

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Continued) Docket No. UT-003013
4 Costing and Pricing of Unbundled) Volume No. XXXV
5 Network Elements and Transport) Pages 4048 - 4067
6 and Termination.)
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7 A prehearing conference in the above matter
8 was held on March 28, 2002, at 10:10 a.m. at 1300 South
9 Evergreen Park Drive Southwest, Olympia, Washington,
10 before Administrative Law Judge LARRY BERG.

11

12 The parties were present as follows:

13 THE WASHINGTON UTILITIES AND TRANSPORTATION
14 COMMISSION, by MARY M. TENNYSON, Senior Assistant
15 Attorney General, and GREGORY J. TRAUTMAN, Assistant
16 Attorney General, 1400 South Evergreen Park Drive
17 Southwest, Post Office Box 40128, Olympia, Washington
18 98504; telephone, (360) 664-1220 (Tennyson).

17 QWEST CORPORATION, by LISA A. ANDERL,
18 Attorney at Law, 1600 Seventh Avenue, Room 3206,
Seattle, Washington 98101; telephone, (206) 345-1574.

19 VERIZON NORTHWEST, INC., by JENNIFER L.
20 MCCLELLAN, Attorney at Law, Hunton and Williams, 951
East Byrd Street, Richmond, Virginia, 23219; telephone,
(804) 788-8571.

21 MCI/WORLDCOM, INC., by MICHEL SINGER NELSON,
22 Senior Attorney, 707 17th Street, Suite 4200, Denver,
Colorado, 80202; telephone, (303) 390-6106.

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Kathryn T. Wilson, CCR
25 Court Reporter

1 AT&T OF THE PACIFIC NORTHWEST, INC.; XO
2 WASHINGTON, INC., by GREGORY J. KOPTA, Attorney at Law,
3 Davis Wright Tremaine, 1501 Fourth Avenue, Suite 2600,
 Seattle, Washington 98101; telephone, (206) 628-7692
 (via bridge).

4 COVAD COMMUNICATIONS COMPANY, by DAVID L.
5 RICE, Attorney at Law, Miller Nash, 601 Union Street,
6 Suite 4400, Seattle, Washington 98101; telephone,
 (206) 622-8484.

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

2 JUDGE BERG: Let's go ahead and be on the
3 record. This is a prehearing conference in Docket No.
4 003013 before the Washington Utilities and
5 Transportation Commission in the matter of the
6 continued costing and pricing of unbundled network
7 elements, transport and termination. My name is Larry
8 Berg, I'm the presiding officer. This prehearing
9 conference is being convened pursuant to notice served
10 on parties in the 29th Supplemental Order served on
11 January 22nd, 2002. Today's date is March 28th, 2002.
12 The prehearing conference is being conducted in the
13 main hearing room at the commission's headquarters in
14 Olympia, Washington.

15 At this time, we will proceed to take
16 appearances from parties. To the extent that all
17 counsel have previously entered an appearance, it's
18 only necessary to state your name, your affiliation,
19 and the party you represent, and we'll start with
20 commission staff and work around the room, and then we
21 will take an appearance from AT&T and XO on the
22 teleconference bridge line.

23 MS. TENNYSON: I'm Mary M. Tennyson, senior
24 assistant attorney general, appearing on behalf of
25 commission staff.

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1 MR. TRAUTMAN: Gregory J. Trautman, assistant
2 attorney general for commission staff.

3 MS. SINGER NELSON: Michel Singer Nelson on
4 behalf of MCI/WorldCom.

5 MR. RICE: This is David Rice. I've not
6 appeared yet so I'm going to give you my full
7 information. I'm with Miller Nash, and my address is
8 4400, Two Union Square, Seattle, Washington, 98101. My
9 phone number is (206) 622-8484 or (206) 777-7424. I'm
10 here on behalf of Covad Communications Company.

11 MS. ANDERL: Lisa Anderl appearing on behalf
12 of Qwest.

13 MS. MCCLELLAN: Jennifer McClellan appearing
14 on behalf of Verizon.

15 JUDGE BERG: For AT&T and XO?

16 MR. KOPTA: Gregory J. Kopta of the law firm
17 Davis Wright Tremaine, LLP, on behalf of AT&T and XO.

18 JUDGE BERG: Are there any other persons who
19 wish to enter an appearance at this time? Let the
20 record reflect that there was no response. I'll
21 indicate for the record that Ms. Doberneck, who is
22 Covad's counsel, had previously indicated that she
23 would not be appearing, that Miller Nash would be
24 representing Covad here today. I will also indicate
25 that I spoke with Mr. Arthur Butler, counsel for

1 TRACER. Mr. Butler indicated that TRACER would not be
2 participating in the Part D hearing.

3 The next matter I would like to address at
4 the prehearing conference would be correspondence
5 submitted by counsel for AT&T dated March 22nd, 2002,
6 wherein AT&T indicates that pursuant to a stipulation
7 with Qwest, AT&T proposes to strike a portion of the
8 prefiled response testimony of Ron Stanker dated
9 December 20, 2001, and further, AT&T requests that
10 Mr. Stanker be excused from appearing at the hearing.
11 Is there anything else that you would like to state
12 about that matter, Mr. Kopta?

13 MR. KOPTA: Yes, Your Honor. Thank you. I
14 would like to give a little explanation of what
15 happened. Mr. Stanker's testimony addressed two
16 nonrecurring charges related to multiple tenant
17 environment access, and the basis of his testimony was
18 that these were two charges that the commission in the
19 271 docket, Docket UT-003022 and 3040, had already
20 addressed that issue, and he went on to also explain
21 why from a policy perspective that those charges were
22 inappropriate.

23 In discussing the testimony with Ms. Anderl
24 on behalf of Qwest, Ms. Anderl informed me that Qwest
25 would be withdrawing its proposal to impose those two

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1 charges and would agree that it would not need to
2 question Mr. Stanker if the policy arguments that were
3 included in his testimony were removed. So we agreed
4 that that would be an appropriate resolution, and
5 therefore, we propose to provide revised testimony for
6 Mr. Stanker that essentially deletes the policy
7 argument and simply raises the fact that the commission
8 has already decided this issue and recommend that these
9 charges not be permitted, and we will do that in
10 consultation with Qwest to make sure that we agree on
11 the portions of the testimony to be stricken, and then
12 it was my understanding that since Qwest was the only
13 party that would be impacted that they would not have
14 any questions if no one else would, and Mr. Stanker
15 would be able to simply have his testimony admitted
16 into the record by stipulation without a need for him
17 to actually appear in Washington in these proceedings.

18 JUDGE BERG: When do you propose that revised
19 testimony would be ready for filing?

20 MR. KOPTA: I will circulate a revised draft
21 of the document red lined to show the strikeout to
22 Ms. Anderl, and as soon as she has a chance to look at
23 it, we can talk and file it promptly.

24 JUDGE BERG: Ms. Anderl, anything further you
25 would like to add to Mr. Kopta's comments?

1 MS. ANDERL: No. He's accurately represented
2 our discussions to date, and I think we also have a
3 pretty good idea of what the revised testimony should
4 look like. It's just a matter of getting it done.

5 JUDGE BERG: Just so it's clear, there will
6 be some portion of the testimony that remains filed;
7 that portion of the testimony that contends that these
8 two nonrecurring charges for multitenant environment
9 access haven't been addressed in that other proceeding.
10 Do we actually have those nonrecurring charges filed in
11 this proceeding?

12 MS. ANDERL: Yes, they were filed.

13 JUDGE BERG: Were they filed by Qwest?

14 MS. ANDERL: Yes, and I believe -- Mr. Kopta,
15 you can check me on this, but I believe Mr. Easton's
16 rebuttal testimony in March acknowledges that we would
17 withdraw those elements.

18 MR. KOPTA: That's my understanding is that
19 the responsive testimony that Qwest filed, on the reply
20 testimony that Qwest filed in response to Mr. Stanker's
21 testimony acknowledged the commission's decision in the
22 other docket and said that they would be withdrawing
23 those proposed rates.

24 JUDGE BERG: In this proceeding?

25 MR. KOPTA: Yes. So in this proceeding,

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1 Qwest initially proposed those. It's my understanding
2 that Qwest has withdrawn that proposal, but as a matter
3 of record in the prefile testimony, they are still
4 there, so just for the interest of completeness of not
5 having to revise too much of the record, we just
6 propose to revise some of Mr. Stanker's testimony, and
7 the rest of the testimony will remain as it is.

8 JUDGE BERG: What we will do when it comes
9 time to mark the exhibits for Mr. Stanker, we will mark
10 his December 20th, 2001. We will assign a number to
11 it, but the exhibit list will indicate that the exhibit
12 is withdrawn, and then we will also proceed today to
13 assign a number to the Stanker revised response
14 testimony, which I then understand would be stipulated
15 as an exhibit into the record, and if counsel could
16 work together and make sure that I have the requisite
17 number of copies or the requisite number of copies are
18 filed with the commission before we go on the record
19 the morning of April the 8th, I would appreciate it.

20 MR. KOPTA: Yes, Your Honor. We will file it
21 with the commission, I'm hoping, no later than the
22 first part of next week, so you should have the revised
23 documents in hand prior to the beginning of hearings on
24 April 8th.

25 JUDGE BERG: Anything else on that matter?

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1 MR. KOPTA: No, Your Honor. I believe that
2 takes care of it. I, unfortunately, need to leave,
3 with the Court's indulgence, but I would make one other
4 notation. I know you will be discussing later in the
5 prehearing conference cross-estimates and scheduling of
6 times for witnesses, and I don't have it in front of
7 me, but to the extent that any Qwest witness has only
8 cross-examination estimates from me, then please
9 consider it an opportunity for another witness not to
10 have to appear, then I would ask that that not be the
11 case; that the witness appears to speak as I happen to
12 reserve some cross for that particular witness.

13 JUDGE BERG: I already looked at the matrix,
14 and that's not the case.

15 MR. KOPTA: Thank you. I just wanted to make
16 sure since I wasn't there that I wasn't the cause of
17 having to have someone fly out from Denver or wherever.

18 JUDGE BERG: Let me just say that having to
19 conclude business pertinent to your clients, you will
20 be excused to drop off at any time. If you wish to
21 stay on the bridge longer, there is no need for you to
22 announce when you drop off.

23 MR. KOPTA: Thank you very much, Your Honor.
24 I appreciate your indulgence.

25 JUDGE BERG: You're welcome. The next matter

1 to be addressed are motions that are pending. I've
2 indicated to counsel off the record that I've had an
3 opportunity to review all the written arguments of the
4 parties as well as other related documents. I've
5 worked out my decisions on each of these issues, so
6 there is no need for parties to present arguments here
7 this morning. I do intend to provide the parties with
8 sufficient explanation of my decisions so that if they
9 decide to seek further review that they will have a
10 record to refer to.

11 The first matter is the Covad Communications
12 motion to file second supplementary responsive
13 testimony. The Covad motion is denied. Covad received
14 the subject matter, so-called sample weeks for November
15 and December 2001, on February 25th. The deadline for
16 filing motions was originally March 15th. On March
17 14th, WorldCom recognized that it needed more time to
18 file motions and requested an extension to March 18.
19 WorldCom's request was granted, and the deadline for
20 all parties to file motions was extended to March 18.
21 Covad made no filing whatsoever on or before March 18.
22 Covad's motion was filed on 3/25, one week after the
23 deadline had lapsed. Covad did not request leave to
24 submit a late-filed motion, nor does Covad offer any
25 explanation why it was unable to file its motion on

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1 March 18, three weeks after receiving the subject
2 discovery. The commission may extend a deadline where
3 good cause exists, but it does not ignore deadlines,
4 and neither should the parties.

5 The next motion is WorldCom's motion to
6 compel demonstrations. The WorldCom motion to compel
7 demonstrations is denied for several reasons. WorldCom
8 frames its request as seeking to compel demonstrations,
9 but what it really seeks is an opportunity to perform a
10 field audit related to certain nonrecurring costs, or
11 even, perhaps, to compel Qwest to perform time and
12 motion study.

13 The commission has facilitated field audits
14 on two occasions that I have been able to learn of, and
15 in each instance, it was a cooperative exercise among
16 all parties, a situation which clearly doesn't exist
17 here. 480-09-480 (1) as quoted in WorldCom's motion
18 refers to the commission's ability to audit public
19 service companies, but it does not address the ability
20 of one public service company to conduct an audit of
21 another public service company. 480-09-480 (1) is not
22 controlling over the issue at hand, but also let me
23 make clear that if the commission did choose to conduct
24 such an audit, it would not be conducted under terms
25 that were instituted by that public service company but

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1 rather would be conducted on the commission's own
2 terms, including the place where such audit would be
3 performed.

4 Let me also indicate that the commission is
5 addressing Qwest's reliance on subject matter experts
6 in its Part B order, and Qwest's nonrecurring cost
7 study methodology is also at issue in this proceeding
8 as are the subject matter expert estimates it proposes.
9 In this instance, it's my conclusion that WorldCom is
10 capable of refuting Qwest's proposed costs through
11 information produced in discovery and through expert
12 witnesses of its own. WorldCom fails to establish the
13 necessity to conduct a demonstration or a field audit
14 to accomplish its objectives.

15 I'll note that at a time when unemployment in
16 the telecommunications sector is reported to be
17 soaring, there must be one or two engineers who have
18 the expertise and the motivation to testify in a
19 proceeding such as this. I have little to no
20 confidence in the prospect that a demonstration or a
21 field audit would produce any reliable relevant
22 evidence without extensive controls, numerous
23 observations, and constant oversight, much less a
24 demonstration that is arranged on short notice and
25 proposed just prior to hearing. I agree with Qwest

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1 that the motion is not timely. WorldCom's implication
2 that Qwest has strung it along is unconvincing, and the
3 suggestion that Qwest should welcome the opportunity of
4 a demonstration for a field audit is not serious. Any
5 questions?

6 Next is WorldCom's motion to file surrebuttal
7 testimony. The motion is conditionally granted. I'll
8 discuss the conditions in a moment. Let me just
9 indicate that it is difficult to make decisions on
10 motions like these without great detail in the motion
11 itself, and I understand that it's possible that
12 counsel came prepared to discuss to great detail that
13 would be relevant, but I'm not going to explore that
14 other than to say my preference, certainly my
15 preference is that those kinds of details are included
16 in the written motion, and what I am talking about
17 would be references to the very specific information in
18 the rebuttal testimony that is the subject matter of
19 this motion, which counsel concludes to be new
20 information.

21 I can look at those pages that are cited and
22 turn to the supplemental testimony that was filed by
23 Mr. Lathrop and ascertain that, in fact, WorldCom did
24 propound certain data responses to Qwest, which were
25 responded, that did produce some of the same

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1 information that's contained in the pages that are
2 being cited as providing new information. It's unclear
3 to me the extent to which WorldCom could have conducted
4 additional discovery to elicit the information that it
5 considers to be new in the rebuttal testimony and, in
6 fact, in the future, I can assure you I will be taking
7 a much closer look in my cases, or in cases in which I
8 preside, as at whether or not, in fact, the matter that
9 appears to be new is matter that could have and should
10 have been elicited in the course of discovery.

11 I agree with Qwest that it is always possible
12 to go into more detail on a particular point, which is
13 the purpose of discovery. It would not be reasonable
14 to expect that a party filing direct testimony is going
15 to provide all possible information in its prefiled
16 direct case; particularly in a case such as this where
17 there are numerous rates being placed on the table.
18 It's necessary for other parties to zero in on those
19 particular points that are to be disputed and to
20 further develop the record.

21 It's unclear whether WorldCom did or didn't
22 pose all data requests that could have elicited
23 whatever information is to be considered new in the
24 rebuttal of Mr. Hubbard at pages 5 through 14 and
25 Ms. Million, pages 25 through 33, and I don't think

1 that it would be productive at this point to ferret
2 that out. The parties have been working together in
3 this process now for five years, and they should know
4 the steps, and I expect parties to aggressively use
5 discovery to elicit information about assumptions,
6 processes, and other operational details before filing
7 response testimony rather than waiting until after
8 rebuttal. I also agree that Qwest is the party with
9 the burden, and as such, Qwest deserves the last word.

10 The hard part for the commission when these
11 sorts of issues arise is that very often this kind of
12 additional information leads to a better decision, but
13 it may be that that information is not essential, so
14 here's the conditional part. The schedule that I'm
15 about to provide is driven by the fact that Mr. Lathrop
16 is only available to testify on Tuesday, April 9. If
17 this were not the case, if he were available later in
18 the hearing, there would be a slightly different
19 approach.

20 The Lathrop surrebuttal testimony is due
21 April 1, and it must be limited to Hubbard rebuttal,
22 pages 5 through 14, and Million rebuttal, 25 through
23 33. Qwest must provide data requests to WorldCom
24 regarding the Lathrop surrebuttal on April 3rd. Qwest
25 will be entitled to a minimum of six data requests or a

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1 maximum of one data request per page of surrebuttal
2 testimony. WorldCom's responses are due at nine a.m.
3 on April 8th, and Qwest will be allowed to provide live
4 sur surrebuttal at the hearing; that live sur
5 surrebuttal to be provided on April 9th, 10th, or 11th
6 at Qwest's own choice. In setting up this aggressive
7 schedule, I will indicate to parties I don't think this
8 is complicated subject matter, and that while parties
9 may have other things that may deserve a higher
10 priority during the same time frame, I believe that
11 this is doable.

12 In the future, I'm going to be looking to
13 schedule these prehearing conferences on an
14 increasingly earlier basis. In the past, these
15 prehearing conferences have been scheduled closer to
16 the hearing to enable the parties more time to prepare
17 their cross-examination exhibits for hearing, but
18 whatever the case is, we need to add more time into the
19 process because these problems continue to come up. If
20 it means that there will be additional weeks added to a
21 hearing schedule for parties to prepare, or it may be
22 that we need to set up a prehearing conference to
23 resolve motions and then a latter prehearing conference
24 for the purposes of cross-exam documents, that's what
25 we will do, and the parties, I'm sure, get a sense that

1 I'm working off the top of my head, and as I see your
2 heads bobbing up and down in agreement, I certainly get
3 a sense that that's a better approach, but the
4 commission wants to seriously consider these types of
5 motions, but at the same time, it's not always fair to
6 place a burden on other parties to correct any problem
7 that may exist at the 11th hour. Comments from
8 particularly WorldCom and Qwest regarding the schedule?

9 MS. ANDERL: Your Honor, we understand your
10 ruling, and we will work with WorldCom to make this
11 work. To the extent that Ms. Singer Nelson's motion
12 has been granted, I believe for it to be meaningful,
13 she's entitled to some data request responses from us
14 because Mr. Lathrop's ability to prepare surrebuttal,
15 as I understand it, is somewhat contingent on the
16 getting response from us to questions that they had
17 propounded.

18 I don't think our responses are due until
19 April 1st. If we could take a moment off the record so
20 I could talk with Ms. Singer Nelson about which numbers
21 she needs, I could make some phone calls and try to
22 expedite that so she gets the answers by the close of
23 business today or tomorrow. That means Mr. Lathrop
24 works on the weekend, but it would help effect your
25 ruling.

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1 JUDGE BERG: I understood that responses to
2 DR's were pending. I did not anticipate that they were
3 due on April 1, so let's go ahead -- even though we got
4 a little bit of a late start and there is a lot of work
5 left to be done, let's take approximately a five-minute
6 break here and certainly no more than 10 minutes. I'll
7 be back in the room in about five minutes, and I'll be
8 ready to go when the parties are but no later than five
9 minutes to the hour, and before we go, Ms. Singer
10 Nelson?

11 MS. SINGER NELSON: That's what I was going
12 to raise, the fact that we did have outstanding data
13 requests. I may not be able to prioritize those over
14 this break. I talked to Mr. Lathrop this morning and
15 he was available, but he was going into a meeting, and
16 I don't know how long that meeting has lasted, so in
17 case I can't get ahold of him, it might not be useful
18 to take such a long break at this point to talk about
19 that. I could leave him a voice mail and he could call
20 me back with that priority.

21 JUDGE BERG: I would normally be looking to
22 take a five-minute break anyway, so let's do it, and
23 we'll talk about that when we come back on.

24 (Recess.)

25 JUDGE BERG: Back on the record. There have

1 been some off-record discussions regarding exhibits as
2 well as the possibility of opening statements, brief
3 opening statements by witnesses. Parties are going to
4 continue working with regard to exhibits and the
5 numbering of exhibits off the record.

6 With regards to brief opening statements,
7 parties exchanged their views regarding the merits of
8 having a brief opening statements. All parties agree
9 that in some proceedings, it would probably be very
10 helpful. There is some slight difference of opinion
11 whether it would be helpful in this proceeding. To the
12 extent that this hearing is not being presented before
13 the commissioners but to myself as administrative law
14 judge and Dr. David Gabel as adviser and in light of
15 the overall schedule, I've decided that it would be
16 better to proceed without opening statements in this
17 case. The commission will continue to consider the
18 process for allowing parties to make opening statements
19 in proceedings and continue to work with parties in
20 other parts of this docket as well as the new new
21 generic case to see if that will be of benefit.

22 Are there any other matters that the parties
23 want to raise on the record before the formal
24 proceeding adjourns? Hearing nothing, then we will
25 stand adjourned.

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1 (Prehearing conference adjourned at 11:46 a.m.)

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