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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION

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4 In re Application of US WEST,) Docket No. UT-991358
5 INC., and QWEST COMMUNICATIONS) Volume II
6 INTERNATIONAL, INC. for an) Pages 60-196
7 Order Disclaiming Jurisdiction,)
8 or in the Alternative,)
9 Approving the US WEST, INC. -)
10 QWEST COMMUNICATIONS)
11 INTERNATIONAL, INC. Merger.)
12 _____)

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10 A hearing in the above matter was
11 held on November 23, 1999, at 9:32 a.m., at 1300
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge DENNIS MOSS.

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15 The parties were present as
16 follows:

17 AT&T COMMUNICATIONS OF THE
18 NORTHWEST, INC., NEXTLINK, NORTHPOINT COMMUNICATIONS,
19 ADVANCED TELCOM GROUP, INC., McLEOD USA
20 TELECOMMUNICATIONS, and NEW EDGE NETWORKS, by Gregory
21 J. Kopta, Attorney at Law, Davis, Wright, Tremaine,
22 1501 Fourth Avenue, Suite 2600, Seattle, Washington
23 98101.

21 US WEST COMMUNICATIONS, INC., by
22 Lisa A. Anderl, Attorney at Law, 1600 Seventh Avenue,
23 Room 3206, Seattle, Washington 98191, and James M.
24 Van Nostrand, Attorney at Law, 600 University Street,
25 Suite 3600, Seattle, Washington 98101.

24 THE COMMISSION, by Sally G.
25 Johnston, Assistant Attorney General, 1400 S.
26 Evergreen Park Drive S.W., P.O. Box 40128, Olympia,
27 Washington 98504-0128.

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1 PUBLIC COUNSEL, by Simon ffitch,
Attorney at Law, 900 Fourth Avenue, #2000, Seattle,
2 Washington 98164.

3 RHYTHMS LINKS, INC., by Angela Wu,
Attorney at Law, Ater Wynne, Two Union Square, 601
4 Union Street, Suite 5450, Seattle, Washington 98101.

5 COVAD COMMUNICATIONS COMPANY,
METRONET SERVICES CORPORATION, and NORTHWEST PAY
6 PHONE ASSOCIATION, by Brooks E. Harlow, Attorney at
Law, 4400 Two Union Square, 601 Union Street,
7 Seattle, Washington 98101.

8 SBC INTERNATIONAL, INC., by Arthur
A. Butler, Attorney at Law, Ater Wynne, Two Union
9 Square, Suite 5450, 601 Union Street, Seattle,
Washington 98101.

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11 QWEST, by Gina Spade and Ronald
Wiltsie, Attorneys at Law, Hogan & Hartson, 555 13th
Street N.W., Washington, D.C. 20004.

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13 WASHINGTON INDEPENDENT TELEPHONE
ASSOCIATION, by Richard A. Finnigan, Attorney at Law,
2405 S. Evergreen Park Drive, S.W., Suite B-3,
14 Olympia, Washington 98502.

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24 BARBARA SPURBECK, CSR

25 COURT REPORTER

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1 JUDGE MOSS: Let's go on the record. Good
2 morning, everyone. This is Dennis Moss speaking.
3 I'm the presiding Administrative Law Judge and we are
4 convened here in the matter of -- or the matter
5 styled In Re: Application of US West, Inc. and Qwest
6 Communications International, Inc. for an order
7 disclaiming jurisdiction or, in the alternative,
8 approving the merger. Perhaps that's a short title.
9 That doesn't sound quite right. Docket Number
10 UT-991358.

11 I hear some people coming on to the
12 conference bridge line, and momentarily we will take
13 appearances and we'll find out who that may be. I
14 will remind the parties that the notice of this
15 proceeding indicated that those who wish to
16 participate must appear in person, and I intend to
17 stick to that.

18 Our basic agenda today will be to take
19 appearances. Then we will take up, at last count, 11
20 motions and the answers thereto. I'm sure you all
21 have been collecting the papers I have. We have
22 quite a bit to get through this morning. My latest
23 filing I received -- apparent filing, I should say,
24 latest paper in this about two minutes ago, so
25 hopefully I have everything we need. And to the

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1 extent I don't, I'm sure you all will furnish it to
2 me at the appropriate time.

3 Once we conclude the motions, I'll have a
4 few words about filing requirements that are not
5 being met in some instances, and I'm going to have a
6 few words about ex parte contacts.

7 Before we launch into the -- well, no,
8 let's do launch into the appearances, and then I'll
9 pause between that and the motions to see if anyone
10 wishes to bring anything else to my attention before
11 we start on those motions. So let's do take
12 appearances, and we'll begin with US West.

13 MR. VAN NOSTRAND: Thank you, Your Honor.
14 On behalf of Applicant US West Communications, James
15 M. Van Nostrand, at the Law Firm of Stoel Rives in
16 Seattle.

17 MS. ANDERL: And Lisa Anderl, in-house
18 counsel for US West.

19 JUDGE MOSS: Thank you. Qwest.

20 MR. WILTSIE: Your Honor, for Qwest, Ronald
21 Wiltsie, of the law firm of Hogan and Hartson.

22 MS. SPADE: And Gina Spade, from Hogan and
23 Hartson.

24 JUDGE MOSS: And I didn't catch your name,
25 sir. Ronald --

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1 MR. WILTSIE: Wiltsie, sir.
2 JUDGE MOSS: Wiltsie. Spell that, please.
3 MR. WILTSIE: W-i-l-t-s-i-e.
4 JUDGE MOSS: This is your first appearance?
5 MR. WILTSIE: Yes, sir.
6 JUDGE MOSS: Better give me the address and
7 telephone and all that stuff.
8 MR. WILTSIE: Certainly. It's Hogan and
9 Hartson, 555 13th Street N.W., Washington, D.C.,
10 20004. And the phone number, sir, is 202-637-5629.
11 JUDGE MOSS: Facsimile?
12 MR. WILTSIE: 202-637-5910, sir.
13 JUDGE MOSS: And do you use an e-mail?
14 MR. WILTSIE: Yes, sir. It's
15 rjwiltsie@hhlaw.com.
16 JUDGE MOSS: And Ms. Spade, you have
17 previously entered an appearance?
18 MS. SPADE: That's correct, sir.
19 JUDGE MOSS: All right. I'm just going to
20 go down my list here, and if we miss anybody, we'll
21 come back. The next one I have is -- do we have
22 anyone present for AT&T?
23 MR. KOPTA: Yes, Your Honor. Gregory
24 Kopta, of the law firm Davis Wright Tremaine, on
25 behalf of AT&T Communications of the Pacific

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1 Northwest, Inc., and we might as well list the
2 others. Nextlink Washington, Inc., NorthPoint
3 Communications, Advanced Telcom Group, Inc., McLeod
4 USA Telecommunications, and intervenor -- or
5 petitioner for intervention New Edge Networks, Inc.

6 JUDGE MOSS: And that is one of the motions
7 we'll take up this morning. Now, let's see. I don't
8 associate your name in my list with AT&T prior to
9 today; is that correct?

10 MR. KOPTA: That's correct. Mr. Waggoner
11 is the primary attorney representing AT&T from our
12 firm, but since our firm is representing AT&T, I'm
13 appearing for them. The same thing for McLeod. Mr.
14 Trincherro, out of our Portland office, is the primary
15 lawyer for McLeod, but I'm appearing for them today.

16 JUDGE MOSS: Sure, that's just fine. I
17 just want to be clear. All right. I'll try to skip
18 over those others you mentioned. Telecommunications
19 Resellers Association. Anyone present? Rhythms
20 Links, Inc.

21 MS. WU: Angela Wu, Ater Wynne.

22 JUDGE MOSS: Thank you, Ms. Wu. Let's see,
23 we denied the Pension Equity Council intervention
24 status. Washington Independent Telephone
25 Association.

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1 MR. FINNIGAN: Rick Finnigan.

2 JUDGE MOSS: Thank you, Mr. Finnigan. I'll
3 just note for the record these parties who are
4 stating all your names have previously entered
5 appearances, so we don't need the full information
6 from them. Northwest Pay Phone Association.

7 MR. HARLOW: Good morning, Your Honor.
8 Brooks Harlow, for Northwest Pay Phone Association,
9 and we also represent Covad Communications and
10 MetroNet Services Corporation.

11 JUDGE MOSS: Level Three Communications,
12 Inc. No one present. SBC National, Inc.

13 MR. BUTLER: Arthur A. Butler, Ater Wynne.

14 JUDGE MOSS: And for Staff.

15 MS. JOHNSTON: Sally G. Johnston, Assistant
16 Attorney General.

17 JUDGE MOSS: Went out of order, didn't I,
18 Mr. ffitich? Public Counsel.

19 MR. FFITCH: Surprised me. Simon ffitich,
20 Assistant Attorney General.

21 JUDGE MOSS: Thank you very much. And I
22 will ask, if we have appearances on the bridge line,
23 I will take those appearances now. Do we have anyone
24 present who wishes to enter an appearance on the
25 telephone line? Hearing nothing, I assume we have

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1 some monitors, based on the beeps I've been hearing,
2 but that's just fine.

3 Okay. Does anybody want to bring anything
4 to my attention before we launch into the motions?
5 Any last minute submissions or -- all right, fine.

6 I have established an order for these
7 motions that I think will work best today. There is
8 some interrelationship among them, and I will first
9 take up the joint applicants' objections to or
10 petition for reconsideration of third supplemental
11 order outlining scope of review, and that's dated
12 October 21st, 1999.

13 I have answers by Staff, Public Counsel,
14 AT&T, Washington Independent Telephone Association,
15 Covad, in joint response with the Northwest Pay Phone
16 Association and MetroNet Services, and Nextlink, in
17 joint response with Advanced Telcom Group and McLeod
18 USA. Did I miss anybody? Okay.

19 I have all that paper. I have read and
20 considered the motion, or the objections, petition
21 for reconsideration, I have considered the answers.
22 I have sat with the Commissioners and discussed this
23 matter at considerable length. And while I'm going
24 to entertain argument on other motions this morning,
25 I do not see, nor do the Commissioners see the need

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1 for further discourse on this subject matter.

2 I do want to note first, in terms of the
3 form of the filing, it is not a proper petition for
4 reconsideration under WAC 480-09-810, which by its
5 terms applies only to final orders. This is not a
6 final order. The filing does appear to be a
7 procedurally proper statement of objections to a
8 prehearing conference order under WAC 480-09-460,
9 keeping in mind that one of the purposes stated in
10 the rule for such conferences is to formulate the
11 issues in the case.

12 Taking the filing in that light, the
13 Commission finds the objections are not well-taken
14 and will not modify its third supplemental order
15 outlining scope of review, and I'll have more to say
16 about that in a moment. Although the filing is not
17 so styled, it arguably could be considered a petition
18 for review of an interlocutory order under WAC
19 480-09-760.

20 Taking the filing in that light, the
21 Commission exercises its discretion to decline
22 review. Having discussed this matter with the
23 Commissioners at some length, I have a few words to
24 say about the applicants' objections and the
25 responses to the applicants' filing, and I want to

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1 convey those thoughts to you so that we might proceed
2 more smoothly on a going forward basis in this
3 proceeding.

4 First, as noted uniformly by the responses,
5 the applicants' objections spring from a faulty
6 premise regarding the standard by which we review
7 mergers. The standard is as stated in WAC
8 480-143-170, entitled application in the public
9 interest. That section states, and I'm quoting, If
10 upon the examination of any application and
11 accompanying exhibits or upon hearing concerning the
12 same, the Commission finds the proposed transaction
13 is not consistent with the public interest, it shall
14 deny the application.

15 I'll note for the record that this was
16 formerly section WAC 480-143-150, and that was
17 recently changed.

18 As the Commission stated clearly in its
19 third supplemental order, quote, In order to approve
20 the proposed transaction, the Commission must
21 determine whether it is consistent with the public
22 interest. There is no bright line against which to
23 measure whether a particular transaction meets the
24 public interest standard. As we observed in another
25 recent merger case, quoting from that order in turn,

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1 the approach for determining what is in the public
2 interest varies with the form of the transaction and
3 the attending circumstances.

4 And that last quote was from the order --
5 third supplemental order on prehearing conference In
6 re: PacifiCorp and Scottish Power PLC, Docket Number
7 UE-981627, which was entered April 2nd, 1999. That
8 quote's on the third page.

9 Applicants in this case, however, focus on
10 other language from our scoping order in the
11 PacifiCorp and Scottish Power case, and argue that
12 language establishes some sort of highly restrictive,
13 quote, no harm, unquote, standard for the entire
14 merger review process, a standard they contend --
15 apparently contend extends across industries and
16 under all circumstances.

17 Specifically, applicants quote from the
18 PacifiCorp/Scottish Power order the following: The
19 standard in our rule (WAC 480-143-170) does not
20 require the applicants to show that customers or the
21 public generally will be made better off if the
22 transaction is approved and goes forward. In our
23 view, applicants' initial burden is satisfied if they
24 at least demonstrate no harm to the public interest,
25 end quote.

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1 The reference to no harm is, by its own
2 terms, nothing more than a clear statement by the
3 Commission regarding the initial burden an applicant
4 has in a merger case. Lest there be any doubt about
5 that, the Commission said in its third supplemental
6 order in this case that, quote, Applicants' initial
7 burden requires them to produce sufficient evidence
8 to demonstrate no harm will result as a result of the
9 transaction. That is, the burden of going forward
10 with the prima facie case. Assuming applicants meet
11 their initial burden, other parties who assert the
12 transaction as proposed is inconsistent with the
13 public interest, then must offer evidence to support
14 their assertions. If there is evidence to support
15 allegations that the proposed transaction is not
16 consistent with the public interest, the burden then
17 shifts back to the applicants, who bear the ultimate
18 burden of proof.

19 Finally, on the specific question of what
20 the public interest standard implies in this case, I
21 focus your attention again on what the Commission
22 says in its third supplemental order and has said, in
23 one fashion or another, in several prior cases,
24 quote, There is no bright line against which to
25 measure whether a particular transaction meets the

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1 public interest standard. The approach for
2 determining what is in the public interest varies
3 with the form of the transaction and the attending
4 circumstances.

5 That specific language was used in
6 PacifiCorp/Scottish Power to emphasize that each
7 industry is different and each transaction is
8 different. What any specific proposed transaction
9 may portend relative to the public interest varies.
10 The telecommunications industry is not the electric
11 power industry. Circumstances in these two business
12 sectors are vastly different at this point in
13 history.

14 There is, in the telecommunications sector,
15 the Federal Telecommunications Act of 1996, and all
16 that that requires. There is not yet a comparable
17 law in the electric sector. The natural gas industry
18 is in yet another condition relative to open markets
19 and competitive initiative. Under these
20 circumstances, it is neither possible nor desirable
21 to create a one-size-fits-all model of regulatory
22 review for merger transactions.

23 Having said that, I also wish to emphasize
24 that the Commission does not intend that this
25 proceeding should be, to use applicants' words,

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1 quote, a venting session for disgruntled customers or
2 competitors, close quote. Nor will we allow the
3 discovery process to be abused or used for improper
4 purposes.

5 In connection with these suggestions by
6 applicants and the statement that, quote, the
7 Commission should not permit this proceeding to
8 become a feeding trough in which intervenors, Public
9 Counsel or Staff line up to see what concessions they
10 can demand, close quote.

11 The Commission does not see that these
12 proceedings exhibit such characteristics. We also
13 observe generally that parties' motions are not an
14 appropriate vehicle for venting ire in response to
15 the rigors of administrative litigation and the
16 participation in that process by counsel who
17 zealously advocate their client's interest.

18 There is a difference between zeal and
19 stridence. In the conduct of advocacy before this
20 Commission or any venue, the one is entirely
21 appropriate; the other entirely inappropriate. It
22 does not advance your interest to, as public counsel
23 put it, quote, use intemperate language. It does not
24 advance your interest to abstractly accuse your
25 opponents of improper motives or behaviors that would

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1 violate the Commission's orders or otherwise run
2 afoul of the law.

3 As a final word here, I note that the
4 Washington Independent Telephone Association
5 forwarded for the Commissioners' consideration in
6 connection with the scoping order a similar order
7 from the Colorado Public Utilities Commission
8 concerning the applicants' merger proceedings there.

9 Although there are a number of differences
10 in the law and policy of the two jurisdictions and
11 perhaps some analytical and even legal differences
12 with respect to the public interest standard as
13 applied in Colorado, there is an important parallel
14 between the Colorado PUC and what it is allowing and
15 what we are allowing, what this Commission is
16 allowing in review of this transaction in this state.

17 In relevant part, the Colorado order at
18 page six speaks in terms of a two-step process for
19 issues to, quote, make their way in, close quote.
20 Quoting further, The Issue must have an effect,
21 positive or negative, on consumer and producer
22 welfare. Second, that effect must be potentially
23 caused by the merger. Throughout the Commission's
24 third supplemental order in this case, the Commission
25 is careful to make the point that the focus of its

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1 inquiry here is on effects that are somehow or
2 another tied to the merger transaction.

3 You simply don't have to look very hard to
4 see that theme and understand that point from the
5 Commission's order. This does not mean that the
6 scope of the issues is potentially any less broad
7 than what the parties identified in our prehearing
8 conference and what the Commission acknowledged in
9 its scoping order as, quote, proper subjects for
10 inquiry in this proceeding, close quote.

11 What it does mean is that, following a
12 fairly liberal approach to discovery, consistent with
13 the Commission's obligation to not let things go
14 beyond what is appropriate in that regard, the
15 evidence that ultimately is allowed into the record
16 in this proceeding will be limited to that which
17 demonstrably bears on or is related to the merger
18 transaction itself.

19 With that, we will turn to the motion of
20 joint applicants to amend protective order filed
21 November 5th, 1999, and the various pending motions
22 to compel. I'll note that there are developments in
23 this connection as late as this morning and
24 yesterday, when I found on my desk and reviewed the
25 applicants' general response to discovery issues in

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1 this case that discuss the establishment of a
2 computer Internet website and some other matters that
3 I'm hopeful will perhaps shorten our day, but may
4 not. We shall see.

5 First we'll take up the motion of the joint
6 applicants to amend the protective order, and I did
7 find an answer yesterday, I guess, filed by AT&T,
8 Nextlink, Advanced Telcom Group. I will hear
9 argument on this. Who's going to argue for the joint
10 applicants?

11 MR. VAN NOSTRAND: I will, Your Honor.

12 JUDGE MOSS: Go ahead, sir.

13 MR. VAN NOSTRAND: Thank you, Your Honor.

14 This motion seeks to have the Commission modify
15 slightly a standard form of protective order to
16 recognize another class of confidential information
17 which is highly-sensitive, competitive information.

18 The motion recognizes that in a previous
19 merger proceeding, two or three years back, the
20 Commission created a new category of
21 highly-confidential data and recognized that not all
22 parties to a proceeding would be given access to all
23 data; that, in that case in particular, the documents
24 at issue related to merger synergy savings, earnings
25 forecast, information that was included in financial

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1 agency presentations involving the post-merger
2 company and its strategic plans.

3 In that case, the Commission limited
4 discovery or access to those materials to Staff,
5 Public Counsel, and customers, and excluded those
6 parties that were potential competitors or actual
7 competitors of Puget Sound Energy, the surviving
8 corporation.

9 What joint applicants are seeking in this
10 proceeding is similar protection as to similar type
11 of information. In particular, the data requests
12 which come to mind ask for exactly that type of
13 analysis regarding synergy savings, the post-merger
14 plans of the new combined company, which we feel
15 should not be put in the hands of competitors. And
16 joint applicants have no problem whatsoever with
17 Staff and Public Counsel having access to that
18 information with their unique responsibilities to
19 represent and find the public interest. It's just
20 that access should not go beyond that.

21 And in a decision as recently as within the
22 last 10 days, the Commission also recognized in a
23 complaint proceeding involving AT&T and US West this
24 super-protection category of documents, which
25 requires treatment above and beyond that provided by

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1 the standard form of the Commission's protective
2 order. So our motion is to have those protections
3 extended to similar type of material, Your Honor.

4 JUDGE MOSS: Let me ask you if you have
5 identified at this point in time the specific data
6 request responses to which you believe would fall
7 into this category, and whether those data requests
8 come exclusively from Staff and Public Counsel and
9 would come into the hands of various competitors only
10 by virtue of what I assume is the standard discovery
11 request by all parties, Please provide me your
12 responses to everybody else's data request. That was
13 always my first data request, and I assume it's
14 everybody else's.

15 I need to understand which is the case,
16 whether there are specific data requests from
17 intervenors who are competitors that would elicit
18 this type of response, or whether that all came from
19 Staff and Public Counsel?

20 MR. VAN NOSTRAND: I don't know that we've
21 done that exhaustive search, Your Honor, but we do
22 know AT&T Request Number Four seeks that type of
23 merger synergy savings analysis that was the subject
24 of the super-protective order in the Puget Gas
25 Company merger.

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1 JUDGE MOSS: Okay.

2 MR. VAN NOSTRAND: It was also asked by
3 Staff and Public Counsel, but we don't have any
4 problem, as I indicated, in making that information
5 available to Staff and Public Counsel, but it's also
6 AT&T Number Four.

7 JUDGE MOSS: Okay. Anything else?

8 MR. VAN NOSTRAND: No, Your Honor.

9 JUDGE MOSS: Okay, thank you. I do have an
10 answer, as I mentioned, filed by AT&T, Nextlink and
11 Advanced Telcom Group. Mr. Kopta, will you be making
12 that argument?

13 MR. KOPTA: Yes, Your Honor, thank you. We
14 don't have a problem with designating certain
15 information as highly-confidential. That's something
16 that the Commission has done as a matter of course in
17 many different proceedings. Our objection is to
18 preclude parties from having at least some access to
19 that information.

20 The Commission, in past telecommunications
21 cases, has recognized heightened protection for
22 certain information and has restricted that
23 information to certain designated representatives of
24 parties, for example, attorneys and one expert
25 witness. That sort of protection has been more than

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1 adequate to ensure that the information is not
2 disseminated or otherwise left unprotected, even by
3 the terms and conditions of the standard protective
4 order that's been entered in this docket.

5 We have a very strong objection to only
6 Staff and Public Counsel having access to certain
7 information. Even if they are the only ones that
8 have requested it, and as Mr. Van Nostrand pointed
9 out, AT&T has also requested some information that US
10 West considers to be highly-confidential, Staff and
11 Public Counsel are separate parties and they
12 certainly are not looking out for the interests of
13 others in terms of having any reason to question the
14 designation, as long as they have access to it. They
15 are not looking out to make sure that other parties
16 have access to information that might be relevant to
17 their case or impact their interests in this case.

18 So if we're denied access completely to
19 information, we have no way of knowing whether
20 information that is germane to the issues that are
21 presented in this docket is available and what impact
22 that information would have on the issues that are to
23 be resolved in this case.

24 So at a minimum, we should have the
25 opportunity to review that information, to only have

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1 certain parties or only certain representatives
2 review that information if there is a legitimate
3 reason for it to be treated as highly-confidential.

4 And from our perspective, that would
5 provide ample protection for highly-confidential
6 information. As we did in our response, we would
7 point the Commission to its orders in the generic
8 costing and pricing docket as an example of this sort
9 of heightened protection that the Commission has
10 granted while still allowing parties to have access
11 to highly-confidential information.

12 JUDGE MOSS: Let us suppose that the
13 protective order were modified in a fashion that
14 would permit one representative, one counsel
15 representative, for example, to review material
16 designated as highly-confidential, and in the hands
17 of, say, Public Counsel or Staff, and then work with
18 Public Counsel and Staff if such information was
19 deemed by the intervenor to be of some significance,
20 yet Public Counsel and Staff have no intention of
21 putting that information in the record. Is that a
22 viable alternative?

23 MR. KOPTA: It may be. The concern that I
24 have is, as an attorney looking at numbers, I'm not
25 sure that I would be able to recognize the value of a

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1 particular set of documents, which is why the
2 Commission has, as a matter of course, also included
3 at least one expert witness, someone who knows enough
4 about it to be able to say yes, this is what this
5 particular document means, whereas an attorney may
6 not know that without someone to consult with,
7 someone who's a subject matter expert in that area.

8 JUDGE MOSS: All right. Another option
9 that I have used in cases in the past is to require
10 that the expert be someone other than an employee of
11 the party. In other words, a consultant. And
12 furthermore, place limitations on that consultant in
13 terms of that consultant's future employment and
14 activities.

15 In the one recent case where I did that, I
16 understand, from the trade press, that the party
17 affected had a rather difficult time finding such an
18 expert, so I recognize the potential problems. But
19 is using an outside consultant for that review
20 something that your clients would entertain, as
21 opposed to having in-house people looking at this
22 material?

23 MR. KOPTA: Well, I think that poses some
24 difficulties, not only that you have described, but
25 also whether or not my clients are intending to have

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1 an outside expert involved in this case. I don't
2 think that they want to retain an outside expert
3 purely for the purpose of reviewing data request
4 responses, and it's my understanding, at least at
5 this point, that none of my clients are intending to
6 engage a third party expert in this particular
7 proceeding.

8 So that's what it would, in fact, require
9 to have access to the information by someone who
10 knows something would be to go out and retain someone
11 specially just to review data responses, and that's
12 certainly an economic burden that is unwarranted. As
13 long as there are restrictions even on the in-house
14 person, that they can't be involved in the business
15 side of the house, for example, or are subject to
16 review by the other party to make sure that they
17 don't have concerns that this person would be in a
18 position they could use this information to the
19 competitive detriment of the applicants. That sort
20 of restriction, I think, would be appropriate.

21 JUDGE MOSS: Require that they thereafter
22 office in an isolated corner of El Paso, Texas.

23 MR. KOPTA: Hopefully not to that extent.

24 JUDGE MOSS: Are there any other
25 intervenors who have a direct interest in this, and

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1 by that, I mean have outstanding discovery that might
2 be the subject of this sort of problem? If so, I
3 will hear from them. I don't want to just hear
4 abstract argument, however. Is there anybody else
5 who wishes to speak to this subject, this motion?

6 I would like to hear briefly from Public
7 Counsel and Staff whether they have any position on
8 this matter and whether they might take some
9 exception to the suggestion that they might overlook
10 some significant piece of data that should be brought
11 to the attention of the Commission in the course of
12 this proceeding.

13 Let me -- I said that both to try to inject
14 a small element of humor in here, I'm such a humorous
15 guy, but also to note the point that the Commission's
16 interest in all of this is in having a full and
17 complete record so that it can make an intelligent
18 and informed decision in this matter. And frankly,
19 it does not matter a great deal to the Commission
20 whether the information comes through the voice of
21 Public Counsel's witness, Staff's witness, or some
22 intervenor witness, just so we get the information.

23 Another possibility, and I should have
24 touched on this before, too, and I recall, I believe
25 it was in the -- I don't know, it may have been the

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1 Pacific Power merger, I'm not sure. But in any
2 event, it was a case where the restrictions, such as
3 has been suggested by the applicants in case, was
4 imposed with the twist, if you will, that Public
5 Counsel and/or Staff somehow aggregated the data and
6 made that aggregation available, and that apparently
7 was suitable.

8 I guess this would apply, for example, in
9 the case of talking about merger synergies. While
10 the companies may not wish to give the details of
11 those merger synergies, they might be willing to have
12 that information aggregated in some fashion, working
13 perhaps with the parties who have full access to it.
14 And that's another possibility.

15 And I'm going to make a decision here at
16 some point about how we're going to go on this, so
17 I'm just throwing that out and people may want to
18 comment on it or not. Mr. ffitch, do you have
19 anything to help us here?

20 MR. FFITCH: Thank you, Your Honor. I
21 don't know if it's helpful, but I'll make a couple of
22 comments. First of all, we do not object, as a
23 matter of principle, to the request of the joint
24 applicants. The Commission has issued modified
25 protective orders of this type in the past.

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1 I guess it would be our view, however, that
2 they should be only issued in appropriate
3 circumstances narrowly drawn so as not to inhibit the
4 ability of the intervenors to advocate their
5 interests in the case. And we would support, along
6 those lines, I think, the discussion that's been had
7 so far about trying to find a way to provide the
8 information to them with protections, as opposed to
9 having the information simply not be available to
10 those parties, which leads to my next point, kind of
11 along the lines of whether we would spot the magic
12 information that an intervenor might care about.

13 I think that's actually an important point.
14 While Public Counsel's designated by statute as a
15 representative of the public, we certainly are not in
16 the role of looking out for or advocating for the
17 interests of individual intervenors who are actually
18 parties to the case. They know best what their
19 interests are and what information is important to
20 them. We're simply not in a position to do that, nor
21 should we be, I don't believe. I think that's a very
22 difficult burden to carry, to be not only looking out
23 for the general interests of consumers, but to be
24 sort of trying to imagine what other intervenors
25 might care about in the case. I guess we'd be

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1 reluctant to end up in that position.

2 JUDGE MOSS: You'll bring us the smoking
3 gun, but not necessarily the smokeless gun.

4 MR. FFITCH: I think that perhaps that's
5 right. It is very difficult to put yourself in the
6 shoes of the other parties. And even if that were an
7 appropriate role for our office, I think whether it's
8 possible to perform that well is an entirely
9 different question. It's much better performed by
10 the party themselves with some reasonable access to
11 the information.

12 I think the only other question I have is
13 really -- is with regard to how this type of order
14 would affect us specifically and the relief
15 requested. By the terms of the motion, the language
16 that would be inserted in the order would only
17 require that information be available for inspection
18 and review at a mutually-agreed upon place and time.

19 That's actually something of a burden on
20 us. We have a consultant who is in the Midwest. It
21 is better for us if we can get copies of the
22 information provided to us and to our consultant,
23 rather than to have to go to the location and review
24 the material. It's not even clear from this language
25 whether we would be allowed copies of the

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1 information. So we would like to have it be modified
2 so that we can -- the information that's in this
3 category would actually be made available to us in
4 copy form.

5 I will say, by the way, that some
6 information has been made available to us by the
7 joint applicants through -- as a result of
8 discussions with counsel, so those have been worked
9 out. Those arrangements have been worked out
10 cooperatively, so that hasn't been a problem or isn't
11 a problem right at this point, but this language here
12 might actually end up with us having somewhat less
13 access than we have right now to some of this -- to
14 this type of information. So I think those are all
15 the comments I have on the motion, Your Honor.

16 JUDGE MOSS: Thank you. Ms. Johnston, do
17 you have anything that would help us forward here?

18 MS. JOHNSTON: No, I don't have anything
19 helpful. Commission Staff doesn't oppose some sort
20 of heightened protection. I will agree with Public
21 Counsel that such protection should be narrowly
22 drawn. In these sorts of circumstances, it makes it
23 very difficult for Commission Staff to incorporate
24 confidential information into testimony and exhibits,
25 much less super-protected information, and I think

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1 that makes it just that much more difficult for the
2 Commission in an order to rely on information that
3 has been designated super-confidential.

4 The second point is I would concur with the
5 comments of Public Counsel that it's not Staff's role
6 to, in essence, prepare the cases for intervenors in
7 a given case. Staff analyzes and evaluates the
8 response to data requests in what I suspect may be a
9 different manner than perhaps intervenors.

10 And finally, I would just question why the
11 joint applicants saw fit to move for this sort of
12 amendment to the protective order at this late date.
13 Under the hearing schedule, we were required to
14 pre-file direct testimony and exhibits yesterday, so
15 this seems -- it's a bit late in the game.

16 JUDGE MOSS: Well, we've got the motion
17 before us and the procedural schedule has been
18 suspended and we're going to deal with that today,
19 too, so --

20 MR. HARLOW: Excuse me, Your Honor. While
21 Public Counsel and Staff was addressing the
22 Commission, I double-checked, and Covad
23 Communications has received one objection to one of
24 its own questions based on the highly-proprietary
25 objection, so rather than repeat Mr. Kopta's

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1 arguments, we would basically concur in them. And
2 clearly, we need access to the data we've requested.
3 I can certainly conceive that my other clients might
4 ask questions down the road that would receive a
5 similar objection.

6 JUDGE MOSS: And perhaps I was a little
7 unfair to ask Mr. Van Nostrand the question. And I
8 should ask, instead, what about your clients, Mr.
9 Kopta? How many data requests do you have
10 outstanding as to which this sort of objection has
11 been interposed?

12 MR. KOPTA: That's a good question.
13 Certainly, Number Four, I think we agree, is one that
14 would raise that, but given the generality of the
15 motion, there's really no parameters in which they
16 have suggested that there be some way to designate
17 highly-confidential from just confidential. And
18 that's another one of the concerns we have, is that
19 the applicants asked for basically unilateral
20 authority to decide what's highly-confidential and
21 what's simply confidential.

22 So at this point, I can't tell you.
23 They've objected to virtually all of our data
24 requests and included in virtually all of those
25 objections that there's some confidentiality to the

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1 information. Whether it's run-of-the-mill
2 confidential or whether it's highly-confidential, I
3 don't know.

4 JUDGE MOSS: Any final word?

5 MR. VAN NOSTRAND: If I may have a brief
6 response, Your Honor?

7 JUDGE MOSS: You may.

8 MR. VAN NOSTRAND: I guess, on the issue of
9 narrowly drawn, I think we have been fairly specific
10 in our requests as to types of information that we
11 would consider to be highly-sensitive and
12 competitively-sensitive, and I guess we view the
13 parties as having an ability to challenge that.

14 Certainly Staff and Public Counsel would
15 have access to the information. If anybody believes
16 that information has been incorrectly designated or
17 that that level of protection should not be afforded,
18 I think parties would have the right to challenge
19 that. I think some deference is probably accorded
20 the applicants in making that designation. It has a
21 tremendous chilling effect, I think, on the
22 regulatory environment to know that your most
23 sensitive strategic information is potentially
24 subjected to the eyes of competitors, and I think, in
25 light of that, some deference would be appropriate.

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1 I've had considerable experience in the
2 last year when such a procedure was implemented in
3 virtually all of the states in which the Scottish
4 Power/PacifiCorp merger occurred, and the states
5 routinely put this measure in place. And I
6 understand there was some question as to why certain
7 documents were designated as they were, but it was
8 not seriously challenged by parties, and I think it's
9 because of the chilling effect that you're subjecting
10 very sensitive information to the eyes of your
11 competitors.

12 And that brings me to the last point. And
13 I think Mr. ffitch and Ms. Johnston both emphasized
14 the point that Staff is not really in the shoes of
15 looking out for the interests of every possible party
16 to the case. I think that's precisely the point,
17 that Staff and Public Counsel uniquely have a charge
18 to represent the broad public interest, not
19 necessarily to look out for the special interests of
20 a competitor who may be using this proceeding for
21 purposes other than advancing the broad public
22 interest.

23 I think if I can try to anticipate what --
24 speculate as to what the Commission was thinking, it
25 did recognize statutory parties as being a different

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1 sort of creature when it allowed the super-protection
2 in the Puget case, and I think it's because of that
3 that they have certain unique rights under the law.
4 Staff, in particular, has rights to audit and inspect
5 the company's books and records, so it has
6 investigative rights which are broader than that of
7 competitors. So I think it's because they're
8 charged with looking out for the broader public
9 interest that Staff and Public Counsel uniquely
10 should be given access to these highly-sensitive
11 documents.

12 On the issue that Mr. ffitch raised about
13 copies being made available, I think, in conferring
14 with my client, we won't necessarily need to abide by
15 the strict make available for inspection at a
16 mutually agreeable place. I think my client would be
17 willing to make the actual copies available to Public
18 Counsel's consultant, if that would assist in the
19 process. Thank you, Your Honor.

20 JUDGE MOSS: Thank you. Why don't we take
21 a five-minute recess. We're off the record.

22 (Recess taken.)

23 JUDGE MOSS: Let's go back on the record.
24 During our recess, I've had an opportunity to debrief
25 the excellent arguments that have been presented on

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1 this motion.

2 I am persuaded that the protective order
3 should be amended, and I have not drafted the
4 specific language of that amendment, but the thrust
5 of it will be that intervenors whose discovery would
6 require responses of information that the applicants
7 deem to be highly-confidential will be allowed some
8 limited access to that information, and by that, what
9 I intend is that the protective order will be amended
10 to require that those individuals will have access
11 only through one designated counsel, and that counsel
12 may be assisted by one designated outside expert.
13 Nobody in-house to the intervenor will be allowed
14 access to that information.

15 The reason for that is simply that no
16 matter how well-intended an individual may be, if
17 they are inside of an organization, they are subject
18 to the stresses and pressures of the workplace and
19 can inadvertently allow such information to influence
20 decisions, and that simply is not a good idea. So we
21 will require that sort of special handling and
22 disclosure of this information.

23 To the extent any intervenor anticipates or
24 desires to use any such material, put that material
25 in the record, then we will have an opportunity for a

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1 -- I'll call it an in-chambers review, and that
2 review will take place with counsel, representatives
3 from the applicants present. We will discuss the
4 handling of this material that is appropriate to the
5 needs of the applicants to protect their
6 highly-confidential information.

7 The Commission itself is accustomed to
8 handling the special requirements of confidential and
9 highly-confidential information. I think the parties
10 here have some experience with that in other cases,
11 so I don't anticipate that we will have any problems
12 in this regard. However, the important thing is that
13 everything go through me, so that we don't have any
14 inadvertent disclosure.

15 I want to emphasize that I take this very
16 seriously. I take the matter of confidential
17 information and its protection from disclosure very
18 seriously, and I expect you all to take it with equal
19 seriousness. And you will -- you know, the shoe is
20 on the other foot, as often as it is the way it is
21 now. I've been on both sides of it as an advocate.
22 I've seen both sides argue it 180 degrees differently
23 from one case to the next, depending on which side of
24 the fence they're on, so keep that in mind.

25 MR. VAN NOSTRAND: Your Honor, could I get

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1 one clarification?

2 JUDGE MOSS: I'm not through yet. Why
3 don't you wait until I finish and we'll see -- I
4 probably will leave some things out and there will no
5 doubt be a need for clarification. I'm not as
6 skilled as some of you thinking on my feet, but I
7 try.

8 Any highly-confidential information that
9 would be provided to an intervenor only as a result
10 of that intervenor's blanket request, that is to say,
11 as a result of a request, Provide your responses to
12 everybody else's data request, need not be provided.

13 Highly-confidential information that would
14 be provided in response to a data request filed as of
15 this date by an intervenor must be provided subject
16 to the amended protective order and the
17 highly-confidential protections that I will draft
18 when I have a time to sit down and do that. I
19 wouldn't expect you to see that, by the way, before
20 next week.

21 And I want to emphasize here that I will
22 take a dim view of any data requests that are filed
23 by anyone at this point that seek to wire around what
24 I intend by that last requirement. I think it's
25 pretty clear what I require by it. You ought to know

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1 by now what you need, and in fact, had it not been
2 for the suspension of the procedural schedule, your
3 testimony would have been filed yesterday, so I don't
4 expect to see a rash of follow-up data requests that
5 mimic what Public Counsel has submitted or Staff has
6 submitted in an effort to wire around what I intend
7 here.

8 If a party has sought information to date
9 that would require the applicants to provide
10 highly-confidential information to be fully
11 responsive, fine. I'm going to give you access to
12 that in this fashion. Otherwise, you're going to
13 have to overcome a considerable bias I will have
14 against allowing you to seek that information by way
15 of follow-up discovery.

16 Parties may contest the designation of
17 material as highly-confidential if they don't believe
18 it is, and I will make the observation in this
19 connection, that having spent many hours as a young
20 lawyer in Washington, D.C. and those dim rooms in El
21 Paso and so forth, it's hard sometimes. It's hard to
22 know. So I will handle that and we will discuss that
23 as we need to. I understand it's difficult sometimes
24 for one side to appreciate the highly-confidential
25 nature of something that the other side thinks is of

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1 that nature. At the same time, I expect the
2 applicants to be diligent about not exercising
3 overbreadth in that designation.

4 Parties may contest the designation of
5 individual counsel or experts as potential reviewers
6 of highly-confidential information, but only for good
7 cause shown. We have this one free shot at a judge
8 rule in this state, which I find kind of peculiar,
9 where you can get a judge off the bench without even
10 stating a reason. Well, we're not going to have the
11 one free shot rule in this case for the experts and
12 for the counsel. If you have good reason, then you
13 bring that to my attention and I'll rule on it.

14 And now, Mr. Van Nostrand, what did I
15 overlook?

16 MR. VAN NOSTRAND: Of course, Your Honor,
17 you overlooked nothing. Your further comments --

18 JUDGE MOSS: You can get in trouble with
19 everybody else saying that. Flattery will get you
20 nowhere.

21 MR. VAN NOSTRAND: You covered that one
22 already, Your Honor.

23 JUDGE MOSS: Is there seriously nothing
24 that needs clarification?

25 MR. VAN NOSTRAND: No, you addressed the

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1 point I was seeking clarification on.

2 MR. BUTLER: Excuse me, Your Honor. I have
3 a question about this.

4 JUDGE MOSS: Yes, Mr. Butler.

5 MR. BUTLER: If I understand your ruling,
6 if a party has not made an independent data request
7 that would call out this claimed highly-confidential
8 information, even just that counsel for that party or
9 a designated outside expert would not have access to
10 it, is that the intent of the ruling?

11 JUDGE MOSS: That is correct.

12 MR. BUTLER: It is my understanding, based
13 upon the practice in multiple commission proceedings,
14 that the Commission desires that parties avoid
15 unnecessary duplication, and that is the reason why,
16 in fact, data requests are to be submitted to other
17 parties when they're made so that one need not ask
18 questions that have already been asked by other
19 parties.

20 Am I to understand, then, that it was the
21 intent of Your Honor in this case that if you did not
22 -- if you relied upon that past practice not to
23 duplicate a request from another party, that somehow
24 now you're not entitled access to the information?

25 JUDGE MOSS: Well, you make a good point,

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1 but what I'm concerned about is that parties should
2 have a sense of what it is they wish to advocate in
3 the proceeding. Discovery is not a fishing
4 expedition, and although it's often treated that way,
5 and the purpose of that blanket data request that I
6 have described a couple of times now is often just
7 that. Let's see what's out there. And it does not
8 impose a particular burden on the responding party.

9 My concern is that we not just have a sort
10 of a free look through the material. It ought to be
11 something that's focused, something that is required.
12 I need to be persuaded, and I was persuaded by some
13 of Mr. Kopta's comments that his clients, at least
14 through their Data Request Four, for example, have
15 identified some specific set of data that they
16 believe is required for their advocacy in this case.
17 I certainly cannot have that assurance with respect
18 to a blanket data request.

19 But at the same time, I understand your
20 point, that you may have interposed such a request,
21 in part, at least, in an effort to avoid needless
22 duplication. So in that connection, I think, as a
23 further element of this, I will give you an
24 opportunity to convince me that there is such data
25 out there that you need for your advocacy. I want it

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1 connected to a specific issue and what you intend to
2 show. With that kind of a showing, then I will
3 consider opening that up to you.

4 MR. BUTLER: Is there a date by which you
5 would want that?

6 JUDGE MOSS: Well, we're going to talk
7 about dates here in a little while, so we'll work
8 that out.

9 MR. FFITCH: Your Honor.

10 JUDGE MOSS: Mr. ffitich.

11 MR. FFITCH: One other -- I did have a
12 point of clarification, I'm sorry.

13 JUDGE MOSS: No, that's quite all right.

14 MR. FFITCH: This is with regard to the
15 in-chambers review for the use of confidential
16 information, prior to the use of confidential
17 information in hearing proceedings, for example. And
18 you mentioned that that would be intervenors -- with
19 intervenors who wanted to use the information. I
20 would just ask that that also be made available --
21 I'm assuming that would also be made available to
22 counsel for Public Counsel or all parties who needed
23 to use that kind of information.

24 JUDGE MOSS: I think it's a good idea for
25 us to have established a game plan for the use of

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1 this information before we start, and so yes, it
2 would be available to all counsel. And we might even
3 have some kind of a joint conference and have
4 breakout sessions, whatever we need to do. I'm
5 prepared to devote whatever my resources are required
6 of this case to make it go smoothly and to protect
7 the parties' interests with respect to confidential
8 information. So yes, we'll do that. Of course, we
9 can do that more close in time to the hearing. Yes,
10 Ms. Wu?

11 MS. WU: I just would like to ask for
12 clarification. If the showing of a connection in
13 respect to the confidential nature of some of the
14 responses to data requests is something that applies
15 to anybody who wants to share that connection, or do
16 I need to request that specifically?

17 JUDGE MOSS: You would need to request that
18 specifically with respect to the case that you're
19 going to put on, all right. I don't want you to just
20 sit down and read this stuff because you don't have
21 anything better to do with your time between ten
22 o'clock and midnight.

23 MS. WU: Not a chance. Thank you.

24 JUDGE MOSS: Okay. Are we clear now on
25 this? Anybody else need some clarification? I'm

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1 perfectly prepared to provide it. And hopefully,
2 when I sit down and write all this up, it will be
3 understandable. I'm sure you all will tell me if
4 it's not. It will probably precipitate another round
5 of motions and responses. All right.

6 Seriously, though, if somebody does have a
7 problem, if I draft it in such a way that it does
8 seem to leave a problem for someone, do let me know.
9 I do want to do this consistent with the intent that
10 I'm trying to express here from the bench this
11 morning. Okay, that takes care of item two of 11.

12 The next matter we're going to take up this
13 morning is Staff's motion to compel, filed on
14 November 10th, 1999. We have applicants' initial
15 response, filed November 8th, 1999, and applicants'
16 second response, filed November 19th, 1999, and in
17 addition, applicants' general response to discovery
18 disputes. And finally, I have received a Staff
19 answer, I suppose reply, to the response. So we have
20 a few papers on this one.

21 I have not focused on this to the point of
22 having in mind the specific data requests and their
23 various elements. If we need to, we'll go through
24 them one at a time. We have a good 36 hours between
25 now and Thanksgiving, so we'll take whatever time is

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1 required and get through this today. It's my
2 intention to rule on the discovery request from the
3 bench and get this process moving, which may give you
4 some insight as to what we're going to do in terms of
5 the schedule, but I haven't made any decisions on
6 that yet, so I may be persuaded to expand that a
7 little bit.

8 All right. Ms. Johnston, I guess we'll
9 turn to you and say where do things stand? It's
10 clear that you have been working with the applicants,
11 and so I have indicated in the notice that you will
12 be required to report. But in that sense, I only
13 wish to hear where we stand today.

14 MS. JOHNSTON: Well, as of today, Your
15 Honor, we need additional time to meet and confer
16 regarding certain data request responses that Staff
17 believes are inadequate, and I have communicated this
18 to both Ms. Spade and Ms. Anderl, and they are
19 amenable to meeting with Staff to work through these
20 issues.

21 I did not want to leave the Commission with
22 the impression that all matters concerning discovery
23 have been resolved as among companies and Staff.
24 That is why I filed with you this morning this letter
25 concerning the incomplete responses, to the extent

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1 that they bear on whatever hearing schedule is
2 ultimately set in this matter.

3 JUDGE MOSS: Looks like a pretty long list
4 to me.

5 MS. JOHNSTON: It does to us, as well.

6 JUDGE MOSS: Are you going to want me to
7 issue orders with respect to these?

8 MS. JOHNSTON: No.

9 JUDGE MOSS: You just want additional time
10 to work with them?

11 MS. JOHNSTON: Yes.

12 JUDGE MOSS: And you're taking it on faith
13 that you're going to get what you need.

14 MS. JOHNSTON: If not, I will file a motion
15 to compel and march through them one-by-one.

16 JUDGE MOSS: All right. Let's hear from
17 the applicants. What are the applicants going to do?

18 MS. SPADE: We look forward to meeting with
19 Staff to try to resolve these and we are eager to
20 hear what the Staff's problems are with each of the
21 requests, and I feel that we can at least resolve
22 some of them by meeting and conferring.

23 JUDGE MOSS: How long is this going to
24 take?

25 MS. ANDERL: Your Honor, Lisa Anderl. It

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1 might take longer to just get all the right people in
2 one room than it does to actually walk through each
3 of these. Bear in mind that we have provided
4 responses to each of these questions, but they are
5 simply questions which Staff believes the responses
6 are inadequate. We have had an opportunity, because
7 we have been talking to Ms. Johnston for a while
8 about this, to review a number of the data requests.
9 And as to many of those, we believe we just need to
10 sit down with Staff and explain that that is a full
11 and truthful answer.

12 And while we understand Staff would
13 perhaps, in certain instances, like to see more,
14 there is not more. And whether Staff is satisfied
15 with that or not, I don't know.

16 On others, there may be, after discussion,
17 an opportunity to more fully understand what Staff is
18 seeking and provide some additional information.
19 We're available to meet, in fact, even today, if need
20 be, certainly next week. Four of the -- or five of
21 the data requests do require one of our witnesses to
22 be present, and he's not here today, but I don't
23 think it would take more than a couple of hours, at
24 the most, in a room together to either reach
25 agreement or agree to disagree.

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1 JUDGE MOSS: I wonder why those two hours
2 have not been expended as of this late date?

3 MS. ANDERL: Well, I think that some of the
4 responses were only identified to us very recently,
5 today, as being inadequate. And others, we've been,
6 I think, on all busy schedules, exchanging e-mails
7 and voice mails between myself and Ms. Spade and Ms.
8 Johnston seeking some greater definition from Staff,
9 in terms of what they were looking for in a
10 supplemental response or additional information, and
11 it just simply hasn't happened.

12 JUDGE MOSS: My concern, and this bears on
13 what happens to our schedule when we get to motions
14 for continuance -- and by the way, to the extent you
15 all filed joint motions to compel and for
16 continuance, I'm treating the two matters separately,
17 so we'll get to the continuance as a separate item.

18 But my concern is simply that things are
19 dragging on here. You did mention the difficulty --
20 and what, are you proceeding in six jurisdictions on
21 this matter, something like that, not to mention the
22 federal jurisdiction?

23 MS. ANDERL: Nine.

24 JUDGE MOSS: Nine jurisdictions, plus the
25 federal. I understand the difficulties. I

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1 understand you now have received something like 2,400
2 data requests, and you have established a website and
3 this sort of thing. I think those are appropriate
4 and good steps to take. I gather from your filing
5 that that was a development of such recency that the
6 parties have probably not had an opportunity yet to
7 spend their evening hours perusing your website for
8 valuable information in support of their cases, so we
9 don't really know at this point in time whether
10 that's going to satisfy a lot of need or whether it's
11 going to be, you know, just more fun than playing
12 Pokemon or something.

13 All right. Well, we'll return to this
14 point, then, at the time we take up the continuances,
15 but be thinking about this and be realistic. Let's
16 don't say, Okay, we can take care of this in a couple
17 hours. If those couple hours aren't going to be
18 available and the people necessary to be at that
19 meeting aren't going to be available for a week or 10
20 days, then, you know, let's be realistic and deal
21 with this appropriately, because, frankly, while I
22 love sitting up here on the bench and doing my job, I
23 want to get through this and get this proceeding
24 moving, so I think we need to be realistic about
25 that.

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1 As I understand, Ms. Johnston, what you're
2 asking for today is that I defer a ruling on the
3 motion to compel until such time as you deem it is
4 again necessary to go forward in that fashion,
5 perhaps with respect to a narrower set of problems.

6 MS. JOHNSTON: Yes.

7 MS. ANDERL: Well, Your Honor, may I just
8 interpose a point of clarification? As to Staff's
9 formal motion to compel, US West has provided
10 responses. US West and Qwest have provided responses
11 to all of those. That motion to compel was as to
12 data requests which had not been answered at all.
13 And we believe, because we have answered all of them
14 now, that formal motion is moot. This letter is an
15 informal kind of development out of that motion and
16 other data request responses that have been provided,
17 so --

18 JUDGE MOSS: This is the son of motion to
19 compel. All right. Do you agree the original
20 motion's moot?

21 MS. JOHNSTON: That's correct.

22 JUDGE MOSS: All right. The original
23 motion, then, is denied as moot. I guess that's the
24 appropriate step to take. And we will expect
25 follow-up along the lines we have discussed this

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1 morning and we will get back to the question of
2 scheduling when we talk about continuance and what
3 have you. So that takes care of Staff, I guess, for
4 now.

5 MS. JOHNSTON: Thank you.

6 JUDGE MOSS: You're welcome. Operating in
7 reverse order, we turn next to Public Counsel. And I
8 did have a paper that suggested to me there was a
9 settlement in principle or understanding in principle
10 or something to that effect. How do we stand, Mr.
11 Ffitch?

12 MR. FFITCH: That's correct, Your Honor.
13 We're actually in, I think, a fairly similar posture
14 as Staff. Maybe this is spawn of motion to compel.
15 We had three areas. We had unanswered requests, we
16 had a group that involved five years of data, and
17 some synergies documents. Synergies documents have
18 been provided, the five-year data, it appears, has
19 been provided, and the late materials have been
20 provided.

21 With regard to the late materials, we have
22 now gone through those and found some additional
23 questions about those responses. And I just spoke
24 very briefly with Ms. Anderl before the hearing today
25 to let her know that we did have some follow-ups on

00111

1 those, and I can give her the numbers of those today.
2 I don't know that we need to put those on the record
3 at this point.

4 JUDGE MOSS: No, we do not.

5 MR. FFITCH: And I will try to confer with
6 Ms. Anderl or other counsel, Ms. Spade, for Qwest,
7 about those at this point. I think it will have to
8 be probably next week, but I will give you those
9 numbers, or give counsel those numbers today, so they
10 know which ones we're talking about.

11 JUDGE MOSS: Okay. So again, we need to
12 get back to the subject in terms of timing, but,
13 otherwise, what would be the appropriate action here?
14 Do you want to withdraw your motion to compel at this
15 time or shall I declare it moot?

16 MR. FFITCH: I think the same ruling you
17 gave on Staff is probably appropriate.

18 JUDGE MOSS: I'll declare the motion moot.

19 MR. FFITCH: I guess the only other thing I
20 would say is that, due to the timing of the
21 responses, we think that still factors into the
22 continuance issue, and we would address that at that
23 time.

24 JUDGE MOSS: Absolutely. I meant to
25 indicate that to be the case. Northwest Pay Phone

00112

1 Association, motion to compel.

2 MR. HARLOW: Thank you, Your Honor. We
3 spoke with the -- at least with US West's attorney a
4 couple of times. In fact, we even scheduled a
5 meeting, which was then cancelled. I assume you
6 don't want the details of our efforts, but I think
7 basically our inability to reach any agreement or get
8 any more responses stems from our philosophical
9 difference about whether the issues raised by the
10 Northwest Pay Phone in its discovery are
11 appropriately within the scope of this proceeding,
12 and so unless counsel for US West has anything to add
13 on our status, I think it's appropriate for us to
14 argue that motion.

15 MS. ANDERL: I agree.

16 MR. HARLOW: Thank you, Your Honor. The
17 applicants in this docket keep saying this is just a
18 merger of parents, trust us, we'll obey the law,
19 repeating the mantra, if you will, that nothing will
20 change, as if that would make it so. But this is a
21 \$65 billion merger. There are big risks for the
22 companies, and big risks are undertaken only for big
23 rewards.

24 Mergers are all about change. Something
25 will change. It's the Commission's job to find out

00113

1 what that is and whether those changes are indeed in
2 the public interest. No question about it, Northwest
3 Pay Phone Association has its own interests at heart,
4 interests of its members. Equally, however, the
5 applicants have their own interests at heart.
6 Somewhere in the middle, hopefully, the Commission
7 can decide whether those competing interests and the
8 outcome of the merger will result in something that's
9 in the public's broader interest.

10 And allowing full discovery is the best way
11 that we can think of to force the applicants to put
12 on a real case here, rather than a piece of trust-me
13 type fluffs were the case.

14 Now, the Northwest Pay Phone Association is
15 not in this docket simply because it likes to take
16 potshots at US West. This is a call for help by the
17 Pay Phone Association and its members. The pay phone
18 industry is suffering today. Not all of its problems
19 are caused by US West. Clearly, there are a lot of
20 industry influences that are beyond US West's
21 control.

22 JUDGE MOSS: Hello, on the conference
23 bridge line? Do we have persons listening in on the
24 conference bridge line? Would you please respond?
25 This is Judge Moss.

00114

1 MR. HARLOW: I guess we'll just have to
2 talk over them, Your Honor.

3 JUDGE MOSS: We have no appearances from
4 this. We're going to take a five-minute recess. I'm
5 going to have this thing turned off. Sorry to
6 interrupt your flow, Mr. Harlow.

7 MR. HARLOW: That's all right.

8 (Recess taken.)

9 JUDGE MOSS: Let's come back to order,
10 please.

11 MR. HARLOW: I'll back up a little bit.
12 The independent pay phone industry is here because it
13 needs help, and some of the problems the industry is
14 facing are perennial problems caused by US West that
15 we think are going to get worse because of the
16 merger, or potentially could be made better, again,
17 because of the merger. At the end, I'll try to tie
18 this back in to the Colorado two-part test that you
19 mentioned earlier this morning.

20 Two issues, essentially, that we've raised
21 in a number of data requests. Number one, our
22 services are priced at unlawfully high price by US
23 West. And secondly, US West, with over 70 percent of
24 the pay phone market, continues to cross-subsidize
25 its pay phones. Although its costs are up and its

00115

1 revenues are down, like the rest of the industry, US
2 West continues to bid more and more for pay phone
3 sites.

4 US West says this is not the time or place
5 to raise these issues, but we've had three cases
6 regarding pay phones covering almost an eight-year
7 time span, starting with UT-920174, following through
8 in UT-950200, and then most recently UT-970658. All
9 of those dockets are addressed in the parties'
10 briefs.

11 In both '92 and the 1997 cases, US West was
12 found to be unlawfully subsidizing its pay phone
13 division. In 1995, there was no specific finding,
14 although the Commission did find that the subsidy was
15 eliminated, at least temporarily, by a power rate
16 reduction flowing out of that docket.

17 Clearly, complaint cases are not working
18 here, Your Honor. We've had three traditional cases,
19 and we think the subsidy continues. That's what our
20 discovery goes to. If indeed the discovery proves
21 that to be the case, then it's time for more serious
22 action again, in the pay phone industry's view.

23 US West's mantra that it would continue to
24 apply the law when the merger approves rings hollow
25 to the Northwest Pay Phone Association. US West

00116

1 hasn't complied for eight years and they're not
2 complying now, in our belief.

3 Now, US West tries to define the scope of
4 discovery based on its theory of this case, its
5 theory being that nothing will change after the
6 merger, its theory being that they should be trusted.
7 Therefore, under that theory of the case, obviously
8 you don't need discovery. But the theory of one
9 party of a case is not what determines the scope of
10 discovery.

11 The purpose of discovery is to allow full,
12 factual development to support or rebut the theories
13 of both parties. That the Commission may reject our
14 theory is irrelevant to the issue of whether we are
15 entitled to present that theory bolstered by relevant
16 facts obtained through discovery. We're entitled to
17 discover whether the rates are lawful, we're entitled
18 to discover whether US West is continuing to
19 subsidize its pay phones after three cases that tried
20 to wring out those subsidies from that pay phone
21 division.

22 US West cites the pay phone order in FCC
23 Docket Number 96128 in its response, and it's quite
24 correct. The Commission cannot impose a separate
25 subsidiary requirement on US West, and that is

00117

1 precisely why these issues must be taken up in the
2 context of a merger docket. This kind of remedy is
3 not available under federal preemption in a
4 traditional complaint case.

5 Were the Commission to condition merger on
6 a separate subsidiary, however, that would not be
7 imposing a separate subsidiary. That would simply be
8 incenting the parties to adopt a separate subsidiary
9 as a condition of the merger. Only in the
10 self-centered world of US West is this merger
11 required or is it an absolute right.

12 If you assume, as we do, that the
13 Commission can deny the merger, if it is not in the
14 public interest, then clearly the Commission could
15 instead condition the merger on actions that it
16 cannot directly order in order to protect the public
17 interest.

18 These arguments are really academic now.
19 What we need now is to get the discovery before we
20 will know if we can prove that subsidies are
21 continuing or that other unlawful actions are
22 continuing that should be curbed as a condition of
23 the merger.

24 To determine if the merger may, in fact,
25 make such problems better or worse, that's the goal

00118

1 of our discovery. As you noted this morning, Your
2 Honor, there's no bright line, which I think
3 inherently, in and of itself, broadens the scope of
4 discovery.

5 And then, finally, let me wrap up with the
6 Colorado tax. And this is really the thrust of our
7 discovery, it's the thrust of our motion to compel,
8 but let me just tie it in directly to that two-part
9 test.

10 Two areas. First of all, the power rates
11 being unlawfully high. A positive benefit,
12 potentially, of the merger is a flow-through of
13 synergies, of cost savings. As we've seen in a
14 number of previous dockets, synergies have been flown
15 through to ratepayers and reductions of rates have
16 been a condition of merger. And indeed, in those
17 cases, determination of how to flow through what
18 rates are to benefit from these synergies is an issue
19 that's commonly undertaken by this Commission.

20 We intend to argue that if there are rates
21 that are actually so high they're unlawful under
22 applicable law, that that is where those synergies
23 should be flowed first, if they have become available
24 as a result of this merger.

25 Secondly, as to the subsidy issue, we

00119

1 believe that US West continues to subsidize pay
2 phones to maintain monopoly power and a monopoly
3 market share in the pay phone market, and that a
4 natural result of the merger will be to extend that
5 monopoly into the public Internet terminal market.
6 This, if you will, is tomorrow's version of the pay
7 phone.

8 Extending an existing monopoly to a new
9 market, such as public Internet terminals, is clearly
10 a negative impact to the merger. It's caused by the
11 merger. The applicants' own actions in rolling out
12 Internet terminals and announcing that they tend to
13 focus their merger efforts in the future on
14 Internet-related activities indicates there's
15 substantial danger that US West will extend its pay
16 phone monopoly because of -- and it's supported by
17 the merger and its association with Qwest.

18 Accordingly, given the broad scope of
19 discovery and the clear tie in with the issues this
20 Commission announced this morning that it intends to
21 look at, Northwest Pay Phone Association is entitled
22 to discover the information that it seeks.

23 JUDGE MOSS: Thank you. Response, Ms.

24 Anderl.

25 MS. ANDERL: Thank you, Your Honor.

00120

1 Northwest Pay Phone Association here is, in US West
2 and Qwest's view, seeking discovery on issues that
3 are entirely unrelated to the merger. As we
4 mentioned in our written papers, we believe that our
5 objections are sustainable and well-taken, even under
6 the Commission's stated scope of review in this
7 docket.

8 The Northwest Pay Phone Association
9 premises its motion to compel on an assumption that
10 it is entitled to discovery which is equivalent in
11 scope and faces the same fairly low threshold for
12 propriety as in a civil case. I think that's an
13 incorrect interpretation and reading of the
14 Commission's discovery rule, and that view is
15 bolstered by the recent Commission decision in the
16 AT&T complaint case, where, in a footnote, the
17 Commission expressed concern about litigants' use of
18 the discovery rule as follows:

19 The Commission created data requests in WAC
20 480-09-480 to prevent the search for data in
21 Commission proceedings from becoming as wide-ranging
22 and burdensome as discovery in civil proceedings. It
23 is apparent from this and other recent proceedings
24 that the distinction has become blurred. In part,
25 that results from a changing nature of Commission

00121

1 proceedings, which, in this instance, demonstrates
2 stronger similarities and issues to civil litigation
3 than to the traditional regulatory rate case
4 litigation that was common when the Commission
5 adopted the rule.

6 Further orders invoking the discovery rule
7 should address the expected scope of discovery and
8 the Commission may consider developing a policy or
9 interpretive statement on discovery issues.

10 To the extent that NWPA premises its
11 entitlement to the data requested in this docket on a
12 scope of discovery or a threshold which is equivalent
13 to that which is proper in civil litigation, I think
14 that they're simply wrong. I believe that there is a
15 higher threshold and a narrower scope which is
16 appropriate, even under the Commission's
17 broadly-stated interest in reviewing the merger
18 proceeding.

19 In fact, the proper subjects for inquiry in
20 this matter and the proper scope of admissible
21 evidence, as Your Honor stated earlier, will be
22 whether there are effects on producer or consumer
23 welfare and whether the information is directly
24 related to, tied to, or connected to the merger. I
25 hope I've paraphrased you correctly.

00122

1 And you further stated that evidence will
2 be admissible if it demonstrably bears on or is
3 related to the merger itself. I don't believe that
4 NWPA's data requests would produce such information.
5 And in fact, if we need to go to the NWPA motion and
6 review some of the specific requests, I think that
7 that would become clear. And I apologize, Your
8 Honor. I thought I had it open.

9 JUDGE MOSS: That's all right. It will
10 take me a minute to find it, too.

11 MS. ANDERL: For example, Request Number
12 Three, Provide copies of all documents created or
13 modified since January 1st, 1996, that discuss pay
14 phone services, as that term is used in 47 USC
15 Section 276, through a separate subsidiary.

16 JUDGE MOSS: Let me get on the same page.

17 MS. ANDERL: Sure.

18 JUDGE MOSS: Where are you? Is this an
19 attachment?

20 MS. ANDERL: Attachment A to NWPA's motion.

21 JUDGE MOSS: Okay.

22 MS. ANDERL: I'm about six pages back, five
23 or six pages back.

24 JUDGE MOSS: Oh, okay. So these are the
25 requests and the responses provided so far?

00123

1 MS. ANDERL: Yes.
2 JUDGE MOSS: Including objections.
3 MS. ANDERL: Yes.
4 JUDGE MOSS: Okay. You're at -- the
5 requests are numbered. NWPA 001 hyphen --
6 MS. ANDERL: Yes.
7 JUDGE MOSS: Give me the number that you're
8 on.
9 MS. ANDERL: This one is NWPA USW 01-003.
10 MS. JOHNSTON: It's fax page seven.
11 JUDGE MOSS: Thank you, Ms. Johnston. Got
12 it. All right. Now, let's go back. Back up a
13 minute and let me focus on this a little bit.
14 MS. ANDERL: Certainly.
15 JUDGE MOSS: Okay. Go ahead and make your
16 argument on this point.
17 MS. ANDERL: The point with regard to this
18 question is that the information which would
19 potentially be produced in response to it, besides
20 the fact that it's clearly overly broad and unduly
21 burdensome by asking for all documents created or
22 modified over the past four years, has no bearing
23 whatsoever on what the impacts of the merger will be
24 on US West's or Qwest's provision of pay phone
25 services.

00124

1 Even leaving aside the fact that the FCC
2 has preempted the Commission's regulation of the
3 provision of pay phone services, except for a narrow
4 area of public interest pay phones, which the
5 Commission could still potentially exercise
6 jurisdiction over, so it seems to me -- well, and
7 furthermore, and I was going to get to this in a
8 minute, but it seems to me that the argument that Mr.
9 Harlow makes with regard to whether or not the
10 Commission could order a separate subsidiary, which
11 he agrees the FCC prevents the Commission from doing,
12 and yet, on the other hand, impose a separate
13 subsidiary requirement as a condition of the merger
14 is a distinction that I cannot grasp.

15 How the Commission could impose as a
16 condition of what would otherwise be a lawful
17 transaction, a requirement which it would not be
18 allowed to order on its own under a showing of
19 identical circumstances, is certainly a mine field
20 that I can't pick my way through. I believe that the
21 Commission is preempted by the FCC's clear rulings
22 from requiring a separate subsidiary under any
23 conditions.

24 JUDGE MOSS: Well, I think you could agree
25 to do it that way, and we could say all right, but --

00125

1 MS. ANDERL: That's certainly true.

2 JUDGE MOSS: In terms of imposing it, that
3 would be another matter entirely and preempted under
4 the law, as Mr. Harlow acknowledges. All right. Go
5 ahead.

6 MS. ANDERL: The next request in line is a
7 request for all of the telecommunications services
8 that US West provides to its pay phone service
9 division for that particular division's -- for a
10 specific type of telephone, customer premises
11 equipment pay phone, that that division uses.

12 And the next request similarly focuses on
13 what type of telecommunications services are provided
14 for non-millennium phones. In spite of Mr. Harlow's
15 and my discussions on these subjects, I have been
16 unable to understand how what US West does in
17 connection with the provision of telecommunications
18 services to its unregulated pay phone division has
19 anything to do with the merger, particularly with
20 regard to the time frames that are sought in these
21 data requests and the very broad scope of
22 information.

23 I think Mr. Harlow's very candid when he
24 says that the Pay Phone Association is in this docket
25 because the industry is in trouble. The industry is

00126

1 not in trouble because of anything that US West has
2 done and it is not going to be in more or less
3 trouble depending on whether or not this merger is
4 approved or what types of conditions are placed on
5 the merger.

6 The industry is in this docket in order to
7 seek to obtain an advantage through its positioning
8 in this docket and seek to obtain an order either
9 requiring reduced rates or requiring an order
10 mandating a separate subsidiary, both of which it has
11 been either successful or unsuccessful on in other
12 dockets.

13 The industry has been decidedly
14 unsuccessful in attempting to obtain a requirement
15 that a separate subsidiary be created for the
16 provision of pay phone services. The industry has
17 been somewhat more successful in other dockets in
18 advocating that rates be reduced. The Northwest Pay
19 Phone Association successfully achieved a reduction
20 in US West's PAL, or public access line rate, in a
21 complaint proceeding that Mr. Harlow cited to you.

22 The industry advocated that the PAL rates
23 should be reduced in US West's general rate case.
24 The Commission declined to do that. US West's PAL
25 rates are currently set and are presumptively lawful.

00127

1 They are set at the one FB rate they are linked to
2 and set the same as the flat-rated business line
3 rate.

4 It seems to me that the attempt here to
5 discover information that would enable Mr. Harlow or
6 his clients to advocate that rates should be reduced
7 are no more than an attempt to collaterally attack
8 valid prior Commission orders establishing US West's
9 lawful rates.

10 It is because we do not believe that they
11 can collaterally attack US West's rates in this
12 docket and because we now believe that the Commission
13 can't, under any circumstances, mandate a separate
14 subsidiary for pay phone operations that we believe
15 that the information sought in these data requests is
16 improper and outside the scope of the docket.

17 JUDGE MOSS: Thank you.

18 MS. ANDERL: That concludes my remarks.

19 MR. HARLOW: Brief reply, Your Honor. If
20 obtaining a level playing field in compliance with
21 the applicable law is an advantage, then yes, the
22 Northwest Pay Phone Association is seeking those
23 advantages. Make no mistake about it, applicants are
24 seeking a tremendous advantage in seeking to create a
25 \$65 billion telecommunications powerhouse.

00128

1 The argument of US West puts the cart
2 before the horse. You can't work backwards and
3 assume an outcome, basically a final ruling, that is
4 going to reject our legal theories in determining the
5 scope of discovery. The scope of discovery is
6 broader than the final findings of fact that are
7 going to be made in this docket at its conclusion.
8 The scope of discovery is much broader than that.

9 Evidence that may be obtained by the
10 parties and brought before the Commission may well
11 not be considered when the Commission ultimately
12 makes its conclusions of law, but, again, the cart is
13 before the horse.

14 What is our discovery going to show? Is it
15 even going to support our theories? We don't know.
16 We think we have reasonable cause to inquire into
17 those areas, and that we will find something. But
18 what has US West got to hide here? If they are, in
19 fact, subsidizing their pay phone division, then we
20 certainly feel we can argue that an appropriate
21 condition, as opposed to imposition of a remedy, is a
22 separate subsidiary.

23 There are other remedies. The orders to
24 which US West cites, FCC Order 96388, paragraph 145
25 and subsequent paragraphs refer to the nonstructural

00129

1 separations that the FCC -- and safeguards the FCC
2 required, such as a cost accounting manual, which we
3 have requested and been denied, such as a CEI or
4 comparably efficient interconnection plan, which we
5 have requested and our data requests have been
6 denied.

7 Separate subsidiary is not the only remedy.
8 Should the Commission disagree with our legal theory
9 about whether it is, in fact, preempted from
10 conditioning, as opposed to imposing a separate
11 subsidiary, there are other remedies to which our
12 discovery goes.

13 The threshold issue, which we can't even
14 find out, is whether or not there is, in fact,
15 cross-subsidization. And under the circumstances, we
16 feel that we ought to get the discovery first and
17 then sort out the legal theories. That's the way
18 it's supposed to work, Your Honor.

19 JUDGE MOSS: The difficulty I'm having, Mr.
20 Harlow, is not whether the cart is before the horse
21 or the other way around, but whether there is any
22 harness to potentially connect the two, and I have
23 not heard anything this morning that persuades me
24 that there is.

25 I simply do not see the nexus between the

00130

1 discovery request that the Northwest Pay Phone has
2 interposed and its statements of its purpose for
3 intervening in this proceeding such as it has reason
4 to believe US West is continuing to abuse its
5 bottleneck monopoly power, the local access lines and
6 related services, and its monopoly revenue streams to
7 stifle competition in the pay phone industry.

8 I have a difficult time recognizing any
9 nexus between that purpose of participating in this
10 proceeding and the data requested through the data
11 request and the merger itself. Whether or not US
12 West and Qwest ever consummate this multi-billion
13 dollar transaction, if these are problems that the
14 Northwest Pay Phone Association is having, they will
15 continue, or not.

16 MR. HARLOW: Your Honor, if that indeed is
17 what the discovery proves out, then I think we can
18 argue, and you may yourself consider this to be a
19 weak nexus, but I think we're entitled to argue to
20 the Commissioners themselves that it's reasonable to
21 infer that not only will that continue, but that the
22 much larger entity, as well as an entity that has
23 announced its intentions to focus on and try to
24 capture the Internet market will extend that monopoly
25 and those practices to new areas, areas where

00131

1 currently, since the market is just getting off the
2 ground, I mean, you've probably seen in your life
3 half a dozen public Internet terminals anywhere.
4 That's about all I've seen, and I go out looking for
5 them.

6 This market is just getting off the ground.
7 It should be wide open to competition. My clients,
8 our industry should be able to come in and be able to
9 compete head-to-head and capture good, reasonable
10 market share against US West and Qwest, but you're
11 creating an entity that is leveraging its pay phone
12 experience, leveraging its ability to control prices
13 for access lines, leveraging its ability to control
14 access -- its prices for digital subscriber loops,
15 which will be serving these public Internet
16 terminals, which is an avowed target market, target
17 industry of this merged entity. You're allowing that
18 to continue.

19 And again, whether the Commission
20 ultimately buys off on our theory of this case and
21 says, hey, yes, this monopoly might get extended into
22 Internet terminals or not, shouldn't -- you know, the
23 fact that that may be a stretch for us to argue that
24 shouldn't be determinative of the scope of discovery.
25 JUDGE MOSS: Would this --

00132

1 MR. HARLOW: And there's also a legal
2 issue. I just want to add one more thing. I
3 apologize for cutting you off. There's a legal
4 question in my mind whether or not the prohibition on
5 extending -- on requiring a separate subsidiary for
6 pay phones would extend to public Internet terminals.
7 I think that's a matter best left to final briefing
8 in this case.

9 While we think the public Internet
10 terminals are an area of concern to our industry,
11 because they're a natural extension, there's no clear
12 preemption in any of the FCC's pay phone orders with
13 regard to separate subsidiaries for Internet
14 activities, such as public Internet terminals.

15 So I think there's a lot of room to craft a
16 remedy within the scope of those orders, and I think
17 we should be allowed the leeway to get the discovery
18 to work on those remedies in this case.

19 JUDGE MOSS: Now, we don't regulate
20 Internet, do we?

21 MR. HARLOW: You do not regulate Internet
22 service provision, which I think is more of a
23 forbearance issue than a jurisdictional question.

24 JUDGE MOSS: Would we have some regulatory
25 authority over public Internet terminal activity?

00133

1 MR. HARLOW: I think you would, and clearly
2 you would over the provisioning of the access lines,
3 the DSL lines.

4 JUDGE MOSS: Some of the things that feed
5 into it perhaps, but not directly the --

6 MR. HARLOW: DSL's arguably -- the rates
7 for it are arguably within the federal jurisdiction.
8 But I think the applicants' claim of preemption is
9 way overly broad. This Commission has about a
10 three-page pay phone rule, WAC 480-120-137. This
11 Commission is still very active in regulating pay
12 phone issues, and the Commission has a lot of room,
13 both through direct regulation of the DSL lines and
14 other network services, as well as indirectly through
15 its review of this merger, and in attempt to ensure
16 the public interest is protected, the Commission has
17 a lot of remedies that we can craft.

18 Again, the exact nature of those and where
19 we go with those will not be evident until we get the
20 factual background that we need for that through the
21 discovery process.

22 JUDGE MOSS: Ms. Anderl has something more
23 to say, I can sense it.

24 MS. ANDERL: I was struggling with myself.
25 I wasn't at all sure that additional response was

00134

1 necessary. I did want to indicate, in response to an
2 earlier remark by Mr. Harlow, that some of the data
3 that they have requested from US West, such as the
4 CEI, or comparably efficient interconnection plan, is
5 a matter of public record and obtainable through the
6 FCC, as is the FCC's order approving US West's
7 comparably efficient interconnection plan.

8 Additionally, we've directed Northwest Pay
9 Phone Association how to obtain the cost accounting
10 manual that they seek, as well. I don't believe that
11 they're reliant on US West for all of the data that
12 they seek, if they, in fact, wish to advance some of
13 their theories of the case.

14 I think that it is an enormous stretch that
15 the potentiality of the provision of Internet
16 terminals through DSL or a public access line somehow
17 justifies the scope of discovery that NWPA seeks in
18 this case. I similarly cannot see the connection,
19 either, and I don't believe that Mr. Harlow has
20 provided any additional support for the scope of
21 investigation that NWPA wishes to engage in this
22 docket.

23 And I guess, as an aside, I would just
24 mention that there are a lot of things that could be
25 taken up in this docket if Mr. Harlow's claim were

00135

1 correct.

2 Even though the Commission has a costing
3 and pricing docket ongoing for unbundled network
4 elements and collocation, I could make the same
5 arguments Mr. Harlow is making for the pay phone
6 industry for other industries to say, Well, you know,
7 we should consider physical collocation in this
8 docket, even though the Commission is going to have
9 another proceeding on that, because it potentially --
10 the provision of physical collocation potentially
11 impacts competitors and is enormously significant,
12 and what if the merger affects that. But that
13 doesn't make it right, and that doesn't make this the
14 place to do this.

15 JUDGE MOSS: All right. I think I've heard
16 enough on this. What I'm going to do is take this
17 one under advisement until the end of the day, and
18 then I think we're probably going to go through some
19 of these one at a time, and there may be some
20 different rulings with respect to different data
21 requests.

22 But in general, I would say at this point
23 that I'm failing to recognize the immediate nexus
24 between the discovery sought and the merger case
25 that's before us. I think that, based on the written

00136

1 pleadings and the argument that I've heard, there may
2 be other venues that are more appropriate to the
3 Northwest Pay Phone's advocacy. I notice that
4 there's a good bit of discussion about the
5 deregulation of the pay phone industry, and the
6 Internet is not yet subject to the degree of
7 pervasive regulation that we are familiar with in the
8 utilities sector, and to that extent, the antitrust
9 laws may become the appropriate vehicle for resolving
10 some of these problems and --

11 MR. HARLOW: We've actually had one of
12 those cases, too, Your Honor.

13 JUDGE MOSS: Well, that may be the
14 appropriate way to proceed. This is not an antitrust
15 case, and although I find that particular area of the
16 law fascinating, I doubt I could convince the
17 Commissioners to let me indulge my academic interest
18 by bringing that into this case.

19 So I will give this further thought and
20 we're going to take -- this is going to take a little
21 longer than we all would like, so we're going to take
22 a break at some point and give me an additional
23 opportunity to think about this and we'll return to
24 this at the end of the day, look at the individual
25 requests. I do see some room for requiring some

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1 response here that hasn't been given. Looking, for
2 example, at Northwest Pay Phone Association Request
3 001-002, which simply asked whether Qwest intends
4 that the merged entity will continue to provide pay
5 phone service, as that term is used in 47 USC Section
6 276. Well, yes, no, or I don't know. It doesn't
7 seem to me like there's a real problem answering a
8 question like that, whether it means anything to this
9 case or not, so -- ultimately, I should say.

10 Because I am sensitive to the comments you
11 make, Mr. Harlow, that the discovery process is
12 necessarily broader than the evidentiary process, and
13 I discussed that earlier in some of the remarks I
14 made today that that is the case. On the other hand,
15 it should not be so far ranging as to clearly go
16 beyond the scope of anything we're going to give any
17 serious consideration to in this particular docket.
18 That's not to say that there might not be some other
19 docket or some other venue where these issues could
20 be aired, but I'll give some additional thought to
21 that.

22 Okay. Well, it's 11:30, so I guess we can
23 still have some time to move on to some of these
24 other matters and -- but being the lucky guy who gets
25 to take breaks whenever I feel like it, I think I

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1 would like to take just a few minutes off the bench.
2 I'm getting a little tired. So we'll take 10 minutes
3 at this point and come back at 20 before the hour.
4 Thanks.

5 (Recess taken.)

6 JUDGE MOSS: We're on the record. What I
7 believe is the last in our set of motions to compel,
8 we have the motion of AT&T Communications of the
9 Pacific Northwest, Inc., Nextlink, and Advanced
10 Telcom Group. I want to try to hear the argument
11 before we have any sort of a luncheon recess, and I
12 think we are going to need a luncheon recess and have
13 to reconvene, because we have several other matters
14 of business to take up today, and we may need to go
15 through some of these in the same fashion I described
16 we're going to go through Northwest Pay Phone
17 Association. So let's hear the argument now.

18 MR. KOPTA: Thank you, Your Honor. Before
19 we get to that particular part of this, however, I
20 would note that the primary objection that the
21 applicants had to most of these data requests is that
22 it was beyond the scope of this proceeding.

23 And in fact, in our response to the motion
24 to compel, they argued that these may be -- the
25 motion may be moot because the Commission may

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1 reconsider its scope order, and so I do not know
2 whether that decision this morning has had any impact
3 on the applicants' willingness to answer some or all
4 of the outstanding data requests.

5 So I would think, at this point, it might
6 be appropriate to see whether they are standing on
7 their objections or whether they, in light of the
8 ruling this morning, would be amenable to
9 reconsidering and whether this might be something
10 that would be better taken up in a week's time or
11 whatever to allow them to make that evaluation and to
12 provide additional information in response to our
13 requests.

14 JUDGE MOSS: It strikes me that that
15 conversation might best be off the record. So I'm
16 going to give you five minutes to sit with US West
17 counsel and determine whether there's been any
18 movement on the basis of the discussion this morning
19 about the scope of the proceedings. So we'll go back
20 off the record for five minutes.

21 (Recess taken.)

22 JUDGE MOSS: Back on the record. We have
23 had some opportunity for discussion off the record.
24 AT&T, et al. and US West and Qwest had some
25 opportunity to discuss the status of the motion to

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1 compel and discovery in light of the earlier
2 discussion today, the scope of the proceeding and the
3 decision by the Commission to stick with its original
4 scoping order and not modify that order.

5 It seems that the most appropriate way to
6 proceed, then, will be to forgo the argument on the
7 motion to compel at this time and to give the parties
8 an opportunity to work cooperatively to achieve the
9 maximum degree of resolution possible, recognizing
10 that there are likely to be some data requests as to
11 which the parties continue to agree to disagree, and
12 those objections will need to be taken up before me
13 and decided.

14 This leaves us in a similar posture as with
15 respect to the data requests of Staff and Public
16 Counsel that remain less than fully satisfactorily
17 responded to, in the view of Staff and Public
18 Counsel, at least.

19 So I think what we need to do is go ahead
20 and establish a procedure for resolving those points,
21 and we'll fix a date next week, subject to the
22 availability of a room, and I did not have time to
23 check on the availability of rooms, but we'll go
24 ahead and set a tentative time and date for another
25 discovery conference, and if there aren't too many

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1 people involved, then we can allow participation by
2 telephone.

3 The reason that I did not allow that today
4 is that we have been experiencing some difficulty
5 with too many participating by telephone, and it
6 creates a lot of difficulty for our court reporters,
7 because sometimes the equipment does not work as well
8 as it might if the Commission had limitless resources
9 to buy a new system. I'll send that page to the
10 Commissioners. They also recognize the problem.
11 They were in here yesterday when we had the
12 difficulty.

13 So why don't we go ahead and do that, and I
14 think we can probably press ahead, then. I think
15 what we'll do next is go ahead and go through the
16 Northwest Pay Phone Association request and get that
17 resolved, and then we'll talk about the continuance
18 in the schedule and a couple little points I want to
19 make on process, procedure type matters, and then
20 we'll be able to finish up. And hopefully no one
21 will starve to death by that time.

22 So we're not quite ready for your argument
23 yet, but let's talk about setting a date next week.
24 When does Staff, Public Counsel, and your clients,
25 Mr. Kopta, think that -- and I would have to include

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1 US West, Qwest. When can you all confer, get this
2 matter resolved, narrowed down to the maximum extent
3 possible and be available for some kind of a
4 discovery conference to make any final resolutions
5 that need to be made by me?

6 And I should mention that my schedule looks
7 quite open next week. I don't have any hearings
8 scheduled at all, so basically I'm free to do this
9 whenever it's convenient for you all.

10 MR. KOPTA: Counsel for Qwest and US West
11 and I discussed this and at least tentatively thought
12 about being able to talk on Monday, the 29th, which
13 would leave virtually any other day during the week
14 to raise the outstanding issues.

15 So from our perspective, we obviously want
16 to work with them and get this done as expeditiously
17 as we can.

18 MS. JOHNSTON: Staff and the companies
19 agreed to meet on Tuesday, and the companies also
20 committed to responding to the data request outlined
21 in this letter I submitted this morning by Friday
22 next week.

23 JUDGE MOSS: Well, does that mean that we
24 should postpone this until after Friday of next week
25 and you see what you get?

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1 MS. JOHNSTON: It would be my preference,
2 Your Honor, to postpone until Monday, the 6th, if
3 possible.

4 JUDGE MOSS: Public Counsel, do you wish to
5 wade in to our scheduling concerns?

6 MR. FFITCH: I'm intending to speak with US
7 West/Qwest right after we're done today about our
8 outstanding concerns and then a follow-up after I
9 talk to my consultant. So we could present any
10 outstanding issues at a discovery conference next
11 week or on the 6th, either one would be fine. If
12 it's the next week, I would say Wednesday, Thursday,
13 Friday time frame would make the most sense. I would
14 note there is an open meeting on Tuesday, the 30th, a
15 capacity charge workshop, I think, on the 2nd, which
16 might conflict, be a conflict for a lot of the
17 attorneys involved here.

18 JUDGE MOSS: There's probably an open
19 meeting on Wednesday, the 1st.

20 MR. FFITCH: Well, I think it's been moved
21 to the 30th.

22 MR. KOPTA: That's correct.

23 JUDGE MOSS: That's correct, it is the
24 30th, because I have a hearing that morning before
25 the open meeting.

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1 MS. JOHNSTON: I do have a conflict on
2 Wednesday, the 1st.

3 JUDGE MOSS: So it appears to me we're
4 basically looking at either Friday, the 3rd, or
5 Monday, the 6th. I have to say it seems to me most
6 sensible to wait until the 6th, and that way, we can
7 do this all at once, having paused expectantly.

8 MR. HARLOW: Your Honor, if you wait until
9 the 6th, that might be advantageous for another
10 reason. Covad is working on a motion to compel, as
11 well, and it might be possible to tee up that issue
12 at the same time, so that would certainly be
13 efficient for the parties.

14 JUDGE MOSS: All right. Here's what we're
15 going to do. We're going to have to cut the
16 discovery off in this proceeding at some point in
17 time. We can't have an endless round of discovery
18 and motions to compel and responses and half-day,
19 three-quarter-day hearings in this thing, so parties
20 should take that under consideration and raise that
21 again during our discussion with the motions for
22 continuance.

23 We're also going to have to take up the
24 question of how long it's going to take to actually
25 produce responses. We're going to have to set a

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1 deadline for that, too.

2 All right. Let's go ahead and set the 6th,
3 and I will have to check about the availability of
4 rooms and times and so forth, but I'll set that
5 sometime on the 6th and we'll find a place.

6 Okay. So this brings us back, then, and
7 most of the parties off the record indicated to me
8 their willingness to press ahead in the thought that
9 we could probably finish this by 1:30 or so. Does
10 anybody have a strenuous objection to that? No
11 indication of a strenuous objection, so we'll go
12 ahead in that fashion.

13 So let's return, then, to the Northwest Pay
14 Phone Association motion to compel, and we're going
15 to take these up one at a time and see what we're
16 going to do about them.

17 MR. HARLOW: Your Honor, I have a
18 suggestion that may shorten that process of going
19 one-by-one.

20 JUDGE MOSS: It will be welcome.

21 MR. HARLOW: Let me just tell you what I'm
22 going to suggest, and then maybe you want me to pause
23 for a minute before I explain why I think it's an
24 appropriate way to go. What I'm going to suggest is
25 that we would withdraw our motion to compel as to all

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1 data requests but Four, Six, Nine and 21, and proceed
2 to discuss those remaining data requests.

3 JUDGE MOSS: Okay. I better start taking
4 better notes here. All right. And I also think
5 you're going to need to give me the full numbers,
6 because you've got -- there are two that are numbered
7 Four, for example.

8 MR. HARLOW: Okay. The proposal would be
9 that we would --

10 JUDGE MOSS: Withdraw?

11 MR. HARLOW: These are the ones directed to
12 US West. There shouldn't be two number fours,
13 although there would be a number four directed to
14 Qwest. So we would withdraw, and this would be
15 without prejudice, USW 01-004. No, excuse me, these
16 would be the remaining requests. USW 01-006, USW
17 01-009, and USW 03-021.

18 JUDGE MOSS: Okay. You're withdrawing
19 except --

20 MR. HARLOW: We would be withdrawing the
21 motion to compel with regard to all requests, both US
22 West and Qwest, except the ones I just read off.
23 Your Honor, Ms. Anderl's pointed out to me that
24 apparently we didn't have response to 03-021 when we
25 filed our motion to compel, so I guess I'd like to

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1 orally amend our motion to include that request.

2 Does the bench have a copy of that available?

3 JUDGE MOSS: 03-021?

4 MR. HARLOW: You probably do not. We'd be
5 happy to let you have my copy.

6 JUDGE MOSS: Yeah, I don't have that.

7 MR. HARLOW: Staff has offered to run some
8 copies of that.

9 JUDGE MOSS: I'm going to want a minute to
10 look these over. Okay. So we're down to four data
11 requests. Does US West wish to continue to interpose
12 objections to responding to these data requests, or
13 does US West wish to have lunch at 12:30?

14 MS. ANDERL: US West --

15 MS. JOHNSTON: Choose your words carefully.

16 MS. ANDERL: US West wishes to continue to
17 interpose its objections, and we'd defer lunch until
18 1:30, Your Honor.

19 JUDGE MOSS: Fair enough.

20 MS. ANDERL: While I appreciate Mr.
21 Harlow's willingness to narrow the scope of the
22 motion to compel and limit the requested responses to
23 only four questions, my review of those four
24 questions does not find them in isolation any less
25 objectionable than they were in the large group.

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1 JUDGE MOSS: All right. Then we'll have
2 some argument on each of them, and I think four is
3 pretty manageable. All right. The first one, then,
4 is Northwest Pay Phone Association Data Request USW
5 01-004, and the request asked US West to provide a
6 list of all telecommunications services that US West
7 provides to its pay phone service division for that
8 division's Nortel "millennium" phones, including a
9 citation to the tariffs under which that service is
10 offered to US West competitors, the USOC of the
11 service, the retail price of the service, and - if
12 the service is not offered under a tariff - whether
13 and under what terms and conditions the service might
14 be offered to the competitors.

15 US West objects on grounds of relevance,
16 and the further extension of that objection
17 appropriate in the discovery context, that it is not
18 reasonably calculated to lead to the discovery of
19 admissible evidence.

20 US West objects further that the data
21 requested concerns CPE, which has been deregulated by
22 the Telecommunications Act of '96, and is not
23 regulated by the Washington Utilities and
24 Transportation Commission. Is that an objection
25 based on jurisdiction? Are you saying this is

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1 something that's outside the scope of the
2 Commission's jurisdiction to consider?

3 MS. ANDERL: Well, it's more a relevancy
4 objection.

5 JUDGE MOSS: So it's part of your relevancy
6 objection?

7 MS. ANDERL: Yes.

8 JUDGE MOSS: Okay. However, without
9 waiving that objection, US West states that its
10 telecommunications services are provided, and there
11 seem to be some words dropped here. Ms. Anderl, can
12 you help me out?

13 MS. ANDERL: The first "under" should be
14 deleted in that sentence.

15 JUDGE MOSS: Okay. So it should read, US
16 West states that its telecommunications services are
17 provided to all customers under either a contract or
18 tariff and that those contracts and tariffs are filed
19 with the state Commission, that being this state
20 Commission, I presume in Washington, at least, or the
21 FCC, as required. Thus, the documents are equally
22 available to the Northwest Pay Phone Association.

23 So that would be a burdensome objection,
24 that it's no less burdensome for them to find this
25 information than for you?

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1 MS. ANDERL: Correct, Your Honor.

2 JUDGE MOSS: Okay. Mr. Harlow.

3 MR. HARLOW: Thank you, Your Honor. First
4 of all, let me just kind of explain our rationale for
5 trying to narrow this down at this point in time. I
6 think, clearly, part of any discovery motion overall
7 is a weighing of the burden on the party that's the
8 subject of the discovery against the relevance and
9 importance to the issues in the case, and so what I'm
10 trying to do by narrowing roughly 26, I think,
11 discovery responses down to four is to tip that
12 balance considerably.

13 The kinds of things that are left in the
14 four remaining requests are the kinds of things that
15 are readily available to US West. For example,
16 number 21 is a cost study. US West is required to,
17 under federal law, prepare --

18 JUDGE MOSS: Let's stick with --

19 MR. HARLOW: Okay. I'm just trying to give
20 an example. These are things that are readily
21 available. This isn't data that US West should have
22 to go out and create or it shouldn't have to spend a
23 lot of time on it, so the burden is very reduced
24 here, okay. And what I'm trying to do is really go
25 to kind of the heart of our case. If we found

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1 evidence that led us to believe we had issues that we
2 should pursue further, then we might want to come
3 back to the Commission and say, Look, here's the
4 evidence we found, now we need to have these
5 follow-up questions, which are the other discovery
6 requests that I've withdrawn for the time being.

7 On the other hand, if it turns out that
8 we're just, you know, spitting into the wind, if you
9 will, there's nothing there for us to fight about,
10 we'll know that and we'll back off and we've saved
11 everybody a lot of hassle and time in the discovery
12 process by narrowing it to four. So that's the
13 reason behind my approach here.

14 As to Four, and I think we ought to take
15 Six together with it, it's the same question, only it
16 asks with regard to the non-millennium phones. And
17 the reason that we ask that separately is that US
18 West has two different types of pay phones. We know
19 they're provisioned differently. We don't know for
20 sure what services US West provides to its pay
21 phones. And so this is really a means to test, by
22 getting US West to tell us what services they provide
23 to their two types of pay phones, whether, in fact,
24 their statement is truthful, that we are getting
25 those same services under the same terms and

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1 conditions, either under tariff or contract.

2 US West is correct that we can go and look
3 at their tariffs and maybe their contracts
4 ultimately, but those may be filed under
5 confidentiality designation. But they're not correct
6 that we know for sure what services they're
7 provisioning to themselves.

8 Some of these, for example, could include
9 operator services. Qwest, for example, has an
10 operator service division called U.S. Long Distance.
11 Network services, like access lines, screening
12 services, other ancillary services to access lines,
13 and these, in terms of the relevance argument, these
14 obviously do fit into our theory in this case, which
15 I hope you'll allow us to go forward with this
16 minimal amount of discovery and then perhaps, at some
17 later date, we may need a Commission decision as to
18 whether or not this evidence is admissible, but for
19 now I think this is a relatively modest request in
20 light of the showing that we have made of relevance.

21 JUDGE MOSS: Well, in terms of the burden,
22 do I understand that these are matters of public
23 record, or the fact that they've been filed with the
24 FCC or the state Commission doesn't mean a thing if
25 they're filed under confidentiality protection.

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1 MS. ANDERL: I do not. To the extent that
2 there are contracts, I do not believe that they're
3 confidential in a way which would preclude the
4 Northwest Pay Phone Association from learning the
5 essential terms and conditions.

6 JUDGE MOSS: And those would describe the
7 services provided. Has this information been
8 requested in other jurisdictions?

9 MS. ANDERL: I'm not aware that it has.

10 MS. SPADE: I don't think so.

11 JUDGE MOSS: So this is not something you
12 likely would have already posted on your website?

13 MS. ANDERL: Oh, most certainly not. In
14 fact, we do have a central effort to coordinate our
15 discovery responses and identify duplicates from one
16 state to another. I personally drafted these
17 objections. I don't know that they match up with any
18 question in any other state.

19 JUDGE MOSS: Is it something that could be
20 provided in that fashion? I haven't looked at your
21 website, either. I'm not sure I should, as I think
22 about it. I don't know the nature of the material
23 there. Is this the sort of thing that could be made
24 available there if I decided it was an appropriate
25 subject, and I haven't gotten to that question yet.

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1 MS. ANDERL: If Your Honor orders us to
2 provide these data request responses, we'll obviously
3 provide them. And if they are in the nature of that
4 which we would post on the website, they will be
5 there as well.

6 JUDGE MOSS: Would you scan those and put
7 them on the website or --

8 MS. ANDERL: No, no, we would -- if we were
9 required to respond to this data request, we wouldn't
10 actually provide the tariffs or contracts; we would
11 simply provide the information requested. That is,
12 the USOC, the name of the service, maybe a tariff
13 citation or something, but --

14 JUDGE MOSS: Let's now get to the more
15 difficult question for me, which is the relevance
16 question and the likelihood that it would lead to the
17 discovery of admissible evidence.

18 You referred to your theory of the case. I
19 don't really understand what the theory of the case
20 is. And again, it's important that I have some
21 understanding of how this relates to the merger.
22 Whatever services US West is providing today, unless
23 that's somehow impacted by this merger, then the
24 matter is not subject to consideration by the
25 Commission. Because that's what the Commission cares

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1 about, what are the impacts or potential impacts of
2 this merger. And to the extent the inquiry is not
3 directed to a theory of the case, if you will, that
4 is intended to prove something in that connection,
5 then this would be outside the scope of admissible --
6 or allowable discovery, so that's what I want to hear
7 about.

8 MR. HARLOW: Your Honor, these two data
9 requests are really the foundation for 21, which goes
10 for the cost studies. If you just look at the
11 Scottish Power order most recently, the Commission
12 ordered rate reductions in that docket. It was part
13 of a stipulation, but basically it was ordered as a
14 condition of the merger. And I don't remember the
15 exact number. It was several millions of dollars.

16 And I don't remember exactly how those rate
17 reductions would have flowed through, to which
18 ratepayers, but certainly not only Scottish Power,
19 but a number of other cases illustrate that rate
20 reductions are oftentimes a condition of merger
21 approval.

22 And you know, you look around the table
23 here, and I don't know where Staff can argue those
24 rate reductions ought to go, but I suspect Public
25 Counsel may be looking for some residential ratepayer

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1 reductions, maybe AT&T will be looking for some
2 reductions in access charges, and Northwest Pay Phone
3 is going to be looking that those reductions be
4 applied to PAL lines or services.

5 And in particular, we very strongly believe
6 that some, and perhaps several rates are actually
7 unlawfully high. And it will be our argument in our
8 final brief, if we get the evidence to support us
9 through discovery and if the Commission determines
10 there are synergies that need to be passed through in
11 the form of rate reductions, it will be our argument
12 that you ought to start first in applying those rate
13 reductions to rates that are unlawfully high, that
14 that's in the public interest to flow through those
15 rate reductions first to rates that are unlawful and
16 must be reduced to make them lawful. And actually,
17 that will turn out to be a very small number, and I'm
18 sure there will be plenty left over for Public
19 Counsel's constituents.

20 That's the nub of our argument. That's
21 critical to determine where the rate reductions
22 should be applied, if there are any.

23 JUDGE MOSS: Well, as the Commission said
24 in its scoping order that was the subject of some of
25 our discussion earlier today, this is not a rate

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1 case. I do not see the Commission making a finding
2 in this case that any given rate is unjust,
3 unreasonable, unduly discriminatory or preferential,
4 which will be the necessary finding as a prerequisite
5 for a rate adjustment. Given that --

6 MR. HARLOW: Your Honor, I'm not intending
7 that we try a full-blown rate case. For example, if
8 US West produces a cost study that shows that the
9 cost of originating line screening is five
10 one-twelfths of one cent, which is what they filed
11 with the FCC, and the rate is \$2, and we can argue
12 that the new services test requires the rate be
13 cost-based, I can easily see where the Commission
14 might conclude that it would be appropriate to
15 flow-through a rate reduction to that service without
16 having to necessarily make the usual findings.

17 I don't think there was a finding in
18 Scottish Power, for example, that any particular rate
19 that was reduced was previously unjust and
20 unreasonable. Nevertheless, rates were reduced.

21 JUDGE MOSS: Well, as you observed, that
22 case was resolved by stipulation and settlement
23 agreement, which is something that may or may not
24 happen here.

25 MR. HARLOW: Right.

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1 JUDGE MOSS: What about Nine?

2 MR. HARLOW: Nine -- excuse me. We've
3 withdrawn 10, but I ask you to refer to it, because
4 it asked US West to identify their manual, which they
5 do without waiver. They identified their cost
6 allocation manual, or CAM, and they state it's on
7 file with the FCC and is available to Northwest Pay
8 Phone as a public document.

9 And I confirmed this with Ms. Anderl on the
10 break that the CAM that's publicly available simply
11 describes, if you will, the rules of how they will
12 account for their pay phones. The numbers, which is
13 what we need, are not in there, so that's why we
14 stick to Number Nine, which basically is -- we wanted
15 to make sure we didn't call it the wrong thing.

16 But, basically, what 10 tells us we're
17 looking for is the allocations pursuant to their CAM,
18 their cost allocation manual. And that will get --
19 and again, this is something they're required to
20 prepare under their nonstructural safeguards that the
21 FCC imposed, so we're not asking for them to create
22 something. All we're asking for them is to show us
23 the numbers. Indeed, I can narrow this further. We
24 just need the most recent years. I don't think we
25 need to go back in time as an initial matter. What

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1 that will hopefully tell us is whether or not the pay
2 phone division is being operated at a loss or not.

3 And again, the relevance of that is whether
4 or not it's in the public interest to allow them to
5 move into new Internet-based markets without some
6 either additional nonstructural separations, which
7 the state is permitted to order, or perhaps even
8 structural separation. And I know that the bench is
9 having trouble with our concept here of ordering a
10 separate subsidiary as a part of this docket, but
11 again, what we've done is we've scaled this way back
12 to something that's readily available, can easily
13 come out, and the issue could be rendered moot by the
14 results. If the bottom line is a black number
15 instead of a red number, then we're done with it. If
16 it's a red number, then I think we need to take a
17 harder look at the public interest issues that I've
18 argued at length earlier this morning.

19 JUDGE MOSS: Anybody need to say anything
20 else on this before I rule?

21 MS. ANDERL: Not if --

22 JUDGE MOSS: I'm just giving the
23 opportunity. I'm not saying I need to hear anything
24 further.

25 MS. ANDERL: If there were any chance that

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1 the ruling would not be favorable to US West, I'd
2 like an opportunity to comment. Otherwise, I'd be
3 perfectly satisfied to sit quietly.

4 JUDGE MOSS: I think you'll find my ruling
5 satisfactory enough. All right. What I'm going to
6 require is that to the extent this material requested
7 is publicly-available at this time, and the objection
8 was one as to burden, that US West work cooperatively
9 with Northwest Pay Phone Association to make it least
10 burdensome on all concerned for the Northwest Pay
11 Phone Association to review that already
12 publicly-available information.

13 Other than to that extent, the data request
14 and motion to compel with respect to them are denied.
15 I fail to see the nexus between the merger and the
16 issues in this case. Northwest Pay Phone Association
17 will be free to argue on brief or otherwise as it
18 chooses, but in terms of the record that we're going
19 to have in this case, I don't see this sort of
20 material coming in. Clear enough, US West?

21 MS. ANDERL: Yes, Your Honor.

22 JUDGE MOSS: Clear enough?

23 MR. HARLOW: Does this mean we're going to
24 get a list of the services?

25 JUDGE MOSS: It means you're going to get

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1 whatever's publicly-available. If that's a list of
2 the services or a set of the contracts.

3 MR. HARLOW: I guess it's inherent, in my
4 view, that we'll get a list of the services.
5 Otherwise, they can't tell us which
6 publicly-available documents we need to look at.

7 JUDGE MOSS: Well, I'm going to let you all
8 work that out.

9 MR. HARLOW: Okay.

10 JUDGE MOSS: Okay.

11 MR. HARLOW: Thank you, Your Honor.

12 JUDGE MOSS: All right. Now, I believe
13 that concludes our business on the motions to compel,
14 which brings us to the question of scheduling, which
15 was initiated, I believe, by the Staff request for
16 continuance. I believe that was the first one. That
17 was filed November the 4th. We have various
18 responses. We've subsequently had requests for
19 continuance filed by Northwest Pay Phone Association,
20 Public Counsel, AT&T Communications and others, a lot
21 of paper back and forth on this subject.

22 What I draw from all of this is that no one
23 is really interested in postponing this proceeding
24 unduly, yet everyone is understanding that the
25 parties have a lot of responsibilities, that they

00162

1 face a lot of obstacles in putting together a case,
2 and that the adequate time must be provided for that
3 to occur.

4 The Commission's concern is that it have
5 the most excellent record it can have in order that
6 it may make an intelligent and informed decision in
7 this case.

8 With all that in mind, I have to tell you
9 that I have some doubts coming in that we could meet
10 the current hearing dates, January 18th through
11 January 25th. And with that doubt in my mind, I did
12 work with the Commissioners' support staff and
13 identified two other potential blocks of time for
14 hearings. And I asked that we do this for a couple
15 of different time periods, and so what I got was, as
16 possible alternative dates for the hearings, Monday,
17 January the 31st, through Monday, February the 7th,
18 except for Wednesday morning, February the 2nd, which
19 I gather is an open meeting. The other alternative
20 is Friday, March the 13th -- ooh, ominous day --
21 through Friday, March 20th.

22 Now, I wonder if it would be useful for us
23 to go off the record for 10 minutes or so and let you
24 all confer among yourselves about what's going to be
25 needed in terms of getting this discovery process

00163

1 completed, establishing a date for the end of
2 discovery and responses to discovery, establishing a
3 date for the Staff, Public Counsel and intervenor
4 testimony, establishing a date for the applicants'
5 rebuttal testimony, and then a hearing date or set of
6 dates, either on two alternatives I have mentioned,
7 or if you all somehow think you can do it within the
8 existing schedule.

9 MS. JOHNSTON: May I ask a question?

10 JUDGE MOSS: Absolutely.

11 MS. JOHNSTON: Are there no available
12 hearing dates between the January and March dates you
13 referred to?

14 JUDGE MOSS: I asked for dates in January,
15 February, and March, and this is what I got.

16 MS. JOHNSTON: Thank you.

17 JUDGE MOSS: February must be a bad month.
18 Isn't there some kind of NARUC thing in February?

19 MS. JOHNSTON: I think so.

20 JUDGE MOSS: Yeah, I suspect that's
21 probably eating up a block of time in there. Did
22 somebody say something or --

23 UNIDENTIFIED SPEAKER: March 5th through
24 8th is NARUC.

25 JUDGE MOSS: Oh, okay. Well, so that is

00164

1 obviously not the problem, then. NARUC is not the
2 problem. For whatever reason, these are the dates I
3 got, so these are the dates we have to work with
4 today.

5 MS. JOHNSTON: Okay.

6 JUDGE MOSS: Okay. So does my plan sound
7 like a good one?

8 MS. ANDERL: Yes.

9 JUDGE MOSS: Okay. Let's go off the record
10 for about 10 minutes.

11 (Recess taken.)

12 JUDGE MOSS: We're back on the record, and
13 the parties have had an opportunity to work toward
14 schedule. I understand that Staff has a schedule to
15 propose.

16 MS. JOHNSTON: Thank you, Your Honor.
17 Staff, Public Counsel and the intervenors propose
18 that they file their direct evidence on January 10th,
19 2000, that the joint applicants submit their rebuttal
20 testimony in evidence on February 7th, and that we
21 hold evidentiary hearings March 13th through the
22 20th. And the remainder of the schedule, public
23 hearings will be determined after a consultation with
24 Public Counsel, and of course, we could set briefing
25 dates at your discretion.

00165

1 JUDGE MOSS: I'm interested in hearing some
2 proposed dates for cutting off discovery requests and
3 responses to discovery.

4 MS. JOHNSTON: I would propose Friday,
5 December 17th, but I have not addressed that with any
6 of the parties in the proceeding.

7 MR. KOPTA: One of the concerns that we
8 have is we don't know what kind of rebuttal testimony
9 the applicants are going to file, and we may need or
10 want the opportunity to file discovery based on that
11 testimony. So what we would propose is, certainly in
12 preparation for filing our testimony, we would have
13 no problem with a December 17th deadline, and then,
14 if you would also say for testimony that's directed
15 specifically to the testimony that's filed by the
16 applicants in rebuttal, that one week after that for
17 propounding discovery to the applicants directed
18 specifically to that testimony.

19 MS. JOHNSTON: May I ask a question? One
20 week after the filing of the rebuttal?

21 MR. KOPTA: Yes.

22 MS. JOHNSTON: I would request two weeks.

23 MR. KOPTA: That would be fine. I was just
24 trying to give the maximum amount of time.

25 JUDGE MOSS: So Staff, then, is proposing a

00166

1 December 17th date to cut off discovery requests or
2 to cut off responses, finalize responses? I wanted
3 two dates.

4 MS. JOHNSTON: That would be requests.

5 JUDGE MOSS: You would want to have up
6 until December the 17th to propound discovery.

7 MS. JOHNSTON: May I have just a moment,
8 Your Honor?

9 JUDGE MOSS: Sure.

10 MS. JOHNSTON: Your Honor, I would propose
11 the discovery cut off December 17th for the first
12 half of this proceeding, and then the second
13 discovery cutoff date of February 25th for discovery
14 of the joint applicants' rebuttal case.

15 JUDGE MOSS: That would make responses due,
16 under the current process, on 12/24 and on March 5th
17 or something, I don't know how many days in February
18 this year. Twenty-nine, it's a leap year, so March
19 4th, which is a Saturday. Oh, well. Okay. So that
20 will take us up to Christmas Eve.

21 MS. ANDERL: I think the 27th, actually.

22 JUDGE MOSS: Well, under the discovery rule
23 it would be 10 days, but under the agreement of the
24 parties in the current prehearing order it's a
25 seven-day turnaround.

00167

1 MS. ANDERL: Seven business days.

2 JUDGE MOSS: Is it?

3 MS. JOHNSTON: Yes.

4 JUDGE MOSS: I don't know why we even
5 bothered to change it. Comes out the same way.
6 Let's not get into that. All right, does anybody
7 else have a proposed set of dates?

8 MS. ANDERL: Yes, Your Honor.

9 JUDGE MOSS: All right. Let's hear from
10 the applicants.

11 MS. ANDERL: Let me just sketch out what we
12 discussed and then allow counsel for Qwest to
13 supplement if I omit anything. Our proposal is that
14 the parties, intervenors and Staff and Public Counsel
15 would file their testimony no later than December
16 23rd this year, earlier, if they should so agree, and
17 that US West and Qwest, joint applicants, would file
18 their rebuttal testimony on January 10th, and that
19 the hearings could go forward beginning January 31st.

20 That seems reasonable to us, based on the
21 extent of continuance that the parties had previously
22 asked for, which was essentially only about two weeks
23 after they got their final discovery responses. We
24 believe that we will be able to provide discovery
25 responses to those that we are ordered to provide or

00168

1 agree to subsequently provide in the current ones
2 that are at issue certainly no later than the 13th,
3 probably earlier than that if we get a ruling from
4 Your Honor on the 6th.

5 And I believe that that allows a reasonable
6 amount of time for the parties to finalize testimony
7 that should already be well in the works. I would
8 note that the discovery responses from Staff and
9 Public Counsel that led to the motions for
10 continuance initially have been responded to. I
11 understand there are some issues outstanding that
12 we're going to continue to discuss with them, but an
13 extension for the other parties until January 10th
14 seems much broadly beyond the scope of what was
15 originally requested.

16 Additionally, it seems reasonable to us
17 that a discovery cutoff a week from today for
18 propounding additional requests might be an
19 appropriate way to go, given that the parties have
20 already had over two months, or almost exactly two
21 months to the day, to propound discovery requests on
22 the joint applicants' initial filing.

23 JUDGE MOSS: So you'd cut off discovery
24 requests on November 30th?

25 MS. ANDERL: Yes.

00169

1 MR. WILTSIE: Your Honor, for Qwest, we
2 agree, given the motions for continuance that are
3 presently before you, where everyone was basically
4 asking for just two weeks or, in some cases, three
5 weeks, that the January 31st date is the most
6 appropriate. To delay this hearing another
7 essentially two months would severely handicap the
8 applicants in making this merger come to closure.
9 This is one of several states where this merger is
10 pending and we're attempting to get all the states
11 closed as rapidly as possible. To delay until March
12 will risk putting Washington in the last batch that
13 will come to closure.

14 The record will be fully developed or
15 should be fully developed by the end of -- by the
16 middle of next month. We would anticipate that most
17 of the data requests have already come in. They've
18 been at this for two months. There shouldn't be much
19 more to hit us with, and accordingly, we should be
20 able to hit all the deadlines, as Ms. Anderl has
21 stated.

22 JUDGE MOSS: Does anybody else want to be
23 heard?

24 MS. JOHNSTON: I just would like to say one
25 thing, Your Honor, and that is that I don't think --

00170

1 I don't think the companies should be permitted to
2 have it both ways. They should not be permitted to
3 come in here and say that time is of the essence, a
4 ruling on the merger is urgent, yet at the same time
5 flaunt the Commission's discovery rules and not --
6 just flatly not comply with discovery requests.

7 And they have failed to comply with
8 discovery requests not only of Staff, but also of
9 Public Counsel and also each of the intervenors.
10 They made an early commitment for a seven-day
11 turnaround time, and not once, in Staff's experience,
12 has that date been satisfied. I don't believe, in
13 fairness to the Commission Staff's case, that Staff's
14 case should be compromised in favor of the companies.
15 That's all I have. Thank you.

16 JUDGE MOSS: Mm-hmm. Mr. Kopta, I believe
17 you had something to add?

18 MR. KOPTA: Yes, Your Honor. Thank you.
19 We agree with Commission Staff that the schedule that
20 the applicants have proposed is not workable. As far
21 as my understanding is, there are still the vast
22 majority of data requests that we have outstanding,
23 and I'm not sure whether US West and Qwest are able
24 to represent that they would actually be able to
25 provide responses on the 13th, as they've

00171

1 represented, but even if they can, a lot of that
2 information is information that's needed to develop
3 testimony.

4 And in addition, there are major filings in
5 another docket before the Commission that are due on
6 the 15th, which effectively leaves very little time
7 to be able to put testimony together for the
8 intervenors.

9 Another issue is the roughly three weeks
10 between the rebuttal testimony on January 10th and
11 the start of the hearings on the 31st. There have
12 been instances in the past in which a great deal of
13 rebuttal testimony has been filed and would require
14 additional discovery, and that simply doesn't allow
15 enough time to digest that amount of testimony and
16 propound discovery to adequately prepare for hearings
17 that start three weeks after the testimony is filed.

18 I will also note that the March date for
19 hearings is one week after -- or the following week
20 after hearings in Utah, and so there's already at
21 least one other state proceeding that's going to be
22 along the same path that the joint parties have
23 proposed. And I fail to see any prejudice to the
24 applicants by having Washington on the same timeline
25 as another state, as opposed to having it going

00172

1 through the problems of getting everything done by
2 the end of the first week of February.

3 MR. HARLOW: We support the Staff schedule.
4 I think, if history has proved anything, it's that we
5 always tend to underestimate the time these
6 proceedings are going to take.

7 MR. VAN NOSTRAND: Your Honor, I have a
8 brief response.

9 JUDGE MOSS: Go ahead.

10 MR. VAN NOSTRAND: I just want to know,
11 when Staff originally made the request for a
12 continuance, I think US West and Qwest responded with
13 a reasonable proposal, which indeed needs to be
14 slipped in light of the fact that we're not going to
15 have responses to the discovery requests completed
16 until the 10th.

17 But if you look at requests for continuance
18 filed by virtually all of the parties, they asked for
19 a filing date for their testimony two weeks after the
20 responses were provided. If indeed US West files its
21 responses on the 10th, two weeks, the 24th, move it
22 up to the 23rd, so it's not filed on Christmas Eve,
23 but that -- the 23rd date for filing testimony
24 virtually grants the requests for continuance that
25 were made by AT&T, Public Counsel, Northwest Pay

00173

1 Phone Association to slip it and give them another
2 two weeks. It's a month continuance which they
3 didn't even ask for in their original request.

4 I mean, it seems like the response of the
5 applicants was reasonable in agreeing that a
6 continuance was necessary, and now, if the Staff
7 schedule is adopted, they'll be given a continuance
8 far beyond what any party has asked in their written
9 pleadings.

10 MS. JOHNSTON: The fact of the matter is,
11 Your Honor, the responses -- adequate responses or
12 responses at all have not been provided, so the fact
13 that Commission Staff, in its early motion for
14 continuance, requested a much shorter period of time
15 within which to file its prefiled direct testimony
16 and exhibits is irrelevant.

17 JUDGE MOSS: But if you had two weeks after
18 the time you received all your responses to your
19 satisfaction, that would be consistent with your
20 original motion for continuance, wouldn't it?

21 MS. JOHNSTON: That would, Your Honor.

22 JUDGE MOSS: And wouldn't that be adequate
23 time, given the current state of your preparation?

24 MS. JOHNSTON: That would be adequate time,
25 but as I stated in my request for continuance

00174

1 initially, it is a very, very large assumption that
2 we will have completed discovery by any date chosen.

3 JUDGE MOSS: Right. Well, I'm going to
4 take care of that assumption. Here's what we're
5 going to do. All first round data requests are to be
6 completed and in the hands of the applicants by
7 November the 30th.

8 All responses to those data requests and
9 any other outstanding data requests, with the caveat
10 that there may be some additional discussion on the
11 6th that will lead to some rulings on motions to
12 compel and so on, so forth, all those responses must
13 be in hand to the requesting party by December the
14 10th.

15 If that occurs, then the Staff, intervenor
16 and Public Counsel testimony will be due -- frankly,
17 I guess the 24th is a holiday, since the 25th falls
18 on a Saturday, so let's do go with the date the 23rd.

19 Rebuttal testimony will be due on January
20 the 10th, and the hearings will commence on January
21 the 31st, and we will keep blocked out that period
22 through February 7th, with the reminder that
23 Wednesday morning, February 2nd, will be unavailable
24 to us because of the Commission's open meeting.

25 Now, if the first round discovery is not

00175

1 satisfactorily completed by December the 10th, the
2 Staff, intervenor and Public Counsel testimony date
3 will be slipped to January the 10th, the applicants'
4 rebuttal will be slipped to February the 7th, and the
5 hearings will be held in the March 13 through 20
6 period.

7 I recognize that, in doing this, I'm
8 opening the door slightly to gamesmanship, but I
9 caution you to not do that. I've been at this a year
10 or two, and I think I'll recognize it if that's
11 what's going on. So I want you all to exercise the
12 highest degree of professionalism in dealing with
13 this.

14 This is serious business. There's a lot of
15 money involved here, there's a lot of parties
16 interested in this and quite seriously interested in
17 this, and let's all give it the serious attention
18 that it deserves and not just play at being lawyers.

19 It is preferable to me and preferable to
20 the Commission, I believe, to the extent I can speak
21 for them without having consulted them directly on
22 the specific point, that we move this proceeding
23 along and try to get these hearings at the end of
24 January and beginning of February, if we can. That
25 is going to require US West to perhaps give a little

00176

1 where it might prefer to advocate a bit more ardently
2 to be sure that these parties, other parties are
3 satisfied in the discovery process.

4 It is going to require these other parties
5 to be realistic in the realization of their
6 expectations of what they can hope to learn through
7 the discovery process. And I want you all, again, to
8 just exercise the highest degree of professionalism.
9 I've seen all of you before, I think, and I think you
10 are some of the finest lawyers that appear here. And
11 I'm sure you're up to this, and so I want you to --
12 again, I'm just encouraging you, trying to encourage
13 you to proceed in this fashion.

14 And my interest and my only interest in all
15 of this is seeing to it that the Commission receive a
16 well-developed record and benefit from the highest
17 level of advocacy that you all can muster, and if
18 that means we have to adjust the schedule yet again,
19 we'll do so.

20 But I think it is in everyone's best
21 interests to try to make the extra effort, and it is
22 an extra effort, and that's why I'm spending time and
23 all of your money emphasizing this. Is everybody
24 clear on the schedule I've set and the conditions
25 under which I've set it?

00177

1 MR. FFITCH: I have a question, Your Honor.

2 JUDGE MOSS: Yes, sir.

3 MR. FFITCH: What would be the discovery
4 cutoff timelines following the filing of rebuttal?

5 JUDGE MOSS: I will confess that the
6 post-rebuttal testimony process of discovery is a
7 little bit novel in my years of experience. I know
8 it's something done here at this Commission. As I
9 understand that process, and I'm asking for help
10 here, that is to permit you to flesh out your tool
11 box for purposes of cross-examination. Is that the
12 basic purpose of that discovery?

13 MR. FFITCH: Yes, Your Honor.

14 JUDGE MOSS: So it seems to me that you
15 would need to have that completed say at least three
16 business days in advance of the hearing in order to
17 benefit fully from it.

18 MR. FFITCH: Yes.

19 JUDGE MOSS: And I actually can recall
20 circumstances where discovery has been delivered
21 during the course of hearings and has been disruptive
22 and led to their delay. And that's not just here.
23 I've seen that in other jurisdictions, as well.

24 Why don't we require that all data
25 responses be due under the seven-day rule that we

00178

1 have currently in place at least three business days
2 in advance of the first hearing date, whatever that
3 turns out to be. Is that workable? If it's not,
4 tell me.

5 MS. JOHNSTON: That's fine, Your Honor.

6 MR. FFITCH: That sounds fine. So that
7 there would be no -- you have to count back from that
8 --

9 JUDGE MOSS: Yeah, you'd have to count back
10 from that and make sure you propounded your request
11 in sufficient time. Of course, I would expect you to
12 propound them as early as you could, so that that
13 would give the applicants the opportunity to have the
14 maximum amount of time to respond. But certainly,
15 then, if we're talking about a seven-day rule, we're
16 talking three business days before the beginning of
17 the hearing, you would need to do that at least 10
18 days before.

19 MR. WILTSIE: Your Honor.

20 JUDGE MOSS: Yes, sir.

21 MR. WILTSIE: I would request that, within
22 three days after receiving our rebuttal testimony
23 that they propound their data requests. We don't
24 want to be both preparing for the hearing and
25 responding to data requests right up to the very end.

00179

1 They should be able to get their data requests out
2 the door -- three business days would be fine. I'm
3 not sure where our dates --

4 JUDGE MOSS: How about that?

5 MS. JOHNSTON: I disagree. Particularly,
6 as I stated at the opening prehearing conference in
7 this matter, it's been my experience that the
8 rebuttal cases filed by US West are extraordinarily
9 larger and more substantial than the opening. And in
10 this case, we have a mere 10 pages of testimony and
11 three witnesses stating that the merger's a fine
12 idea. So without more, I am very concerned that the
13 rebuttal case be just that, and be limited.

14 MR. KOPTA: Your Honor, if I might point
15 out, looking at the calendar, the 17th of January is
16 Martin Luther King Day, so if you count back 10
17 business days, we'd have to propound discovery by the
18 14th. If their testimony is filed on the 10th, it's
19 essentially within four days after receiving the
20 testimony at the end of the day on the 10th, which is
21 when I would certainly anticipate receiving it.

22 JUDGE MOSS: All right. I think we'll
23 stick with my plan. And it seems to yield about the
24 same net result anyway, thanks to somebody who can
25 count in the room.

00180

1 I will say this, as well. And to
2 accommodate your concern, Ms. Johnston, and that is
3 that, as with respect to anything in one of these
4 proceedings, if you come to me with a petition -- or
5 I think of them as motions, but I think we usually
6 call them petitions or requests in our procedural
7 rules, and demonstrate some good cause, then we will
8 take that matter up. If we get a 4,000-page rebuttal
9 case in here and you have four days to get through
10 that and propound discovery, I might find that an
11 unreasonable burden to have been imposed on you.

12 So we'll see what happens, is all I can say
13 about that. I agree that that's a risk in these
14 cases. The Commission has not yet devised a set of
15 procedural rules that will perhaps reverse this trend
16 toward parties putting their case in chief on in
17 rebuttal, but I think that handwriting is probably on
18 the wall, because it's beginning to happen more and
19 more, and frankly, it makes life very difficult for
20 everyone. But we'll take that up if it's a problem.

21 MS. JOHNSTON: Thank you.

22 MR. BUTLER: Your Honor, given the short
23 timelines here, would we ask that Your Honor require
24 that the rebuttal testimony be submitted to the
25 parties in an electronic format, so those of us that

00181

1 have clients that are located out of state aren't
2 prejudiced by the slowness of the U.S. mail?

3 JUDGE MOSS: That's not going to be a
4 problem for you, is it, looking at the applicants
5 here?

6 MS. ANDERL: It should not be, Your Honor.

7 JUDGE MOSS: We require that you file that
8 testimony here electronically or submit it
9 electronically so that we can put it on our computer
10 and I could read it on the train on the way to
11 Seattle, if they ever build it.

12 MS. ANDERL: Yes, Your Honor, there are
13 some isolated documents that exist in hard copy only,
14 and sometimes scanning them in proves to be more
15 troublesome than it's worth. Absent that, we can do
16 it electronically.

17 JUDGE MOSS: I think the primary interest
18 will be in the actual testimony itself and the
19 exhibits, to the extent that can be readily found,
20 but some will probably have to be a day late.

21 MR. FFITCH: I hesitate to bring this up,
22 but --

23 JUDGE MOSS: Well, then, don't. Go ahead.

24 MR. FFITCH: The prehearing conference
25 order specifies that witness and exhibit lists be

00182

1 provided three days before the hearing.

2 JUDGE MOSS: Yes.

3 MR. FFITCH: Three business days. It
4 appears to me that if that's the same day that -- the
5 last day for us to receive discovery, those two are
6 related, and we may not have time to prepare those
7 lists and get them filed that day.

8 JUDGE MOSS: Suppose you could do it 24
9 hours in advance?

10 MR. FFITCH: Of the hearing?

11 JUDGE MOSS: Mm-hmm.

12 MR. FFITCH: That would be easier to
13 handle. I know that we've worked on that kind of
14 basis before. So you're saying that the witness list
15 and exhibit lists would be due 24 hours in advance of
16 the hearing?

17 JUDGE MOSS: That should give me adequate
18 time. Those things are primarily for me. They help
19 me manage the case from the bench. And I do
20 appreciate the efforts that parties take to put those
21 things together, and I spend a lot of time with them
22 so that we can come in here and rip through this
23 material in the most efficient way possible. And I'm
24 prepared to deal with that in the 24 hours preceding.

25 So what I'm suggesting is, let's see, if we

00183

1 end up in hearing on the 31st of January, that's a
2 Monday. If you could get those things to me Friday
3 night, that would work for me. I can take care of my
4 task over the weekend and be ready to go Monday
5 morning.

6 MR. FFITCH: There was one other component
7 to that, which I didn't mention, but there's
8 cross-examination exhibits, too, that were subject to
9 that same rule, the three-day rule. I guess I might
10 suggest that we request perhaps a rule under which
11 those exhibits are only due for the first day of
12 witnesses, and maybe a rolling 24-hour period to make
13 those available.

14 JUDGE MOSS: That is probably workable.
15 What, of course, the purpose of that is is that we --
16 there's been a trend in American jurisprudence for
17 quite some years to try to avoid surprise at hearing.
18 So although some parties have criticized my practice
19 in this regard, because they like surprise at
20 hearing, I get to decide, and I don't like surprise.

21 So the point is that you want to share
22 those exhibits to the extent possible. And I realize
23 we'd make exceptions if it came up, but sometimes
24 something comes up at the last moment or a witness
25 does something on the stand that causes you to want

00184

1 to create a demonstrative exhibit or that sort of
2 thing, I'm flexible about that. But what I want is
3 to have, to the maximum extent possible, everybody
4 knowing what's going to happen, so I don't hear
5 somebody say, Oh, they just gave me this 60-page
6 thing and I don't have time. You know, what that
7 does, that leads to delay, because I'm going to do
8 everything I can to protect the parties' due process
9 rights. And I have to agree that if you see a
10 60-page exhibit for the first time 10 minutes before
11 a witness is on the stand, it's sort of hard to do
12 effective cross-examination. So that's the purpose
13 of that. I think a rolling 24-hour rule would work.

14 And again, I expect the parties to proceed
15 in good faith and professionally, which means if you
16 have it ready two days in advance, go ahead and give
17 it to them, but you know, you won't have to burn the
18 midnight oil to do that, necessarily, if we have a
19 rolling 24-hour.

20 So I'll see if I can think of some elegant
21 way to amend the prehearing conference order and the
22 process in the case to describe these things we're
23 talking about. I think we can work that out.

24 MR. FFITCH: Thank you, Your Honor.

25 JUDGE MOSS: Anything else?

00185

1 MS. ANDERL: Yes, Your Honor.

2 JUDGE MOSS: Go ahead.

3 MS. ANDERL: Just a clarification that the
4 joint applicants will be permitted to propound
5 discovery requests to Staff and Public Counsel and
6 the intervenors after they file their testimony, and
7 a suggestion that we may wish to establish a cutoff
8 for that, as well.

9 JUDGE MOSS: That's certainly a
10 possibility.

11 MS. ANDERL: Although we wouldn't
12 necessarily advocate a cutoff. In fairness, it seems
13 as though --

14 JUDGE MOSS: I think balance demands that
15 we establish some dates.

16 MS. ANDERL: Precisely.

17 JUDGE MOSS: So if the Staff, intervenor
18 and Public Counsel testimony is filed on December the
19 23rd, it seems to me December the 27th might be a
20 good day for that. No, it wouldn't.

21 MS. JOHNSTON: I was going to suggest the
22 25th.

23 JUDGE MOSS: All right. So we'll have the
24 applicants' data requests -- how long are we giving
25 these folks after rebuttal? Four days; is that

00186

1 right? Is that what we decided it worked out to be?

2 MR. KOPTA: Yes.

3 JUDGE MOSS: But you know, I mean, come on,
4 it's the holidays here. We'll have to give you --
5 why don't we say by -- would by the 30th give you
6 enough time, do you think? That would be for filing
7 those.

8 MS. ANDERL: The 30th is acceptable to the
9 applicants. It would afford us enough time to
10 propound requests.

11 JUDGE MOSS: Right. And then the responses
12 would be expected under the current rule by January
13 the 7th. Boy, I wonder if we need to build in a
14 couple days for the millennium bug here. We are
15 actually operating at this Commission under a
16 guideline that says we will not issue orders,
17 schedule hearings, or other critical dates from
18 January 1st through January 10th. I say at the
19 Commission. My division is operating under that
20 guideline.

21 And so what I think I will do, then, in
22 keeping with that guideline, is say that the
23 responses to discovery propounded by December 30th by
24 applicants will be due by the 11th.

25 MR. WILTSIE: Your Honor, that would put it

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1 past the date for our rebuttal testimony.

2 JUDGE MOSS: That won't work, then, will
3 it?

4 MR. WILTSIE: We could slip the rebuttal
5 testimony.

6 JUDGE MOSS: We do have room in here to
7 slip the rebuttal testimony..

8 MS. JOHNSTON: That gives us no time to
9 conduct discovery of the rebuttal case, Your Honor.

10 JUDGE MOSS: Well, it gets tight, doesn't
11 it? Well, it's your discovery.

12 MS. ANDERL: Your Honor, if --

13 JUDGE MOSS: You want to try to do it in
14 two days?

15 MS. ANDERL: Well, the reality of it is is
16 that the attorneys aren't the only ones who have to
17 think up these questions. We have to get the
18 testimony to our witnesses, et cetera, et cetera. My
19 thought is if we would be permitted some sort of a
20 supplemental filing if we got data request responses
21 that we felt we needed to include in our testimony or
22 some sort of a deal with it if it comes up sort of
23 solution, rather than trying to formalize something
24 now.

25 JUDGE MOSS: Well, I also -- you know, at

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1 the same time, I have to give -- well, I guess we'll
2 just have to not worry about this millennium bug
3 thing. Under the normal rule that we're following,
4 the data responses would be due by the 7th if they
5 were propounded by the 30th.

6 MR. KOPTA: Actually, that's not quite
7 accurate. It would be the 10th, if you're talking
8 about seven business days. The 31st is a holiday.

9 JUDGE MOSS: Be that as it may, I'm going
10 to make them due on the 7th.

11 MR. FFITCH: Those are the --

12 JUDGE MOSS: These will be responses by the
13 intervenors, Staff, and Public Counsel to any data
14 request propounded by the applicants by the 30th.

15 MR. KOPTA: Your Honor, may I interject
16 that --

17 JUDGE MOSS: You may.

18 MR. KOPTA: -- if we get data requests at
19 4:55 on the 30th before a holiday, effectively we
20 don't really get them out till the 3rd, so you're
21 giving us basically five business days to respond.

22 JUDGE MOSS: That is what I'm doing.

23 MR. KOPTA: May we ask that the applicants
24 have that same period of response after their
25 rebuttal testimony?

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1 JUDGE MOSS: I don't see any reason for
2 that. We're shortening this because we're trying to
3 work with a compressed schedule. This is -- if
4 something comes up and it just is impossible to do,
5 well, it's impossible to do. But it just requires
6 hard work. And that's part of this.

7 MR. KOPTA: I understand. I'm just asking
8 that applicants also respond within five business
9 days to discovery propounded to them.

10 JUDGE MOSS: I'm asking that everybody work
11 diligently to respond as quickly as they can to all
12 discovery. And I don't expect any party to hold back
13 and file and submit everything at once. It's going
14 to be an ongoing, rolling thing. I would suspect
15 that the day after some data requests are filed and
16 maybe two days later, some responses can begin being
17 provided, if that is workable.

18 MR. VAN NOSTRAND: Your Honor, in response
19 to Mr. Kopta's specific concern, we could move that
20 to noon on the 30th, so that it wouldn't be -- I
21 mean, it is a problem when a crunch of data requests
22 comes in at 4:55 on the day. If that would help, so
23 he could at least --

24 JUDGE MOSS: Okay. High noon, which time
25 zone, Mr. Van Nostrand?

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1 MR. VAN NOSTRAND: Pacific.

2 JUDGE MOSS: Pacific. Is that Pacific
3 standard or Pacific daylight?

4 MR. VAN NOSTRAND: Whatever is prevailing
5 at the time.

6 JUDGE MOSS: I don't know. Pacific time,
7 PT, all right. Twelve noon in hand. Okay. Anything
8 else? Everybody's getting hungry. All right. Are
9 we set on the schedule now? Appears that we are.

10 I mentioned I had a couple of other things
11 to bring up today, and I'm going to do that quickly,
12 and then we'll be out of here.

13 MR. KOPTA: May I ask one other scheduling
14 question, not for this particular schedule, but for
15 the discovery conference on December 6th, have we set
16 a time for that?

17 JUDGE MOSS: Yeah, I'm going to have to see
18 what I can find in way of a room and whatnot. I'm
19 hopeful that we'll do it at 9:30 in the morning, but
20 it may be that we have to do it at 1:30 or some other
21 time, depending on the availability of space. Of
22 course, you all are going to resolve all this and
23 we're not going to have to have that conference
24 anyway.

25 MR. KOPTA: If I win the lottery, then that

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1 will resolve it for me.

2 MS. WU: That's a 10 to 15 million chance
3 to one.

4 JUDGE MOSS: That's probably about as
5 likely as you all resolving all this discovery. All
6 right. A few words about filing requirements. I
7 want to remind the parties that the Commission does
8 not accept filings by facsimile, except by prior
9 arrangement. The reason for that is that even though
10 we're moving toward an electronic world, we're not
11 there yet. When you file something by facsimile, it
12 creates quite a bit of difficulty for our Records
13 Center staff, who must then pause what they are
14 doing, make the appropriate number of copies that you
15 are required to file, and distribute those according
16 to the distribution guidelines of the Commission.
17 This is burdensome for them, especially when the
18 thing is going to come in in a timely fashion the
19 next day.

20 It's all well and good to send me a
21 courtesy copy by facsimile, but don't be filing
22 things by fax, except by prior arrangement. Because
23 it does cause them problems, they're very nice
24 people, and I get along with them well, and I don't
25 like to be in the middle of it. So please follow

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1 those requirements.

2 I have also seen a couple of filings come
3 across my desk unsigned, and I don't know what's
4 happening about that, but that's the way they're
5 coming to me. And if they're being filed and they're
6 signed and so forth, fine, there's not a problem
7 here. But if you all are filing documents without
8 signing them, that is going to be a problem, I think,
9 because the Records Center shouldn't be accepting
10 them. So I want to caution you to be diligent about
11 that, be careful about that. These are minor things,
12 but the Commission does have rules about these things
13 and can refuse to accept them.

14 MR. KOPTA: May I interject something at
15 this point? It's been my experience that when that's
16 happened, it's because we have e-mailed down an
17 electronic copy and also messengered down the
18 original.

19 JUDGE MOSS: Like I said, as long as you're
20 getting a signed one in, that's fine. I'm just
21 telling you what comes to me. So when I see that, it
22 causes me to want to say something to make sure that
23 everybody's being diligent about following the rules,
24 so that no one's due process rights are compromised
25 by their own act or failure to act. So those are

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1 just a couple of points.

2 Oh, I need to rule on the motion to
3 intervene. The Commission has considered the motion
4 to intervene by.

5 MS. JOHNSTON: New Edge.

6 JUDGE MOSS: -- New Edge Networks, Inc.,
7 has considered the applicants' response thereto, and
8 the petition is denied.

9 Now, I have a few words to say about ex
10 parte contacts. The Commission's ex parte contact
11 rule is WAC 480-09-140, entitled ex parte
12 communications. Although I have a copy here in front
13 of me, I'm not going to read that into the record.
14 Basically, what that rule forbids is that once a
15 matter is a formal adjudication before the
16 Commission, then -- and prior to its final
17 determination, no party to the proceeding or counsel
18 for a party or other person on behalf of a party
19 shall discuss the merits of the proceeding with the
20 Commissioners, the presiding officer, or the
21 Commissioners' Staff, assistants, assigned to advise
22 the Commissioners in the decisional process. And
23 then there's some exceptions with notice and things.

24 When there is such correspondence or
25 communication, it is my obligation, as the presiding

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1 officer, to disclose that on the record, and give
2 parties an opportunity to respond to it if they feel
3 necessary. Of course, communications on procedural
4 aspects are exception. And finally, the Commission
5 may prescribe appropriate sanctions, including
6 default for any violation of the related
7 administrative procedure or provision which was cited
8 in the rule. So you all can go read the rules
9 yourselves later.

10 There have been several communications
11 received in the context of this case. I do not -- I
12 have not determined that these really necessarily, I
13 should say, violate the ex parte rule, which is
14 written fairly narrowly in this jurisdiction, but I
15 do want to put these on the record, disclose these on
16 the record, and copies can be made available to you.

17 These were all filed with the Commission
18 and are available in the file for this docket. Two
19 of these letters are anonymous, which my personal
20 belief is the Commission should not accept anonymous
21 documents for filing, but it does. They are
22 obviously matters that would be of no significance to
23 the determination of the case, just by their very
24 nature. They are unreliable.

25 One of them is a letter dated September

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1 14th, 1999, directed to the Chairwoman of the
2 Commission, Ms. Marilyn Showalter. That document
3 shows a file stamp of September 15th, of this
4 Commission. I'm not going to put the contents of it
5 into the record. To be blunt, I think it is a matter
6 of no consequence, but here it is. You may get
7 copies if you wish.

8 The other is also anonymous. I believe it
9 came in as part of the material that was submitted by
10 the Pension Equity Council, whose intervenor status
11 was denied. Somehow it came to me as a single sheet
12 without a file stamp, but somehow landed on my desk.
13 Again, a matter of small consequence.

14 The other document, which is more -- which
15 is arguably more squarely within the ex parte rule
16 and a violation or potential violation of it is a
17 letter that was received by the Commission November
18 1st, 1999, addressed to Chairwoman Marilyn Showalter
19 from Joseph P. Nacchio, Chairman and Chief Executive
20 Officer of Qwest. The letter, I think, in its
21 substance, is probably innocent enough and harmless
22 enough, but it does make direct reference to the
23 merger proceeding, which was at that time a docketed
24 adjudicatory proceeding.

25 So this sort of communication should not

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1 occur, and I just -- again, this is a matter of
2 public record, it's in the Commission's files, and
3 anybody who wants to can look at it. I'm not
4 suggesting that there need be any sort of response to
5 it or that parties need to deal with it in their
6 testimony or otherwise; I just wish to remind all the
7 parties that the Commission does have this rule,
8 takes it seriously, and we want to be sure that we
9 don't have any problems in this regard down the line.
10 So that's all I have to say about that. Do we have
11 any other business to conduct today?

12 MR. FFITCH: Your Honor, if we wish to
13 request a copy of any of those documents, can we do
14 that through the Records Center?

15 JUDGE MOSS: Yes, or I am perfectly willing
16 to make the copies that I have here available to you
17 right now and somebody can make copies of them. That
18 might be easier for you or you can certainly request
19 them through the Records Center, whichever is your
20 preference.

21 Anything else? With that, I thank you all
22 and hope that you have a hearty, healthy lunch and
23 happy Thanksgiving. We're off the record.

24 (Proceedings adjourned at 1:40 p.m.)
25