 which we have done in the previous proceedings  
17 involving the subject matter before the Commission, and  
18 that is the concern that I would articulate.

19 JUDGE MOSS: Of course, even the highly  
20 confidential amendment, which I'm sure you will agree  
21 is an artfully drafted piece of work, Mr. Cromwell,  
22 does make provision for competitors even to designate,  
23 I believe it's up to two individuals, one of whom I  
24 think has to be a lawyer and the other may or may not  
25 be, so it does not foreclose the coordinated

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1 participation to that extent.

2           Yes, it may require some special  
3 accommodations to be made in a particular meeting or  
4 exchange so that only those persons who are privy to  
5 the information that's been designated highly  
6 confidential may participate. I would say that that is  
7 somewhat akin to the special measures we sometimes are  
8 forced to take in the hearing room to accommodate the  
9 receipt for the record of confidential, or as it may  
10 be, highly confidential information, and I will also  
11 agree with you and acknowledge freely that it is  
12 something we would rather not have to deal with, but we  
13 do in this environment, so we do have to make those  
14 accommodations and make that extra effort in order to  
15 promote the fullness of the record and the fullness of  
16 the exchange.

17           Even under the Open Public Records Act, and I  
18 acknowledge your point that the people of Washington  
19 have decided that we should have a policy that favors  
20 openness in government, and the legislature has  
21 memorialized that through the Public Records Act,  
22 nevertheless, the Public Records Act itself recognizes  
23 the exigencies that sometimes accompany matters in  
24 litigation. So I don't think we've done anything  
25 that's inconsistent with that policy or that the

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1 Commission has done anything inconsistent with that  
2 policy by using the protective order mechanism in this  
3 proceeding, but you are free to make an argument  
4 through an appropriate motion, and the Commission will  
5 consider that.

6 I haven't really formally mentioned, and I  
7 think it's probably generally recognized, the  
8 Commissioners will sit in this proceeding, but they  
9 have delegated to me the responsibility to manage the  
10 proceeding in the usual fashion, so in that sense, they  
11 are involved as presiding officers throughout the case,  
12 and that's always a possibility that you could persuade  
13 them.

14 MR. CROMWELL: Thank you, Your Honor. I do  
15 want to pass my hat off to both Ms. Rackner and  
16 Mr. Roseman. I would note just for the record that the  
17 highly confidential amendment to the protective order  
18 provides for an outside counsel being designated and an  
19 outside expert. It would appear, at least on the face,  
20 that WEBTEC would at this point by the terms of the  
21 order now extant in this docket have to choose whether  
22 Ms. Rackner or Mr. Butler would be representing them  
23 and have access to these documents with regard to that  
24 information, and I think that poses a logistical  
25 problem that shouldn't be posed to a party, and again,



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1 I'm cognizant of your advice, and we will consider  
2 that.

3 JUDGE MOSS: We hope Mr. Butler is not gored  
4 by an antelope while he's in Africa, but I understood  
5 he's probably going to be the lead on this.

6 MS. RACKNER: If I may be heard on this  
7 subject, the amendment to the order actually does pose  
8 a problem for WEBTEC. This is probably not the first  
9 time Mr. Butler is going to be on vacation during the  
10 period of this case, and we had planned to coordinate.  
11 He's certainly lead counsel, but I will be available to  
12 step in for him and be available on numerous occasions  
13 during these proceedings.

14 It does burden us quite substantially if only  
15 one of us has the ability to review the evidence in the  
16 case, and second, we have not determined whether we  
17 will only want one witness. At this point, we are only  
18 contemplating one witness, but there may be two, and I  
19 would just point out to take a step back -- I don't  
20 want to repeat Mr. Cromwell's comments, but I think  
21 that the order, while very artfully drawn, conflicts  
22 the situation of competitors and of customer groups,  
23 and from the face of the motion to amend the protective  
24 order, it would appear that Qwest's concern is that  
25 competitors might have access to the highly

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1 confidential information.

2           First, I've also heard today that Qwest has  
3 some concerns that some of TRACER members might be  
4 competitors, and while I can say that's not the case,  
5 WEBTEC has no problem whatsoever only allowing the  
6 information in the hands of qualified experts and  
7 qualified counsel. So I would think that ought to  
8 satisfy Qwest's concerns if only -- and we would  
9 certainly also stipulate that only two counsel for  
10 WEBTEC would have access to the information, but I  
11 can't imagine what competitive considerations would  
12 require Qwest to prohibit one of the counsel records in  
13 this case and to not have access to the information,  
14 and it would also prohibit us from the opportunity to  
15 engage an additional expert if that expert is willing  
16 to sign the same affidavit as all the other experts.

17           So while in principle, it's our view that  
18 there hasn't been an adequate showing for the highly  
19 confidential order as a practical matter, we really  
20 don't mind as long as the restrictions are altered. So  
21 we would at this point ask Your Honor to alter the  
22 restrictions for customer groups and allow customer  
23 groups to have more than one counsel, up to two  
24 perhaps, and more than one expert if they are otherwise  
25 qualified under the terms of the order.

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1           JUDGE MOSS: Mr. Harlow, I will hear from you  
2 briefly, but let me just say I wonder if we are not  
3 crossing the bridge too far at this juncture. At this  
4 point, we don't really have any active dispute. So far  
5 as I know, there hasn't been a designation of anything  
6 as highly confidential.

7           MS. ANDERL: But there will be. In the  
8 ancillary agreements that support the purchase  
9 agreement, and I'll let Mr. Harlow talk, but the ones  
10 that Qwest filed on, I believe it was the 27th of  
11 September, we Bates numbered everything from beginning  
12 to end, and I don't know if it's more than a thousand  
13 pages or not, but if you go through there, you will see  
14 that there are certain schedules and other things  
15 missing, and when you get the hot pink things that are  
16 currently on hot pink paper waiting in my office to be  
17 submitted, you will be able to insert those in the  
18 appropriate place in accordance with the Bates  
19 numbering system.

20           Now, you can tell what those documents are  
21 named by going to the index of the schedules and the  
22 exhibits, but you won't know what they are until you  
23 see them, but there are maybe eight or ten documents or  
24 parts of documents, maybe less than an inch thick all  
25 together, that is something that the buyer has asked be

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1 designated as highly confidential, and with that, I'll  
2 turn it over to Mr. Harlow.

3 JUDGE MOSS: I suppose it will turn out to be  
4 inconceivable that nobody else in the case will care  
5 about these documents, so I don't get to cut us off on  
6 that basis either, do I? Go ahead, Mr. Harlow.

7 MR. HARLOW: Having sat on the other side of  
8 this issue in the past, I understand that it's  
9 difficult for counsel to comment specifically on  
10 documents that they haven't been seen. The documents  
11 are in some cases potentially valuable to competitors,  
12 but there are great and very high concerns that have  
13 nothing to do with competition but simply the  
14 information contained in the documents could be  
15 commercially valuable.

16 This is the kind of information that  
17 potentially can be used in influencing markets.  
18 Certainly it can be used for a profit. I don't mean to  
19 suggest that anyone in this room would do so, but the  
20 more people know, the greater risk of inadvertent  
21 disclosure, and that's really the effect of the highly  
22 confidential designation is that it provides greater  
23 protection by limiting who may access the documents and  
24 by increasing the protection given documents.

25 So it's not just a concern about competitors,

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1 and the fact that the intervenors here are not  
2 competitive directory publishers really has nothing to  
3 do with the reason for the designation. That said, as  
4 you intimated, I believe that when intervenors see the  
5 documents that they won't have a central role in the  
6 case, perhaps not a role in the case at all. So what I  
7 would suggest is a way to get around this is rather  
8 than forcing the parties to deal with this over the  
9 next four days with motions and cross-motions, because  
10 frankly, we have our own issues that the order, even  
11 though very elegantly drafted, was designed for the  
12 competitive situation and doesn't quite fit the other  
13 concern we have here, and so we were trying to suggest  
14 some beefing up the order in some ways.

15 I suggest we put that all aside for right  
16 now. Let the limited group of people who can see it  
17 under the terms of the amendment that's already been  
18 entered look at it and then revisit the issue. In  
19 other words, make the amendment without prejudice to  
20 renewing motions, and let the parties discuss it over  
21 the next few weeks after the intervenors have had an  
22 opportunity to look at what we are talking about.

23 JUDGE MOSS: I think that is a wise  
24 suggestion, and I didn't mean to imply earlier that the  
25 only avenue possible would be to file something at this

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1 juncture. It does sound to me that this may be a  
2 tempest in a teapot. Once the privileged group takes a  
3 look at these documents, it may turn out they are in no  
4 way central to your advocacy, so this may be much ado  
5 about nothing, so let's wait and see.

6           You can always file to further amend a  
7 protective order. The Commission will maintain an open  
8 mind about that. The Commission has consistently  
9 demonstrated its flexibility and nimbleness in dealing  
10 with these types of issues as they actually arise, if  
11 and when they actually arise, so I suggest we -- we are  
12 going to have more comment on this. I'll start with  
13 you, Mr. Cromwell.

14           MR. CROMWELL: I think Mr. Harlow's approach  
15 is a reasonable possibility for resolving the concerns  
16 we've expressed with regards to the documents that have  
17 been retained, and I guess I would emphasize for the  
18 records, no other parties to this proceeding yet have a  
19 complete copy of the transaction because as noted,  
20 portions of it have still been retained by the parties  
21 to the transaction.

22           So with that said, if counsel for Dex  
23 Holdings and Qwest will provide the assurance that  
24 there are no other documents that they will seek during  
25 this proceeding to designate as highly confidential,

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1 then I think Mr. Harlow's approach is a reasonable one.  
2 My concern, Your Honor, and it is based on the previous  
3 rulings of this Commission, including a matter taken to  
4 appeal and wherein the Commission was upheld is that  
5 essentially when a party fails to clearly articulate  
6 its objection and make its record at the time the order  
7 is entered, it is thereafter at risk if it seeks  
8 amendment of being denied, and in that proceeding, we  
9 felt aggrieved by that and we addressed it through  
10 judicial review that I would note was ultimately  
11 unsuccessful, but being mindful of that, although  
12 unpublished opinion, certainly precedential value to  
13 those practicing before this commission, that is in no  
14 small part why I believe it's reasonable to raise the  
15 issue before you now.

16 JUDGE MOSS: I think that's fine. I  
17 certainly haven't cut anybody off here today, and we've  
18 got this on the record, and I think we've had  
19 sufficient discussion, and I will be mindful of it  
20 throughout the proceeding, but if I'm not, I am certain  
21 I will be reminded at an appropriate point in time, so  
22 you've made your record, and again, in terms of a  
23 procedural order, an order intended to promote the  
24 discovery process, I think we will continue to be  
25 flexible and open-minded to meet the needs of the case

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1 as the Commission has been in prior cases.

2 MR. ROSEMAN: I have a question on that  
3 point. We are trying to embrace Mr. Harlow's offer  
4 here, but let's assume that it doesn't go well. The  
5 four days are running. Our opportunity to seek  
6 revision of this order will have passed.

7 JUDGE MOSS: No. I'm suggesting that you  
8 will have a future opportunity to seek further  
9 amendment of the protective order, and at this  
10 juncture, what is ticking is the clock on appeal of  
11 interlocutory orders, and I don't see that this matter  
12 is one that -- failure to file such an appeal would  
13 foreclose a further motion to amend the protective  
14 order to meet the needs of the case, and the Commission  
15 has the power to modify or amend its orders at any  
16 time.

17 MR. ROSEMAN: I guess it seems from AARP's  
18 perspective, and I guess everyone else has said this,  
19 that the whole order is to protect either competitors  
20 or people who might endeavor to move into this area.  
21 Therefore, it seems to me that the order, if one would  
22 read it now, should not cover or does not cover a  
23 consumer group. Or the purpose of the order is quoted  
24 in quotes extremely sensitive and potentially  
25 commercially valuable to competitors is why this order



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1 was granted, and since we are not competitors, is it  
2 your holding that we are bound by this order?

3 JUDGE MOSS: The order does not distinguish  
4 as among parties based on their status with the  
5 exception of Public Counsel and Staff. It becomes  
6 unduly complicated if we have to draft the order for  
7 each individual participant in the proceeding based on  
8 their specific commercial or noncommercial interests.  
9 I did not read the order as exempting a consumer group,  
10 and the real issue is control, tight control of  
11 commercially sensitive information, and that's what the  
12 effort is intended to capture, and again, we will be  
13 flexible within the context of the proceeding to the  
14 extent necessary, and I will say, as I have done in  
15 other proceedings, I would encourage the parties to  
16 work cooperatively among themselves, but the Company  
17 and potential buyer who are concerned about this  
18 information need to be cautious and diligent in  
19 designating the minimum amount of information as  
20 confidential even, much less highly confidential, and  
21 all the parties need to work together to try to work  
22 these things out among themselves without any necessity  
23 for action.

24 It really is a protective order device as  
25 used in the administrative process is different from in

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1 court in that it is a proactive device in  
2 administrative litigation meant to promote the exchange  
3 of information among the parties, not to inhibit it in  
4 the fashion of a traditional protective order in civil  
5 litigation. So the idea is to promote the exchange of  
6 information, and if everybody will say that 10 times,  
7 then you might feel a greater level of comfort.

8 MR. ROSEMAN: I have just a point of  
9 clarification. Under the proposal that Mr. Harlow has  
10 suggested, the people who will review all the  
11 information and make a determination about whether it  
12 is of some value in this proceeding or not will be  
13 limited to the Staff and Public Counsel only; is that  
14 correct?

15 JUDGE MOSS: No. One designated counsel and  
16 one designated expert, as long as you sign the  
17 appropriate affidavit or whatever it is that's  
18 required.

19 MR. ROSEMAN: Thank you.

20 JUDGE MOSS: You will have an opportunity to  
21 speak to that.

22 MS. RACKNER: Your Honor, one more comment.  
23 In theory, I think that Mr. Harlow's suggestion how to  
24 handle this is a very good one. However, WEBTEC  
25 remains with kind of a Hobson's choice right now.

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1 Mr. Butler is out of the country. If I take it upon  
2 myself to begin reviewing information, then it's  
3 possible that I would foreclose him from having the  
4 ability to review, and I think we both need to review  
5 it.

6 I'm wondering in the spirit of flexibility,  
7 Your Honor would be willing, and perhaps counsel would  
8 be willing to stipulate to allow an exception, and  
9 provided that Mr. Butler and I are both willing to sign  
10 the affidavit that's discussed in the protective order  
11 if Your Honor could orally amend the order to allow  
12 WEBTEC under these special circumstances to have two  
13 counsel qualified to review highly confidential  
14 information.

15 JUDGE MOSS: We are going to take a break in  
16 a minute, and I recommend that you discuss that with  
17 counsel for Qwest and Dex Holdings who would be the  
18 ones concerned about this, and you might be able to  
19 work something out with them, and if not, you can  
20 review it and I'll see what we will do with it.

21 MS. RACKNER: Thank you.

22 JUDGE MOSS: Can we move on to something  
23 else? The next order of business is to discuss process  
24 and procedural schedule, and Qwest took the initiative,  
25 which I appreciate, of publishing to the known group a

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1 suggested or proposed schedule for this proceeding.  
2 Anybody who doesn't have that, I know Ms. Anderl  
3 brought some extra copies, and what we are going to do  
4 is go into a brief recess, and I'm going to give you  
5 all the opportunity to discuss among yourselves whether  
6 this is a workable schedule and maybe we can just adopt  
7 it, or perhaps there will need to be some tweaking. I  
8 can tell you there will need to be some tweaking with  
9 respect to hearing dates because I did a little  
10 checking on that, and it turns out the week of April  
11 28th won't work. It's already spoken for. The week of  
12 May 5th is already spoken for. Those were the two  
13 weeks that were suggested for hearing.

14           However, the week of May 12th appears to be a  
15 good week as does May 19th. The week of May 26th,  
16 which is the Memorial Day weekend, has some other  
17 things going on, so that would not be a good week, and  
18 then the first two weeks of June appear to be available  
19 at this time. So that would be more of a time frame,  
20 those four weeks I've indicated, when a hearing in this  
21 general vicinity as suggested by Qwest could be held.

22           So with those notations, none of the rest of  
23 these dates, I think, require the potential  
24 participation by the Commission on the Bench.  
25 Although, there is always the possibility it might be

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1 my participation to resolve a discovery dispute or  
2 something. That's okay because I will make myself  
3 available for that, unless it comes up during the week  
4 of October the 20th, when I will be away.

5 How much time do you think it will take to  
6 discuss procedural process? Let's take a break for 15  
7 minutes. I'm going to put your feet to the fire. I'll  
8 be in the vicinity of my office if you should by some  
9 miracle finish in five minutes.

10 (Recess.)

11 JUDGE MOSS: The parties have had some  
12 opportunity to discuss among themselves a proposed  
13 schedule for the proceeding, and my sense and  
14 off-the-record informal chat with them is that they  
15 have not reached a consensus on that. I suppose we  
16 could hear a report on where we are.

17 MS. ANDERL: Sure, Your Honor, but I think  
18 that probably you will get more information from Staff  
19 and Public Counsel since they are the ones who do not  
20 want to abide by the proposal that I have out there. I  
21 will just tell you that the concerns that we heard  
22 expressed are that the hearings are being asked for too  
23 soon in the process and that all of the time lines are  
24 too tight. Particularly that other parties felt they  
25 didn't have enough time to file responsive testimony

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1 after receiving Qwest's direct. As a compromised  
2 proposal, we would be able to file our testimony  
3 considerably earlier than that, sometime in December,  
4 if need be.

5           Since we built in time for settlement  
6 discussions, I will tell that you we felt it would be  
7 easier to reach a settlement without having staked out  
8 firm positions in testimony, which is when parties take  
9 their litigation positions sometimes appear to be  
10 further apart than they really are, so that's why we  
11 proposed January 24th. However, the first week in  
12 December, the 5th or 6th, would be something that we  
13 could live with. We would then propose that the rest  
14 of the schedule be held roughly with the way it's set  
15 forth here, maybe pulled back a little bit in order to  
16 accommodate hearings in April. We would like to have  
17 an order sometime in July.

18           I don't know if that comports with what the  
19 Commission can do or not. It's certainly not a  
20 deadline that's established in any of the purchase  
21 documents, but it's something internally that we are  
22 requesting, so I'll concede the floor to someone else.

23           JUDGE MOSS: Now we have Ms. Anderl's  
24 proposal and some suggested adjustments that could be  
25 made to it. Where is Staff and Public Counsel on this?

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1           MR. HARLOW: Very briefly, we strongly  
2 support Qwest in this. Although there is an absolute  
3 deadline in the transaction documents, the sooner this  
4 can close, the better for everyone.

5           JUDGE MOSS: Just to satisfy my curiosity,  
6 what is the deadline?

7           MR. HARLOW: December 5th of 2003, and there  
8 are considerations, presumably the Dexter, the other  
9 half of this transaction, will close, so you've got a  
10 situation where the publishing company is kind of  
11 split. The sooner that get resolves, the better.

12           There is also the possibility of post-order  
13 activity, such as reconsiderations and appeals, so you  
14 need to build in time for that, so I think the  
15 accommodation of moving up the direct filing deadline,  
16 which I assume will apply to the buyer as well, is a  
17 reasonable accommodation to make this schedule work.

18           JUDGE MOSS: Now we will hear from others,  
19 and we will start with Staff and Public Counsel since  
20 they have been the chief negotiators here.

21           MR. TRAUTMAN: Thank you, Your Honor. You  
22 are correct. We would like a more extended schedule  
23 than Qwest has proposed. First, we had proposed having  
24 a discovery period that was devoted only to discovery  
25 from the present, from October 8th, through the end of

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1 November and then having settlement December through  
2 February. Even if Qwest were to file testimony in  
3 December, the problem with that is we then have to file  
4 our testimony, work on our testimony at the same time  
5 we are going through settlement process.

6 We would propose, therefore, that the Qwest  
7 testimony be submitted around March 1st or the end of  
8 February, which is about one month later than on the  
9 schedule that Qwest had submitted. We would then  
10 propose instead of six weeks that we get eight weeks to  
11 respond, and that would make the responsive date  
12 approximately April 28th. Rebuttal would be four weeks  
13 later, which would be May 25th, with hearings four  
14 weeks later, approximately June 23rd through the 27th.  
15 Simultaneous briefs approximately five weeks later,  
16 which would be August the 1st, reply briefs either two  
17 or three weeks later, and then an order to follow.

18 JUDGE MOSS: Anybody else want to be heard on  
19 the proposals?

20 MR. CROMWELL: Yes, Your Honor. I would just  
21 note in response to Mr. Harlow's statement, we really  
22 can't control other state proceedings or possible  
23 appellate recourse. Other parties in other proceedings  
24 and other states may choose to avail themselves, so I  
25 don't think that's a reasonable basis for establishing



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1 a procedural schedule in this docket.

2 I also can't emphasize strongly enough to  
3 you, and I think your experience in the energy dockets  
4 would reflect on this, that it's very difficult to  
5 attempt to settle a case as a party and also prepare  
6 testimony at the same time. The truth of the matter  
7 is, there are limited resources that all parties to  
8 these proceedings can devote to them. That limit may  
9 be much different for certain parties than it is for  
10 others, but I'm cognizant of what our limits are, and I  
11 can only do one thing at a time, and if I'm trying to  
12 devote 100 percent of my energy to resolving a case, I  
13 can't be preparing or assisting my witnesses in  
14 preparation of their testimony at the same time. It  
15 simply does not work. It's not effective for me to  
16 represent my clients in that manner.

17 I also want to emphasize to you that I think  
18 it's important for the Commission to establish a  
19 litigation calendar that would initiate after the  
20 settlement window as close. I believe it provides both  
21 certainty to the parties and as well as, if you will, a  
22 feet-to-the-fire effect of sort of keeping everyone  
23 motivated to try and reach a settlement, and if any  
24 party is filing testimony with the Commission during  
25 the pendency of settlement discussions, it is at least

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1 my experience that that tends to harden positions a  
2 little bit and makes it more difficult thereafter to  
3 reach a resolution. So I would very much encourage the  
4 Commission in establishing a procedural schedule to  
5 allow us to do adequate discovery on the Company's  
6 filings.

7 I would again note for the record we do not  
8 have the Company filing as of yet in this proceeding.  
9 We have released some initial data requests to Qwest  
10 based upon what we do have so far that I would note  
11 that we do not have on the record before us. I would  
12 ask that we have, as Mr. Trautman laid out, a discovery  
13 period, a settlement window that's clearly defined, and  
14 then a reasonable administrative litigation schedule  
15 thereafter that will both allow parties to present  
16 their case as well as achieve a reasonable timeliness  
17 and result for the companies.

18 I would distinguish this docket from those  
19 that we have experienced recently in the energy side  
20 wherein there were assertions of the need for emergency  
21 relief under the statutes and rules of this Commission  
22 and the precedence of this commission. There is no  
23 such assertion in this proceeding. There has been no  
24 assertion of any imminent financial harm or danger to  
25 the existence of the companies involved in this

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1 transaction were this Commission not to issue a ruling  
2 within the deadline before the one containing the  
3 transaction of December 15th. Thank you.

4 JUDGE MOSS: Thank you. Anybody else want to  
5 be heard on schedule?

6 MR. ROSELLI: This is Mr. Roselli with Qwest.  
7 I would like the opportunity to be heard on that point.  
8 I believe that the presentation was made to your  
9 Commission yesterday by representatives from Qwest that  
10 there might be indeed financial harm if this  
11 transaction is not completed and completed fairly  
12 quickly. I certainly understand the point the other  
13 parties are making about the needs perceived, the  
14 difficulty to proceed on parallel tracks with regard to  
15 settlement and litigation of the case as well, but this  
16 deal brings with it a certain attendant amount of  
17 uncertainty, as any significant transaction will, and  
18 to the extent that uncertainty looms and continues for  
19 months and months and months, it certainly increases  
20 the possibility that for whatever reason, this  
21 transaction does not close.

22 Mr. Harlow may be able to address from the  
23 buyer's perspective some of the risk and uncertainty  
24 associated with the financial market's change and  
25 events and impact in the financial market and the

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1 buyer's ability to put together the financing necessary  
2 to undertake and consummate the transaction, but I  
3 would suggest this transaction is vitally important to  
4 Qwest. I can't overstate the importance and  
5 significance of this transaction, and we would be  
6 willing to provide for the record any number of press  
7 reports, analyst reports, etcetera, issued coincidentally  
8 with the announcement of the deal suggesting that this  
9 transaction is nothing short of imperative to the  
10 continued financial liability of Qwest.

11           So I would strongly urge you to take that  
12 into consideration. I know the representation has been  
13 made that no one has suggested that this is any kind of  
14 emergency petition similar to what you may have  
15 appealed from the past, but it could turn to that if  
16 for whatever reason this transaction does not close.  
17 It really is integrally tied to the continued financial  
18 liability of Qwest, and I think we've made that  
19 presentation yesterday and also developed the  
20 interrelationship of this transaction with the  
21 refinancing that we've undertaken and some of the  
22 repayment commitments under that refinancing that is  
23 tied directly to the completion of the transaction.  
24 But I would invite Mr. Harlow if he can add anything  
25 from the buyer's perspective about that issue of risk

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1 and uncertainty in the financial market and how that  
2 bears on timely completion of the transaction.

3 MR. CROMWELL: Your Honor, if I may respond?

4 JUDGE MOSS: All right.

5 MR. CROMWELL: I would ask the Commission to  
6 make inquiry of Mr. Roselli of both the timing and the  
7 nature of the ex parte communication regarding this  
8 docket he appears to be referencing. I would also like  
9 the Commission to make inquiry of the exact identity of  
10 the participants to that communication both on the part  
11 of his client as well as any members of this Commission  
12 or other parties to this proceeding or any other  
13 parties who are not parties to this proceeding. I  
14 appreciate that being made a matter of record in this  
15 proceeding.

16 MS. ANDERL: I would like to address that.  
17 Your Honor, the Qwest employees who spoke with and met  
18 with the Commissioners yesterday were Theresa Jensen --  
19 and let me begin by saying there no improper ex parte  
20 contact -- Ms. Jensen; Wendy Moser, who is an attorney  
21 in Denver; Pete Cummings, and Kirk Nelson met with the  
22 Commissioners individually yesterday. They discussed  
23 with, and Ms. Jensen can better represent this and  
24 she's here to talk about it today if necessary, they  
25 did not talk about the Dex transactions, the illusions,

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1 because we are all highly aware that that would not be  
2 a proper contact and are very sensitive to that.

3           They did discuss, however, because the  
4 Commission has expressed interest in it in general, the  
5 Company's current financial state and, I believe, some  
6 of the financing transactions, including the recently  
7 publicized restructuring of the Company's credit  
8 facilities with the Commissioners in order to satisfy  
9 some curiosity they had there.

10           I am very comfortable, even though I was not  
11 there, that there was no improper ex parte contact.

12 Ms. Jensen can speak to this in more detail if  
13 necessary.

14           MR. ROSELLI: If I could have the opportunity  
15 to clarify remarks on that point, as Lisa Anderl  
16 suggests, it was my understanding that this  
17 presentation in no way pertained directly to Dex or the  
18 Dex transaction. What I'm suggesting is that  
19 presentation did convey to the Commission, and it may  
20 have been at the Commission's request, the current  
21 financial condition of Qwest, and what I'm suggesting  
22 today is that this transaction, as we've already  
23 represented in our application, is integrally related  
24 to our financial well-being, and that in and of itself  
25 presents reason to consider this on some kind of

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1 expedited basis, at least considered in due course.

2           It would be our position that a procedural  
3 schedule that's going to require a whole year to  
4 resolution is not necessary or prudent given the  
5 presentation that our representatives made yesterday,  
6 which again did not bear directly on this transaction  
7 or any of the issues presented by this transaction but  
8 was a general presentation about the financial  
9 condition of Qwest.

10           I don't think I'm revealing anything to  
11 anybody in the room or on the phone when I express the  
12 fact that you are all cognizant of the fact that our  
13 financial condition is not ideal right now. The reason  
14 for undertaking the transaction, as expressed in our  
15 application, is directly to address this financial  
16 condition, to attempt to improve our balance sheet and  
17 make progress in that regard, and to the extent that  
18 delay becomes an issue in perhaps introducing risk and  
19 causing this deal not to close, that would be very  
20 detrimental.

21           MR. TRAUTMAN: One quick response, and that  
22 is my understanding is we've been told that the  
23 drop-dead date, so to speak, is December 15th of 2003,  
24 and the schedule we proposed would allow a Commission  
25 order by the end September or middle of October at the

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1 latest, it would appear, and that should be well within  
2 the time line that Qwest has set forth.

3 MR. ROSELLI: If I might respond to that.  
4 Drop-dead dates and transactions of these kinds are  
5 very, very commonplace. They are certainly something  
6 we don't want to bump against for obvious reasons.  
7 That drop-dead date was negotiated to allow sufficient  
8 time between regulatory proceedings and other logistic  
9 or operational or transitional issues to allow the deal  
10 to close.

11 The risk I was alluding to was not necessary  
12 a risk that we somehow miss or compromise that  
13 September 15th date, but the general risk that's  
14 introduced by an uncertainty in the marketplace. One  
15 of the contingencies of the contract addresses a  
16 buyer's ability to raise capital financing necessary to  
17 close this transaction, and I would simply suggest that  
18 this is outstanding for months and months and months.

19 One cannot control the events in the outside  
20 world, and to the extent that a situation would worsen  
21 with regard to Iraq, for instance, if something were to  
22 happen in that regard, it's entirely conceivable that  
23 the financing market becomes extremely unfavorable to a  
24 buyer, and that becomes an issue in terms of a buyer's  
25 inability to close this portion of the Dex transaction.



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1           That was the point I was attempting to make,  
2 not that we were going to necessarily exceed the  
3 December 5th date, but Qwest would have a strong  
4 desire, within the limits of what's reasonable for  
5 parties, to complete this docket and consummate this  
6 transaction as soon as possible well advance of this  
7 December 15th date to eliminate that risk.

8           JUDGE MOSS: Mr. Harlow, a brief comment, but  
9 much of this is fairly marginal to the decisions I have  
10 to make at this juncture.

11           MR. HARLOW: Mr. Roselli invited me to  
12 comment, and he really covered it, but I do want to go  
13 on record from the buyer's perspective to say we agree  
14 with Mr. Roselli's concerns. The delay is potentially  
15 prejudicial because you don't know what's going to  
16 happen. You make your financing commitments based on  
17 what you know today, and the longer it takes before you  
18 are able to close, the less likely that the assumptions  
19 you made when you struck the deal will continue to be  
20 in place, so it puts the buyer at risk. It puts Qwest  
21 at risk. If we were asking for a three-month schedule,  
22 I would understand the concerns, but I think we've  
23 built in almost nine months here, and that's plenty of  
24 time.

25           JUDGE MOSS: I commented before Mr. Harlow

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1 spoke that a lot of this is fairly marginal to the  
2 issues I have to decide. Certainly I and the  
3 Commission as an institution are aware of the general  
4 principles of government transactions in the financial  
5 community with respect to the industries that this  
6 commission regulates. There have been no specific  
7 assertions or showings in this proceeding concerning  
8 financial consequences. Insofar as there may have been  
9 some discussion of that matter in a meeting, I know  
10 nothing about it other than what I've heard here, and  
11 certainly, it's not something that's been brought into  
12 or integral to this proceeding except to the extent it  
13 has been discussed in this prehearing conference.

14           To the extent parties have concerns, I think  
15 the Commissioners themselves are in the best position  
16 to understand whether there may have been some  
17 inappropriate conversation, and they will certainly  
18 bring that to the attention of the docket in the formal  
19 way required under our rules if that is something they  
20 think occurred.

21           Again, all of that is certainly not central  
22 to what we need to decide in the way of a procedural  
23 schedule, but I do have some questions about the  
24 various proposals that are more central to the  
25 schedule, and I will say this. It's pretty clear to me

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1 that sitting here today I'm not going to give you a  
2 procedural schedule. I'm going to have to think about  
3 this and consider the argument points I've heard and  
4 establish a schedule that will work for everyone  
5 because you are all very far apart on this. Let me ask  
6 my questions, and you also may have some points that  
7 are more directly related to what I wish to consider  
8 that you want to make independently of my questions.

9 First of all, I note that under your proposed  
10 schedule, Ms. Anderl, you had set aside four months for  
11 settlement discussions and discovery, and I wanted to  
12 question that period. That seems to me to be a fairly  
13 lengthy period to set aside if settlement discussions  
14 have not been initiated, which I gather they have not.

15 MS. ANDERL: Yes and no. We've had  
16 preliminary discussions about whether people would be  
17 interested in having settlement discussions, but we  
18 haven't talked substantively about it. Realistically,  
19 I think it's more like a two-and-a-half month period,  
20 because I didn't expect we would start settlement  
21 negotiations until mid October, which is maybe a week  
22 away, and we have to pretty much carve out three weeks  
23 from November and December that you lose to the  
24 holidays. You also end up probably stopping your  
25 settlement discussion in mid January if testimony is

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1 being filed on the 24th, so I know it looks like four  
2 months. When I thought about it, I didn't really think  
3 it was effectively four months of work time, so that's  
4 why I wrote it the way I did.

5 JUDGE MOSS: I'll be frank. My inclination  
6 in terms of setting a period exclusively for settlement  
7 discussions early in a proceeding, my inclination would  
8 be to make that fairly brief; that the parties will  
9 learn as they discuss pretty quickly whether there is  
10 any real prospect or not, and if they learn within a  
11 week or two weeks of discussion that there is no real  
12 prospect, and we've set a procedural schedule  
13 predicated on the idea of even two-and-a-half months,  
14 we have essentially wasted two months, and I don't  
15 really want to set a schedule that does that, and  
16 that's why I ask the question of why we would set such  
17 a lengthy period at the outset.

18 On the other hand, I heard from Public  
19 Counsel and/or Staff that they would prefer to have a  
20 period of time early in the case that would be more or  
21 less exclusively devoted to discovery, and settlement  
22 negotiations could take place in that context, so that  
23 militates in favor of establishing a reasonable block  
24 of time in there for those two things to occur.

25 Now having said that, getting back to the

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1 settlement point, if indeed the parties were to  
2 discover after 30 minutes of discussion that they had  
3 arrived at a settlement in principle and merely needed  
4 to work out four or five thousand pages of details,  
5 they might come to the Commission and request a  
6 continuance in the procedural schedule that was more  
7 ambitious than this in allowing for that period, so I  
8 want to take all of those things into account. That's  
9 where my thinking is going, so I want you all to be  
10 aware of that so you can speak to it before we leave  
11 today.

12 As far as another aspect here, let me turn to  
13 Staff and Public Counsel again, it seems to me, and I  
14 have also been on your side of the Bench and  
15 participated in these types of proceedings in some far  
16 more demanding and complex than what this one appears  
17 to me to be, and I want to ask you about some of these  
18 periods of time that you are proposing here.

19 You are allowing for three months, it looks  
20 like, between Qwest's direct case and the response  
21 testimony? Did I get that right? February 1st, I  
22 think you were saying, for Qwest testimony?

23 MR. TRAUTMAN: March 1st, eight weeks.

24 JUDGE MOSS: That doesn't seem excessive to  
25 me; although, it's fairly generous, and then a month

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1 for the rebuttal.

2 MR. TRAUTMAN: Correct.

3 JUDGE MOSS: That's your view of what's  
4 adequate in terms of the stream of testimony. In terms  
5 of those intervals, what does Qwest and/or Dex Holdings  
6 think about those intervals?

7 MS. ANDERL: The intervals we had proposed  
8 was the first chunk was six weeks and the second chunk  
9 was the same, four weeks, six and four, and I think six  
10 is what's typically given in something that's anything  
11 less than a rate case. It's not an abundant amount of  
12 time, but I think it's enough.

13 JUDGE MOSS: I assume it's the intervals you  
14 are primarily interested in Mr. Trautman.

15 MR. TRAUTMAN: Correct.

16 JUDGE MOSS: You are primarily interested in  
17 preserving these intervals so you have adequate time to  
18 do the various steps that are required.

19 MR. CROMWELL: Correct, and what I was  
20 looking at was I was attempting to build an eight-week  
21 interval between direct and response, a four-week  
22 interval between response and rebuttal, a four-week  
23 interval between rebuttal and hearing, a five-week  
24 interval between hearing and simultaneous briefing,  
25 keeping in mind that the time that our court reporter

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1 will need to do her piece of that work, and then three  
2 weeks after briefing for simultaneous replies with an  
3 assumption that the Commission would thereafter take  
4 around six weeks to process and issue an order.

5           And I don't think it's unreasonable for the  
6 schedule that Mr. Trautman earlier articulated that we  
7 had discussed that the Commission issuing an order at  
8 the end of September, early October, I believe that  
9 does meet the Company's needs. It may not be what they  
10 want, but frankly, what we articulated is not what I  
11 would have requested if we had started to discuss this  
12 on the record prior to our break.

13           And maybe just to leave a few seeds with you  
14 while you contemplate this, I would be most concerned  
15 about protecting the time between rebuttal and hearing  
16 and between hearing and briefing. I believe, at least  
17 in my experience, those are the windows of time that  
18 tend to be most precious, and I think that given the  
19 standard discovery period, unless we were going to  
20 tighten those up during this period, and I think the  
21 Commission has a number of tools at its disposal for  
22 tightening of these types of schedules, shortening  
23 discovery periods during the pendency of testimony  
24 before hearings and after hearings and that sort of  
25 thing, but what I was working off of was the baseline

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1 assumption of the Commission's standard discovery  
2 responsive period and taking into account our need to  
3 digest responses. We would get along with pleadings  
4 and then generating more discovery and getting our own  
5 pleadings out of the door while preparing for hearing.

6 JUDGE MOSS: Let me ask you about the period  
7 between rebuttal and hearing, four weeks. What do you  
8 need four weeks for in that period?

9 MR. CROMWELL: The digestion of the Company's  
10 rebuttal case, which in my experience quite often in  
11 very simple terms exceeds the, shall we say, weight of  
12 its direct case.

13 JUDGE MOSS: That is a practice that is  
14 discouraged, and I will say right now that I will  
15 certainly discourage it. I think a company carries its  
16 burden of going forward through its direct case, and  
17 parties that have been before me before have heard me  
18 say that before. The rebuttal case is just what it  
19 says. It's to rebut the response testimony. It's not  
20 to present the party's direct case, so I don't expect  
21 the rebuttal case to greatly exceed the direct case,  
22 and I recognize we have had contrary experiences in the  
23 past, so I'm not refuting what you say. I am just  
24 stating as nicely as I can what my expectations are in  
25 the case. I just wanted to hear your reasons.



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1           MR. CROMWELL: That is it, Your Honor, and to  
2 be equally blunt and polite, I think that I would much  
3 rather spend my time preparing for a hearing than  
4 occupying your time with motions to strike or any other  
5 type of device regarding rebuttal testimony.

6           JUDGE MOSS: I would rather you spend your  
7 time doing that too. That's one thing that we find  
8 unpleasant to deal with is motions to strike in  
9 discovery disputes. Although, we are prepared to deal  
10 with them, it doesn't make for the best day.

11           MR. TRAUTMAN: I have had that experience on  
12 multiple occasions, and so from my perspective, I would  
13 always want to have four weeks, because often the  
14 rebuttal case is much more extensive than one would  
15 expect, and it can be very, very difficult if there is  
16 not enough time. In fact, in one case, the Commission  
17 extended the entire hearing by two months because of  
18 the rebuttal.

19           JUDGE MOSS: Another factor that I'm going to  
20 consider as I ponder this over the next day or two is  
21 the concern we have about the occasional need for  
22 continuances in these types of proceedings, so we want  
23 to be mindful of that and not run ourselves up so late  
24 that that becomes impossible, because you all may find  
25 you need a break in the action at some point when

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1 settlement discussions show some promise of bearing  
2 fruit later in the case.

3 I don't recall which of the cases it was I  
4 sat on recently where I think there were at least three  
5 separate efforts at settlement before there was ever  
6 success, and that's not entirely atypical of the  
7 litigation process, and parties present things, and  
8 they sometimes focus other parties' intentions and  
9 brings that about. Let me see if there is anything  
10 else I need to get from you in my mind so I can work  
11 out a reasonable schedule.

12 How extensive do we expect the discovery  
13 needs to be in the case? Does anybody have a sense of  
14 that at this juncture? The Company has provided the  
15 principle agreement and the ancillary agreements but  
16 for certain pages that are yet to be provided. How  
17 extensive a discovery process do we anticipate? There  
18 was a proceeding on this subject matter about two years  
19 ago or it was concluded about two years ago, so I would  
20 expect the parties would probably know a great deal  
21 about each other at this juncture, and perhaps that  
22 will in some ways limit the discovery or not. Maybe  
23 there is a great deal more. Give me some sense of  
24 that, if you can.

25 MR. CROMWELL: I can let you know that the

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1 expert we retained is the same expert that we used in  
2 previous cases. I think the type of predicate  
3 discovery that might otherwise be seen in this type of  
4 case won't occur because of his familiarity with this  
5 topic and this company in this state, but I think that  
6 the nature of this transaction and the multipart  
7 structure, and particularly if we are unable to reach  
8 an agreed resolution of the party's concerns through  
9 settlement, I think that you look at a number of very  
10 significant issues, such as evaluation, ratepayer  
11 interest, and the gain on sale, the type of things with  
12 which you are familiar, that I think are likely to  
13 generate a fair degree of discovery. I certainly  
14 wouldn't want to leave you or any of the parties under  
15 misapprehension about the DR numbers we might get up to  
16 in this docket.

17 JUDGE MOSS: My notes are unclear as to who  
18 was speaking. Someone was suggesting a two-month  
19 period for discovery?

20 MR. CROMWELL: I think it was about a month  
21 and a half. What I had been looking at was, assuming  
22 we receive the rest of the filing reasonably soon,  
23 having that discovery window going officially through  
24 the end of November, recognizing that we essentially  
25 lose a week there, and then having the settlement talks

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1 go through from December through February with, again,  
2 recognizing that we essentially lose a week and a half,  
3 two weeks there due to various holidays that folks will  
4 need to take.

5 JUDGE MOSS: In terms of Qwest's ability to  
6 file its case, Ms. Anderl, you made some reference to  
7 the possibility of being able to do that as soon as  
8 sometime in December. When specifically in December  
9 did you have in mind?

10 MS. ANDERL: The 5th of 6th, the Thursday or  
11 Friday of that first week.

12 MS. RACKNER: I would like to clarify. To  
13 the extent we are talking about a discovery window of  
14 six weeks, it would be my understanding that discovery  
15 would continue through the settlement and preparation  
16 of the case, that discovery wouldn't formally cut off  
17 at the end. Is that what you are proposing?

18 MR. CROMWELL: That was my thought.

19 JUDGE MOSS: The rules don't specifically  
20 address discovery cutoff, at least by establishing  
21 guidelines, but it is something we can do, and if the  
22 parties want to establish dead windows or some kind of  
23 discovery schedule or what have you, we have the  
24 flexibility to do that. In many cases, discovery just  
25 proceeds through the case, and often in my experience,

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1 parties are able to manage that without undue  
2 difficulty.

3           We can always amend procedural schedules. It  
4 sometimes become appropriate to change discovery  
5 response times, for example, later in a case, and  
6 sometimes a party will come later in a case and say  
7 that the discovery has become sufficiently burdensome,  
8 that we need to cut it off by some reasonable period of  
9 dates in advance of a filing date to give them adequate  
10 time, and you guys that work with each other for a long  
11 time and understand the importance of working  
12 cooperatively together in this way, because what you  
13 ask for today you may be asked to give tomorrow, so I  
14 like to see that kind of cooperative effort, and in my  
15 experience, parties are pretty good at accomplishing  
16 that most of the time.

17           I guess my point is unless and until we need  
18 to establish a more elaborate schedule for those sorts  
19 of things, I would be disinclined to do so, but I will  
20 hear argument if people want to propose something to  
21 the contrary at this juncture.

22           MR. CROMWELL: No, Your Honor. I think we  
23 were operating under the assumption that the schedule  
24 would be ongoing throughout the case.

25           JUDGE MOSS: I think I have in mind a pretty

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1 good sense of what parties are proposing in terms of  
2 intervals, and my focus will be in large part on  
3 intervals, and then the thing will be driven both by  
4 starting date and ending date, considerations which  
5 will take into account the Commissions' calendar as  
6 well as yours, and if there is anything anybody wants  
7 to add that they think I should take into account as I  
8 consider what schedule to impose, then I would be happy  
9 to hear that now and maybe we can wrap up.

10 MR. CROMWELL: Just a couple of notes for  
11 your consideration, Your Honor. There is the AT&T  
12 complaint case against Verizon that Mr. Kopta  
13 represents AT&T in that proceeding. There is also the  
14 proceeding regarding Verizon's request to weigh the  
15 line extension rule, which has a number of the usual  
16 suspects, if you will, involved, and those proceedings  
17 both have calendars extant, and I would ask you to just  
18 take into consideration the hearing and briefing  
19 schedule in those dockets when making the schedule.

20 JUDGE MOSS: Ms. Anderl, I think you had  
21 something else for me, and maybe Ms. Jensen wants to  
22 whisper in your ear first.

23 MS. ANDERL: I think she might.

24 MS. RACKNER: While they are whispering,  
25 would it be possible for the Qwest and Dex lawyers to

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1 inform the parties as to whether they would stipulate  
2 to an additional counsel for the time being ability to  
3 receive the highly confidential information?

4 JUDGE MOSS: We can take that up too, but,  
5 Ms. Anderl, did you have something on scheduling first?

6 MS. ANDERL: The only observation, Your  
7 Honor, was that, and I think you noted this earlier,  
8 you can always extend out a schedule. There is always  
9 room for continuances if you build an appropriately  
10 tight schedule up front, but once you build an extended  
11 schedule, it's hard to pull things back, and so I would  
12 suggest we err on the side of building a reasonably  
13 tight schedule and either hope to complete the docket  
14 within that period of time or know we have some  
15 breathing room in case circumstances that can't be  
16 foreseen at this point arise.

17 JUDGE MOSS: Anything else on scheduling? If  
18 I have any further inquiry I need to make, scheduling  
19 matter is inherently procedural, and I feel comfortable  
20 speaking with counsel off the record on scheduling  
21 issues to the extent they don't promise to create  
22 prejudice for any other party in the proceeding, and so  
23 if I need to do that, I will, and if anybody becomes  
24 uncomfortable with that, they can bring it to my  
25 attention in writing and we will take the appropriate

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1 action. That probably won't be necessary, but I just  
2 want to explain that it may be something I want to  
3 touch base with one or more of you on a particular  
4 point.

5 I will set a schedule in consultation with  
6 the Commission and publish that in a prehearing order,  
7 and parties will have an opportunity to submit  
8 objections to that if they have a problem with the  
9 schedule arrived at, and I will try to strike some  
10 compromised position given all that I've heard and work  
11 something that will work for everyone, and who knows, I  
12 may actually achieve that, but you do have that  
13 opportunity to object.

14 Ms. Rackner raises the question or returns to  
15 the question of the protective order that we raised  
16 earlier. Has there been an agreement among counsel  
17 with respect to that discreet issue?

18 MR. HARLOW: I've been asked by Dex Holdings  
19 to stick with the wait-and-see approach for now, Your  
20 Honor. We don't want to start chipping away at that  
21 protective order this early in the process --

22 JUDGE MOSS: I think Ms. Rackner's proposal  
23 is that there be an exception for this one party at  
24 this time as opposed to chipping away at the protective  
25 order.



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1                   MR. HARLOW: That's difficult to say. We  
2 hope it becomes a moot issue when they see the  
3 documents. I think Mr. Butler is going to be back in a  
4 couple of weeks.

5                   JUDGE MOSS: We will see how things  
6 eventuate. Parties understand their procedural rights.  
7 If they don't agree to it, that is the order that  
8 stands today, and I'm not going to amend it from the  
9 Bench. I'll note it's an order entered over the  
10 Commissioners' signatures, and I'm loath to amend to  
11 their order without consulting them, and so I will not  
12 do that from the Bench, but if you believe the interest  
13 of your client requires it, you may submit an  
14 appropriate filing and we will consider it, but again,  
15 I want to encourage parties to try to work informally  
16 on these things, and perhaps Mr. Butler can be  
17 consulted by long distance or whatever.

18                   I think it's premature to ask about  
19 dispositive motions so we will hold that. There has  
20 been some discussion today concerning the possibility  
21 of settlement or some sort of alternative dispute  
22 resolution process. The parties may ask the Commission  
23 to assist them in that effort if they believe that  
24 would help them in some way. I won't commit sitting  
25 here today that the Commission will be in a position to

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1 provide direct assistance in the form of a mediator,  
2 but that is a possibility, and it's something we have  
3 done in other proceedings where we believe it's  
4 appropriate, and so you can ask for that, and of  
5 course, you may consider using a private third-party  
6 neutral as well. Although frankly, I think you might  
7 want to try the Commission approach first. A  
8 Commission-based mediator has certain insights that can  
9 be helpful to parties who are trying to resolve  
10 proceedings here, having been in that role.

11 As to other business, paper filings, I did  
12 inquire of the records center, and we ask that you file  
13 an original plus 12 copies in this proceeding. Unless  
14 there is further adjustment to that at some later  
15 stage, that will be adequate. You all know the filing  
16 conventions, I believe, that you require you file your  
17 documents addressed through the executive secretary at  
18 the Commission's mailing address, which is P.O. Box  
19 47250, 1300 South Evergreen Park Drive Southwest,  
20 Olympia, Washington, 98504-7250, and for those of you  
21 who have not practiced here before, please use both  
22 addresses, and that will insure the most expedited  
23 treatment of your mail.

24 I want to stress that filings of substance  
25 should include an electronic copy. We like to receive

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1 that either as an attachment to e-mail or on a  
2 three-and-a-half-inch diskette properly formatted for  
3 non McIntosh/Apple, whatever. We prefer to have the  
4 documents in either MS Word 6.0 or later or Word  
5 Perfect 5.0 or later, and ask if you have the  
6 capability that you also furnish it in the dot PDF  
7 format. That facilitates our ability to post documents  
8 to the Internet, and that can help all of you in terms  
9 of having access to things quickly, and that is one of  
10 the reasons that we ask for electronic copies so we can  
11 make them more readily available and use them more  
12 efficiently internally and require fewer copies from  
13 parties.

14 I have a sneaking suspicion we may meet again  
15 before the hearing date, but in any event, we will meet  
16 at least a few days before the hearing date as has  
17 become common practice in these types of proceedings so  
18 that we can mark all of our direct and  
19 cross-examination exhibits and take up other business  
20 to maximize the efficiency of the hearing itself. We  
21 will notice that at the appropriate time.

22 Our rules allow for stipulations both as to  
23 fact and issues that can be resolved via a settlement  
24 process or other means of alternative dispute  
25 resolution. The Commission should be advised of any

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1 progress you make in that way, and you can, of course,  
2 speak informally with respect to scheduling matters  
3 with respect to a settlement just as you can with  
4 respect to scheduling matters in a litigation, so we  
5 encourage you to let us know at an early point if we  
6 are going to need to schedule some special process for  
7 settlement so we can make necessary arrangements. Is  
8 there any other business that the parties wish to bring  
9 to my attention?

10 MS. ANDERL: Your Honor, if you thought it  
11 appropriate, it might be reasonable to, depending on  
12 how tight the Commissioners' schedules are, perhaps  
13 look at and set aside one or two days in February or  
14 March for possible communication on a settlement,  
15 pursuing the most optimistic line of thought here. I  
16 know that last summer, this past summer, the  
17 Commissioners' schedules were unbelievably congested,  
18 and even a day was a precious commodity, so that might  
19 be something to consider.

20 MR. CROMWELL: I think that's a good  
21 suggestion.

22 JUDGE MOSS: I'll see what I can do on  
23 putting a tentative hold on a couple of days in that  
24 time frame in addition to whatever hearing days we  
25 establish for a little bit later in the year, and you

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1 are correct. It can be become problematic. When I  
2 checked today, I found entire weeks that were already  
3 missing from next year.

4 MS. ANDERL: I have one other additional  
5 point of clarification. The Commission's rules state  
6 that the number of copies that need to be provided when  
7 an electronic copy of a pleading is filed is limited to  
8 an original and six. Is it your intent that the  
9 original and 12 today to modify that requirement for  
10 the purposes of this docket?

11 JUDGE MOSS: Where is that?

12 MS. ANDERL: It's actually in 480-09-120, and  
13 it is under 1(e), where it says number of copies, and  
14 it says unless the Commission specifies a different  
15 number, there is an original and 19, but then it goes  
16 on to say parties that file an electronic copy of the  
17 pleading, and I don't know if it extends to other  
18 documents or not, may file an original plus six.

19 JUDGE MOSS: This particular rule, I think,  
20 pertains to filing and service by fax, and I haven't  
21 authorized that in this proceeding.

22 MS. ANDERL: I understood it to apply more  
23 generally to other types of filings as well.

24 MR. HARLOW: So did we, Your Honor. We've  
25 used it in other proceedings.

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1                   JUDGE MOSS: I will state a preference that  
2 we have the 12 copies submitted in writing, and the  
3 reason for that -- let's be off the record

4                   (Discussion off the record.)

5                   MR. CROMWELL: One other idea was we could  
6 take the schedule we proposed and chop a month out of  
7 the settlement window and knock it down from  
8 essentially 60 days to 30. I'm sorry, 90 to 60. That  
9 might meet some of the Company's concerns while still  
10 preserving what we feel is important intervals in the  
11 pleading cycle.

12                   JUDGE MOSS: Thank you. Anything else?  
13 Thank you all for your patience this afternoon as we  
14 work through the schedule, and I will look forward to  
15 working with you in the case. We are off the record.

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17                   (Prehearing concluded at 5:15 p.m.)

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