

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 In the Matter of the Petition)
4 of QWEST CORPORATION to) DOCKET NO. UT-033044
5 Initiate a Mass-Market)
6 Switching and Dedicated) Volume VIII
7 Transport Case Pursuant to) Pages 493 to 541
8 the Triennial Review Order.)
9 _____)

10 A hearing in the above matter was held on
11 March 2, 2004, from 9:45 a.m to 2:00 p.m., at 1300 South
12 Evergreen Park Drive Southwest, Room 206, Olympia,
13 Washington, before Administrative Law Judge ANN RENDAHL
14 and Chairwoman MARILYN SHOWALTER and Commissioner
15 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.

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5 EXHIBIT: MARKED: ADMITTED:

6 (No exhibits marked or admitted.)

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

2 JUDGE RENDAHL: We're back on the record this
3 morning, Tuesday, March 2nd, and we're continuing with
4 the cross-examination of Mr. Shooshan, and I believe now
5 Mr. Butler for WeBTEC has a few questions for
6 Mr. Shooshan.

7

8 Whereupon,

9 HARRY M. SHOOSHAN,
10 having been previously duly sworn, was called as a
11 witness herein and was examined and testified as
12 follows:

13

14 C R O S S - E X A M I N A T I O N

15 BY MR. BUTLER:

16 Q. Good morning, Mr. Shooshan.

17 A. Good morning, Mr. Butler.

18 Q. Could you please turn to pages 56 and 57 of
19 your direct testimony, Exhibit 1-T, please.

20 A. Yes, sir, I'm there.

21 Q. Beginning on line 14 of page 56 and
22 continuing through line 10 of 57, you have an answer
23 there that addresses the subject of the appropriate
24 crossover point where it makes economic sense for a
25 multiline customer to be served via a DS1 or higher

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1 capacity loop; is that correct?

2 A. Yes.

3 Q. And in that answer, you quote from Paragraph
4 497 of the TRO, which in this proceeding is Exhibit 115,
5 and then state on lines 5 through 7 on page 57:

6 I have not seen any evidence leading me
7 to believe that it would be appropriate
8 to challenge the FCC's presumptive
9 crossover point. Qwest therefore
10 recommends that the Commission utilize
11 the four line presumption.

12 Do you see that?

13 A. Yes.

14 Q. Is it your recommendation that the Commission
15 utilize the four line presumption from the FCC, or is
16 that a Qwest recommendation with which you concur?

17 A. It's a Qwest recommendation with which I
18 concur.

19 Q. Okay. But you did not originate that; is
20 that correct, that recommendation?

21 A. I did not originate that, but I support the
22 -- I think Qwest's position is supportable.

23 Q. Okay. At line 19 of page 56 and continuing
24 through line 4 of page 57, you quote from Paragraph 497
25 of the TRO. Could you please turn to Exhibit 115,

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1 Paragraph 497, please.

2 A. Yes, I'm there.

3 Q. If you could locate the sentence that begins,
4 we expect that in those areas where the switching
5 carveout was applicable, I believe it's the seventh
6 sentence in that paragraph or the third from the end --

7 A. Yes.

8 Q. -- of that paragraph. Do you see that?

9 A. Yes.

10 Q. After that clause in Exhibit 115, the TRO,
11 there is a parenthetical which reads, i.e., density zone
12 1 of the top 50 MSAs. Would you agree that the
13 reference to the top 50 MSAs means the top 50 MSAs in
14 the country?

15 A. Yes.

16 Q. Which MSAs, if any, in Washington state are
17 among the top 50 MSAs in the country?

18 A. Well, I think at the relevant point in time,
19 which would -- I think would be the 1999 UNE Remand
20 Order, which is when this conceptually came into being,
21 I believe that two of the MSAs that are in Qwest's case,
22 Seattle and Vancouver-Portland, were in the top 50 MSAs.

23 Q. Which wire center areas in the Seattle or
24 Vancouver-Portland MSAs would fall within density zone
25 1?

0500

1 A. I don't know off hand.

2 Q. Is there another Qwest witness that would
3 know that?

4 A. Yes, there may be.

5 Q. Would that be Mr. Copeland?

6 A. Mr. Copeland more than likely, yes.

7 MR. BUTLER: Okay, thank you, that's all the
8 questions I have.

9 JUDGE RENDAHL: Thank you, Mr. Butler.

10 We'll now turn to questions from the Bench
11 beginning with Chairwoman Showalter.

12 CHAIRWOMAN SHOWALTER: I'm not quite ready
13 yet.

14 JUDGE RENDAHL: Let's be off the record for a
15 minute.

16 (Discussion off the record.)

17

18 E X A M I N A T I O N

19 BY CHAIRWOMAN SHOWALTER:

20 Q. Good morning, if you could turn to --

21 A. Good morning.

22 Q. -- Exhibit 5.

23 A. Let me just be clear here.

24 Q. That's your HMS-4.

25 A. Oh, the flow chart?

0501

1 Q. The flow chart.

2 A. Oh, yes, thank you.

3 Q. It's Exhibit 5, it's Qwest's flow chart. I'm
4 going to ask Mr. Shooshan to compare Qwest's flow chart
5 to the flow chart we have been using.

6 A. Okay.

7 Q. But wait until everyone has it. I'm just
8 interested in what the differences are in your flow
9 chart versus the one that we labeled with A, B, C, et
10 cetera. And obviously you have some references to the
11 TRO and the rules, but are there other differences? If
12 so, please point them out.

13 A. Yes. Maybe we could start at the top, and I
14 will refer to letters that are on the flow chart that is
15 the exhibit that was prepared by the Commission.

16 Box A in your flow chart is different than
17 the one in the -- attached to my rebuttal testimony,
18 response testimony. The box in your flow chart, the
19 Commission's flow chart, says state determines the
20 appropriate geographic market. The box in my flow chart
21 says, parties propose definitions of relevant market,
22 and that simply reflects the fact that that's how these
23 proceedings are in effect being teed up. That is that
24 it's the incumbent typically that files the testimony
25 and specifies the relevant market as opposed to the

0502

1 Commission abstractly making that determination, so
2 that's one change.

3 Q. But maybe you're going to get there, but I
4 see that you have an extra box.

5 A. Yes.

6 Q. Maybe on the left-hand side.

7 A. Yes.

8 Q. So you're saying that as a process matter
9 here, Qwest proposes a definition, but after some
10 analysis the state, that is this Commission, determines
11 the relevant market?

12 A. Yes.

13 Q. But it's not geographic, it's not only
14 geographic, it's the market?

15 A. No, let me be clear.

16 Q. Okay.

17 A. It's the relevant -- it's the -- let me now
18 -- let me go to that box that's on the far left of my
19 flow chart, because there's no comparable box on yours.

20 Q. I'm going to call that A-1.

21 A. A-1, okay, that's good, A-1. The reason
22 that's there is that, again I think this reflects sort
23 of the reality of the way the process is playing out,
24 and it certainly comports with my view of the way that
25 it should, is that the parties, and typically it's the

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1 ILECs, propose a definition of the relevant market in
2 terms of the geographic market, that's the market we're
3 talking about here. It's that market along with the
4 DS0, DS1 cutoff that are the two market areas where the
5 Commission has discretion in my view.

6 And the purpose of that box on the left is
7 that part of the process the states go through in
8 considering that evidence, as well as the evidence from
9 the intervenors, is what relevant market it wants to use
10 in rendering its decision. And the point of the arrows
11 flowing back into that box is that it's informed, that
12 is the Commission's decision hopefully, by the fact
13 finding that's done in the triggers analysis and in the
14 potential deployment analysis, so it's a continuing
15 process.

16 You know, I believe that I have said in my
17 testimony and on the stand, it's perfectly appropriate
18 for this Commission to adopt a definition of geographic
19 market that may be different from that proposed by Qwest
20 as long as it is within the parameters set by the FCC
21 and informed by the facts presented in the case. That's
22 the purpose of that box.

23 And then the only other changes are that
24 whereas in the Commission's flow chart after the
25 wholesale trigger or trigger 2, there's one box for self

0504

1 provisioning, potentially self provisioning, and what we
2 -- what I have done here is to, if you will, unbundle
3 that box a bit and specify the kinds of evidence that
4 the Commission considers in track 2 and the
5 determination that the states make stated in the context
6 of the TRO, that is if CLECs have the potential ability
7 to deploy switches. And so that really is a -- it's two
8 boxes where there used to be one. Otherwise I believe
9 the flow charts are comparable.

10 Q. All right. Actually, I just wasn't following
11 you closely enough.

12 A. I'm sorry.

13 Q. On the original flow chart what letter are we
14 talking about?

15 A. I'm sorry, I didn't follow my own guideline
16 there. In box F.

17 Q. Okay.

18 A. Is the box on the original flow chart that
19 relates to what I am referring to as the track 2 or
20 potential deployment analysis.

21 Q. Okay. And what is comparable to F on the I
22 will call it original flow chart?

23 A. Yes.

24 Q. Your flow chart has two boxes, and the first
25 box begins with what letters, what words?

0505

1 A. State evaluates.

2 Q. Okay.

3 A. And then there are three things that the
4 state evaluates.

5 Q. All right. And then is the next box that
6 begins with state determines, is that also part of F?

7 A. That is also part of F, exactly.

8 Q. So if I called these F-1 and F-2, is that
9 reasonable?

10 A. Yes, that would be very reasonable.

11 Q. And now that I'm thinking about it, I'm going
12 to go back up to the two boxes in the upper left-hand
13 corner, and I'm going to call the one that says, parties
14 propose definitions, I'm going to call that A-1, and
15 then the one that says, state determines relevant
16 market --

17 A. Yes.

18 Q. -- I'm going to call that A-2.

19 A. Yes.

20 Q. Okay.

21 A. That's fine.

22 Q. So basically compared to our flow chart, you
23 have taken two boxes, box A and box F, and broken them
24 into two. But in addition, box A-2 has different
25 feedback loops going to it.

0506

1 A. Yes.

2 Q. All right. And I'm not going to be very
3 articulate about this question I will tell you in
4 advance, but it does relate to your box A-1 and A-2, and
5 it relates to this. If you didn't have an A-2 and we
6 were simply governed say by our old, old, by the first
7 flow chart -- I'm going to have to start over, I'm
8 sorry.

9 What I'm trying to get at is how this
10 Commission determines the appropriate geographic scope,
11 and I will set aside the crossover.

12 A. Mm-hm.

13 Q. But are we supposed to begin with an area
14 such as MSA and say, well, we can't look behind mass
15 market according to you, we've got to lump the
16 residential and business lines together. We might find
17 a switch or three switches in one of those MSAs,
18 therefore, presto, no impairment. And yet we might look
19 at that market in a more real sense, our own sense, and
20 think that to us it doesn't feel like a real market, it
21 feels maybe either too big or too heterogenous. And in
22 your view, are we able to make some judgments about
23 whether we think companies will actually -- either will
24 provide or will market in that manner, in which case we
25 might say, no, this doesn't make sense to us as a

0507

1 market. Or the sort of I would say a little bit more
2 wooden view but perhaps legally required view would be,
3 the FCC says residential and business are part of the
4 same mass market, and if you find a switch somewhere,
5 three switches somewhere, end of story. So do you get
6 what I'm getting at; do you understand what I'm getting
7 at?

8 A. Yes, and that's why I think that informed by
9 -- I remember as you do where the first flow chart came
10 from. It came from the TRIP workshop. And, you know, I
11 was on a panel that discussed that. That was before any
12 of this process started, and I think that we all now
13 have a better feeling for what the TRO intended and in
14 fact the way the states are handling these cases. All
15 of which is to say I think that box that's A-2 on our
16 renumbered or on my exhibit is -- reflects exactly what
17 -- the dilemma is that you're facing, and that is -- and
18 let me contrast it, for example, with the AT&T view
19 which they have presented to you.

20 They have said in effect, define the market
21 broadly. And actually in terms of how we define the
22 relevant geographic market, I'm pretty much in accord
23 with the principles that AT&T puts on the table. They,
24 of course, as has been pointed out by Mr. Smith, would
25 find that there's no trigger candidate anywhere that

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1 satisfies the FCC's rules. Having said that, their view
2 is, if you don't pass the triggers, if you don't meet
3 the triggers in that wire -- in that -- in that market,
4 the LATA as they have suggested, then you get no relief
5 anywhere. And I think that, you know, is contrary to
6 what the intent of the TRO is.

7 What the TRO says is begin your examination
8 of the market using the principles that are relevant to
9 defining geographic markets, and I have talked about
10 what some of those are in my testimony, and Qwest has
11 elected the MSA. Could they have chosen some other
12 market? I have said they could, it would be reasonable
13 to do the LATA, it would have been reasonable to do the
14 collection of MSAs within the LATA, so there are other
15 approaches they could have taken. The question for you
16 is, when you look at the evidence, the actual evidence
17 presented by Qwest in this case, which they have chosen
18 to present by MSA, does that in your mind support relief
19 throughout that entire geographic market.

20 And I think the point I tried to make
21 yesterday was that while sort of reduced to what I would
22 think it would be an absurd, you know, minimalization,
23 one of them said to me if there's three CLECs, each
24 serving one customer in one wire center in the MSA, you
25 get relief everywhere, that's not the case that Qwest

0509

1 has presented. And I think if you look at those charts
2 that compile the evidence presented by Mr. Teitzel and
3 by Mr. Copeland, which I have revised and put into my
4 exhibit at the end of Exhibit 7-T, you see that the
5 actual facts I think in my view not only support Qwest's
6 view that the MSA is a relevant geographic market, but
7 also as I have said too, give you the opportunity as a
8 Commission if you feel that something less than that is
9 desirable based on the hard evidence to pare that market
10 back. What I don't think it gives you the right to do
11 is what AT&T says is to say reject it across the board,
12 give them no relief anywhere.

13 Q. All right, well, let's turn to your Exhibit
14 7-T, page 21, and why don't we take revised figure 4,
15 Olympia.

16 A. Fine.

17 Q. Since we're a little familiar with Olympia.
18 What you are saying here is that Qwest has proposed
19 everything in the box but that through our analysis
20 should we find that in our view, for example, only the
21 first two wire centers form a real market, we would have
22 the ability to pare this market back by eliminating the
23 second two wire centers?

24 A. I'm not recommending that you do that, but
25 I'm saying I believe that that is within your discretion

0510

1 to do. Because again, and I think this is a point I
2 have stressed in my testimony and I would like to
3 emphasize today, the relevant market for purposes of
4 this examination is the market where competitors are
5 unimpaired by the use of their own or someone else's
6 switches.

7 Q. Right.

8 A. That's the relevant market, and that's what
9 the FCC to the extent you are testing the national
10 presumption wants you to examine. And I think the fact
11 that you look, for example, in Olympia and see that
12 although the triggers are not met, that in two of the
13 four wire centers there there are CLECs using their own
14 switches in combination with mass market UNE-L, and
15 there's a positive business case suggests that I think
16 in the MSA as a whole but certainly in those wire
17 centers, those two wire centers, that relief is
18 justified.

19 And I would point out, and this goes back to
20 the points I wasn't able to make during cross from MCI
21 yesterday, there are other important numbers in those
22 boxes too. For example, the percentage of lines, of
23 Qwest lines in the MSA, we're talking about two wire
24 centers of the four in the MSA, but those two wire
25 centers account for 88% of Qwest lines in those wire

0511

1 centers.

2 Q. All right. But what you are saying is that
3 the only two variables we have to work with under the
4 FCC Order in your view is geographical scope and
5 crossover lines; is that correct?

6 A. Well, as far as market definition is
7 concerned, I believe that's correct. You also have a
8 very important role, and it's going to be a matter I'm
9 sure of some debate given the filed testimony, over who
10 qualifies as a trigger candidate. That is something
11 that is critical to the decision you make. But on the
12 issue of markets and relevant market, yes, I believe the
13 TRO leaves you discretion in only two areas.

14 Q. So, for example, in this figure in your view
15 we do not have the discretion to say, well, we think
16 that there's a business market here, but we don't think
17 that there's a residential market, so we want to divide
18 it that way, that line you don't think we have the
19 ability to draw?

20 A. I don't think you do. Because again, the
21 issue here is not, for example, as it was in the
22 business reclassification case that I had the privilege
23 of appearing before you on, what is the relevant retail
24 market and is the business market separate from the
25 consumer market. But in this case, whether the

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1 operational and economic barriers associated with
2 deploying one's own switching differ as between small
3 business and residence. And the example I went through
4 with Mr. Melnikoff yesterday of the small business owner
5 who lived around the corner, you know, his residence, I
6 said that there was no -- there's no difference in terms
7 of the operational or economic barriers to entry in
8 serving those two types of customers as opposed to an
9 enterprise customer.

10 Q. And --

11 A. And so yes, that's why I think it's
12 appropriate.

13 Q. All right. So your interpretation of the FCC
14 Order is that it went through this analysis and found
15 there were no significant differences in residential and
16 business users at the small level, therefore they were
17 one class, they are one class?

18 A. Yes.

19 Q. I guess the question I have is, if that's the
20 case, why don't we see or do we see residential and
21 business users being marketed in a similar manner?

22 A. Well, again, the question I think is --
23 ultimately turns on impairment and the way in which one
24 serves those markets from a technical basis and the
25 overall economics. I think that in many cases you do

0513

1 see small business and residence customers being
2 marketed to in the same way. Small business products
3 such as MCI's Neighborhood Plan for Business is
4 marketed, you know, through newspaper ads, through
5 general channels of communication, just as their
6 residential product is. I think that the FCC
7 acknowledges that, that in many respects from a
8 marketing point of view as well as from a provisioning
9 point of view, they're in the same market.

10 Now the FCC points out and I concede that in
11 some respects business customers differ from -- small
12 business customers differ from residence customers.
13 That is, a small business customer might conceivably
14 have a greater demand for data services than a residence
15 customer. But overall for purpose of the analysis of
16 impairment under the TRO, the FCC has said as opposed to
17 enterprise customers, which are served in a different
18 way, it's appropriate to put small business and
19 residence customers in the same market category.

20 Q. Well, and maybe this is where the discussion
21 and the FCC order and maybe your testimony comes in
22 regarding the "below cost" residential rates, and let's
23 assume for purposes of the question that existing retail
24 business rates are set high enough that it is economic
25 for competitors to come in and compete for those

0514

1 business customers.

2 A. Yes.

3 Q. But assume for the purposes of the question
4 that the residential rates are set too low for that to
5 be the case. Now I think what I understood you to say
6 in your interpretation of the FCC's Order is that that
7 fact is not determinative of much for purposes of the
8 TRO, that what we're supposed to look at is independent
9 of the actual existing retail rates for residential
10 customers is -- well, I'm going to let you finish the
11 sentence, because this is where I am confused. My sense
12 is that the FCC in that situation has the view that
13 there might be no impairment, and yet the result may be
14 a lack of competition, which I suppose the FCC would
15 say, well, that's a Universal Service problem, take care
16 of it, state, or that should be taken care of in another
17 way, but where does this lead?

18 A. What I think we're grappling with here, and
19 again, I start by saying I have offer -- I offer -- I
20 have not looked at in this context or offer any opinion
21 about where rates are here in Washington.

22 Q. Right.

23 A. Let me talk generically about what I think is
24 going on, and this is driven in large part by the
25 courts. The courts have said, and again, this is in the

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1 context of having found on two separate occasions that
2 the unbundling regime established by the FCC was too
3 liberal. In fact, they said it was unlimited
4 unbundling. And they have -- they have -- they have
5 forced the FCC on two occasions, this is now the third,
6 to go back to the drawing board and come up with a more
7 limited definition of impairment. And in so doing, the
8 courts have said, you know, it is not impaired -- it is
9 not impairment of the kind the Act seeks to rectify if
10 entry doesn't occur because retail prices are held
11 unreasonably low by regulation.

12 It will look as if there's impairment because
13 you will -- for example, I don't know, let's look at the
14 wire centers that have no CLEC UNE-L provisioning now in
15 Olympia. It could well be, and again I'm talking
16 hypothetically here, that the retail rates are such in
17 those wire centers that it's not attractive for
18 competitors to enter that market using UNE-L. Again, it
19 looks like because there are blank spaces there that
20 there's impairment, but the FCC says, oh, by the way,
21 you know, one thing you need to go through is, is it
22 nevertheless profitable or could it be in totality for a
23 CLEC to serve those markets.

24 And what we have tried to show here, and I'm
25 sure you will have an opportunity to explore it further

0516

1 with Mr. Copeland, is that not only do two of those four
2 central offices or wire centers have a positive business
3 case, but that the MSA as a whole if you look at the
4 bottom line there where we say net present value of the
5 MSA, of the business case for the MSA is positive. And
6 we're talking about the whole MSA, not just the two wire
7 centers, where it shows a positive business case.

8 So again, if you're talking about serving
9 mass market customers, there are plenty of reasons to
10 expect that a CLEC even though they're not serving those
11 markets with UNE-L today would serve those markets in
12 the future with resale, for example, that's going to be
13 available to them. It may also be that they would offer
14 service to the, you know, high -- there are going to be
15 high volume attractive customers, whether on the
16 residence side or the business side, located in those
17 wire centers, believe me, and they will in time I
18 believe go after those customers in those wire centers
19 too. And they may well do it again in the context of a
20 mass market product, because they don't want to -- they
21 want to avoid concerns about redlining, you know, that
22 they're in the MSA but they're not serving, you know,
23 certain groups of customers, that might be a concern as
24 well.

25 So all I'm saying is that the key, and I

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1 think probably most important thing I would leave you
2 with, is that the admonition which comes really not from
3 the FCC but from the courts that some areas where you
4 might think there's impairment because there's been no
5 entry or little entry may be because of things that the
6 Act was not intended directly to deal with, which is
7 below cost rates set by regulators.

8 Q. All right. But I'm just trying to follow
9 this hypothetical --

10 A. Mm-hm.

11 Q. -- all the way through. So if we assume that
12 let's say these wire centers 3 and 4 have below cost
13 retail rates, but we find no impairment in the whole
14 MSA, we do not require UNE-P or switching to be made
15 available, the competitors then are limited to their own
16 switch or somebody else's switch made voluntarily
17 available.

18 A. Or resale.

19 Q. Or resale. So the competitors might use
20 resale to reach the "below cost" customers?

21 A. Sure, to avoid concerns over redlining, for
22 example, or because they want to fill in the holes of
23 their, you know, product offering.

24 Q. But if they don't, supposing they don't,
25 maybe that's not their business plan, well, then what,

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1 I'm just trying to follow this all the way through, then
2 there are competitors available who are going after
3 let's say some of the business customers in the first
4 two wire centers and maybe some of the residential
5 customers in those wire centers, a few, but for the most
6 part not the rest of the residential customers until
7 such time perhaps as the regulator sets a different
8 retail rate or somehow another retail rate is present.
9 I'm trying to work that through in my mind and say, all
10 right, is this a problem or not a problem?

11 A. I think I -- look, I understand exactly what
12 you're grappling with here, and, you know, I only think
13 that -- I think the problem has been that the very, you
14 know, 500 pound gorilla that's in this room that
15 overhangs all of these discussions is this thing called
16 UNE-P. And UNE-P, not in my words but in the Court of
17 Appeals' words, is synthetic competition. It is also a
18 form of competition that again I believe in my opinion
19 has never been found to be legal by any reviewing court.
20 That's the anomaly. We're analyzing a market that has
21 been, if you will, infected by something that no court
22 has ever said is legal.

23 Now I'm not talking about the obligation of
24 ILECs to combine elements. That was upheld in the Iowa
25 Utilities Board case. But it's the very elements that

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1 are being combined and that -- they all fall out of the
2 impairment standard, which has been struck down every
3 time the court has had to look at it, and I've got a
4 sneaking suspicion it may be again in a few weeks when
5 the Court of Appeals renders its decision.

6 But that's the 500 pound gorilla in the room,
7 and what that's allowed the CLECs to do is to enter the
8 market and pick off the low hanging fruit, by which I
9 mean the high volume, low cost customers, and that's
10 what they have gone after using UNE-P. What is
11 significant to me is notwithstanding the fact that UNE-P
12 has been there to in my view sort of spoil the market
13 economically, because as I have said it really is a
14 version of cheaper resale is what it amounts to, you
15 still nevertheless have found in Olympia the fact that
16 in two of the four wire centers CLECs have actually
17 deployed their own switching and are using UNE-L to
18 serve that market. I think that's significant. I think
19 that if you take this crutch away from the CLECs, you
20 will force them to find other ways to compete, and in
21 time, you know, I think you have hope that that
22 competition will extend to those wire centers.

23 But again, I think that the object of this
24 proceeding and this Commission's role in it is not to
25 force competition to occur where it's uneconomic to

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1 occur. It's to remove operational and economic barriers
2 to entry such that competitors can enter the market and
3 where they can't supply it themselves, where it's
4 continued to be supplied to them by the incumbent. And
5 that's, for example, UNE-L, UNE-L is not going to go
6 away as a result of this proceeding. Nobody is
7 challenging that. Resale, wholesale resale is not going
8 to go away as a result of this. Intermodal competition
9 that we have not even put into the -- Qwest has not even
10 put into the case is not going to go away as a result of
11 what you do here. What will go away will be unbundled
12 switching in the MSAs where Qwest has met its burden of
13 proof.

14 Q. So this is to your point that if we take that
15 away where UNE-L exists, UNE-L may not be as profitable
16 as UNE-P, but it still may be profitable, therefore it
17 will be expanded?

18 A. Yeah.

19 Q. Maybe?

20 A. It's an option. It's an option that the
21 companies have to pursue, as is what I will call
22 wholesale resale, that's an option as well. Again, the
23 TRO makes it very clear this is not about preserving the
24 most profitable way for CLECs to enter the market. It's
25 about determining once and for all what network elements

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1 are necessary and without which competition would be
2 impaired.

3 Q. Okay. I just wanted to go back a little bit
4 to this residential versus business question, and I
5 understand that your opinion is firmly that is not
6 possible for us to do, and you had some colloquy with
7 Mr. Thompson yesterday, and the FCC could have been very
8 explicit and prohibited us from doing that. I take it
9 you don't think that's what they did, but that implicit
10 in their order is a -- their order implicitly precludes
11 us from dividing the market that way. And I was reading
12 different portions of it last night. I guess my
13 question to you is, where do you think the strongest
14 case is made in the text of the order that precludes us
15 from dividing the market that way?

16 A. Well, I think the problem -- that the problem
17 here is that it's -- it's really not -- my opinion
18 really goes beyond what's in the order, and it goes to
19 the issue of where the state's authority to act comes
20 from. And I believe that we're talking here about, and
21 again, this is a point that was emphasized clearly by
22 the FCC in its appellate brief to the D.C. Circuit, is
23 that the Commission has against challenges by the ILECs
24 that they have impermissibly delegated responsibility to
25 the states, has been very clear that they have delegated

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1 specific tasks to the states. And so my answer to your
2 question is, since one of the things they left for you
3 to do was not to disturb the mass market enterprise
4 definitions, you can determine where to draw the line,
5 that's definitely your right, but because they don't ask
6 you to do it, you don't have, at least under the TRO and
7 presumably the Telecom Act since that's what it's
8 interpreting, the authority to do it.

9 So it's not that they -- I mean I -- the TRO
10 is not written in the form of you can't do this and you
11 can't do that, but as the FCC has said, we have
12 delegated only certain very specified tasks to the
13 states to perform. Because indeed they want that
14 granular analysis, and that's what they're asking you to
15 do. But one of them is not to subdivide the mass market
16 into small and residence markets or frankly to do that,
17 and again, I don't suggest Mr. Thompson was necessarily
18 suggesting this but I heard it that way, to sort of
19 gerrymander your geographic market definition so that
20 you accomplish the same thing. Whether you do it by the
21 front door or the back door, I don't think it's
22 permissible.

23 Q. Actually, I didn't take that as a suggestion
24 from him, I took it as a question he was posing to test
25 your position.

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1 A. I see.

2 Q. But if you could turn for just a minute to
3 Exhibit 115, that's the TRO, it's Footnote 432, it's
4 near Paragraph 129, 128. I will just give you a minute
5 to read Footnote 432.

6 A. (Reading.)

7 Yes.

8 Q. And what struck me as noteworthy maybe is the
9 slight qualification in the sentence, we will usually
10 include very small businesses in the mass market. Now
11 what they're saying is sometimes very small businesses
12 get catapulted up into the --

13 A. Right.

14 Q. -- bigger market, which leaves hanging this
15 other question --

16 A. Right.

17 Q. -- about whether the remaining part of the
18 mass market, i.e., residential, does or can become a
19 separate class and for what purpose. And I tend to get
20 lost as to where I am in the analysis when I'm reading
21 these things, but it seemed to acknowledge that at least
22 sometimes all business, including very small business,
23 should be treated differently from residential.

24 A. I mean I -- first, I take -- I take your
25 point, this is a long document, and as we have discussed

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1 already just in my cross-examination on the stand in the
2 last two days, there are plenty of paragraphs everybody
3 can point to to support their position. I say you start
4 with the Rules and that part of the TRO that reflects
5 what the Commission actually decided. But having said
6 that, I think in Footnote 432, you know, it does
7 announce very clearly the kinds of issues you need to
8 resolve for example in doing the crossover analysis. It
9 does not, it seems to me, permit you to divide the mass
10 market between residence and very small business. This
11 is simply saying in some cases the demands in looking at
12 it from the demand side, how customers buy services,
13 small businesses look like residence customers. On the
14 other hand, in some ways they look like enterprise
15 customers and that, you know, there's that kind of, you
16 know, back and forth in the commission's decision. But
17 I think that to the extent that you have that issue to
18 wrestle with it's in the cutover or crossover analysis,
19 it doesn't open the door it seems to me, any language in
20 here, to do the res-bus split within mass market.

21 MS. ANDERL: Your Honor, may I interrupt for
22 just a moment, we just through the wonders of electronic
23 mail and blackberries have been advised that the court
24 is going to issue its order at 2:00 this afternoon East
25 Coast time.

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1 JUDGE RENDAHL: Let's be off the record.

2 (Discussion off the record.)

3 JUDGE RENDAHL: I believe Chairwoman
4 Showalter has finished.

5 CHAIRWOMAN SHOWALTER: Yes, I am.

6 JUDGE RENDAHL: And Commissioner Hemstad has
7 a few questions for Mr. Shooshan.

8 While we were off the record we discussed our
9 schedule, which is we will complete Mr. Shooshan's
10 cross-examination and hopefully get through redirect and
11 then break at approximately 11:00 when the D.C. Circuit
12 Court of Appeals decision is supposed to be posted on
13 the Web site, and we'll come back at 1:30 after an
14 extended lunch.

15 Go ahead, Commissioner Hemstad.

16

17 E X A M I N A T I O N

18 BY COMMISSIONER HEMSTAD:

19 Q. Well, we're all struggling trying to get a
20 handle on some of these issues. My questioning will be
21 brief here and perhaps excessively naive. What is your
22 understanding of the relationship of the concept of
23 impairment to the presence of or the lack of the
24 presence of effective competition?

25 A. Two very different concepts, and I can give

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1 you my understanding of both, but I could also as I am
2 want to do in my testimony here point you to the fact
3 that the TRO specifically rejects effective competition
4 and the considerations that flow from that as a
5 consideration for impairment. The issue in implementing
6 the Telecom Act, and this is again after two
7 unsuccessful efforts by the FCC and pretty clear
8 direction from the court, has been to say that -- has
9 been to focus on where the unbundled element is
10 unsuitable for competitive supply. That in effect is
11 the test that you're being asked to apply and the FCC is
12 being asked to apply.

13 The issue of effective competition and the
14 extent to which the presence of competitors constrain
15 Qwest pricing ability is specifically rejected by the
16 FCC as a basis for impairment, as is residual monopoly
17 power and many of the arguments that intervenors make
18 that you should consider. If you look at the TRO, the
19 FCC considered them and rejected them as being not
20 consistent with the statute or the court's
21 interpretations of the statutes.

22 Q. So we can have the circumstance where the
23 CLECs are not impaired even though there is effective
24 competition is not present in the marketplace?

25 A. Yes, the two are different determinations

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1 that you have to make, and the issue of effective
2 competition and how it applies to markets here in
3 Washington is this Commission's decision to make and to
4 review at any point in time. It's a different standard
5 and different test than what you are required to apply
6 in the context of the TRO.

7 Q. Now you were involved in the Qwest business
8 classification case as a witness, and you have read our
9 order in that case, which relies heavily on UNE-P as a
10 basis for a conclusion that there is effective
11 competition for business services. Would you agree with
12 that?

13 A. Yes.

14 Q. Here it's your position that UNE-P is not
15 permissible as a, well, in the context of impairment?

16 A. Let me be clear, and I know this concern. In
17 fact, part of my testimony as you will recall in that
18 case was to talk about the effect of the pending TRO
19 proceeding on what you were about to do, which I believe
20 was the right decision to take at the time. I said at
21 the time that it would be this Commission that would
22 determine in implementing the TRO whether competitors
23 had been able to deploy their own switches and whether
24 the presence of competitors in the marketplace using
25 their own switching and either UNE loops or some other

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1 loop alternative were present in the market, and that's
2 what you're being asked to do here.

3 The effect of your deciding, as I would urge
4 you to do, that unbundled switching should be removed in
5 the six MSA's that Qwest has identified will obviously
6 have an effect on the marketplace. But two things I
7 would point out. One is there's going to be a
8 transition. The TRO clearly sets that out. So that if
9 you decide that unbundled switching goes away in all or
10 part of these MSAs, there will be a transition period
11 where existing UNE-P providers are transitioned to
12 UNE-L. That's what the whole batch hot cut issue is
13 about. So in that sense, they're moving from one
14 platform, if you will, or one UNE to another.

15 And certainly if over time you feel that the
16 extent of competition in the marketplace doesn't warrant
17 the deregulation or competitive classification of
18 business services, you can come back and reexamine that
19 market. I don't think it's you can automatically infer
20 that there won't be effective competition, because UNE-L
21 is still going to be available, intermodal competition
22 is going to still be available, and Qwest did rely on
23 that in its business reclassification case.

24 And in addition there's, and I know this
25 Commission has taken a position on resale in the past, I

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1 also believe there's what I will call wholesale resale
2 competition, and that will be there too. But you can
3 always come back at some point in the future and see
4 whether the removal of UNE-P has diminished effective
5 competition in the market, and if you find it has, you
6 can correct it at that time. That would be my view.

7 COMMISSIONER HEMSTAD: Okay, thank you,
8 that's all I have.

9 JUDGE RENDAHL: Commissioner Oshie.

10

11 E X A M I N A T I O N

12 BY COMMISSIONER OSHIE:

13 Q. Let me go back to I believe it's your 2-T,
14 Mr. Shooshan, and there's a statement that you make on
15 page 15, lines 7 through 10.

16 JUDGE RENDAHL: Which page are you referring
17 to?

18 COMMISSIONER OSHIE: Page 15.

19 JUDGE RENDAHL: Page 15 of Exhibit 2-T?

20 COMMISSIONER OSHIE: 2-T.

21 A. This is my direct. I'm sorry, Commissioner
22 Oshie, I'm getting there. That's the problem with
23 having this all in one big binder.

24 Here, all right, page 15, yes, sir.

25 BY COMMISSIONER OSHIE:

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1 Q. Now there's been some cross-examination on
2 the sentence, actually it's in the italics beginning on
3 line 8 and carrying over through line 10, and as I
4 understood from your answer that this is your statement,
5 it's not a statement that you have extracted from a
6 court case or from the order?

7 A. It is my opinion informed by my reading of
8 the court cases. I haven't footnoted it per se, but I
9 think that is a fair encapsulation of the reading of the
10 various decisions taken together.

11 Q. On line 9 you use the words reasonable
12 opportunity to succeed, and I guess my question really
13 is, what do you mean by that, what do you mean by to
14 succeed? What does that encompass? How do you measure
15 it? How long would a firm have an opportunity to
16 demonstrate success? Is it for -- I mean this is a
17 question of many parts, but I think you get the feel for
18 it.

19 A. I do. Again, the term of art in the TRO is
20 whether entry is economic, can be economic without the
21 UNE in question. In terms of succeeding over time or
22 opportunity to succeed, I think that, you know,
23 obviously that involves an analysis of the market.
24 Certainly it is the kind of consideration that the
25 Commission needs to give to the track 2 analysis. For

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1 example, there are shall we say dueling models in this
2 case of an efficient CLEC and whether it would be
3 profitable for it to serve the market over time, you
4 know, using unbundled switching as opposed to relying on
5 UNE switching. And that is one of the things that you
6 certainly can consider in weighing the track 2 evidence
7 in this case.

8 Q. Being economic, is that more than just
9 surviving or is that some I guess positive elements of
10 success would be or being economic would be to make a
11 profit I'm assuming?

12 A. Well, I think the term economic, you know,
13 really refers to and profitable really are, you know,
14 mean different things in the context of the application
15 of the statute.

16 Q. Well, let me ask then another question.
17 Let's just put it in more of a context. To be economic,
18 would that encompass the ability to attract capital
19 sufficient to accomplish the objectives in a business
20 plan?

21 A. Again, in a context of, for example, as I
22 have said, the track 2 analysis of potential deployment,
23 yes, that's something that one needs to look at. That's
24 why the FCC I think asks for in effect a business case
25 model of an efficient CLEC.

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1 Q. Would it mean the earning a return, enough to
2 achieve a return of and a return on capital invested?

3 A. Yes.

4 Q. And do you have an idea of what a rate of
5 return should be for an economic firm, is it 5%, 10%,
6 15%?

7 A. You know, I don't as part of my testimony
8 offer an opinion on that. I think that to the extent
9 that Qwest offers that kind of analysis it's encompassed
10 in the presentation of the CPRO model results which
11 Mr. Copeland will be testifying on. So my sense is that
12 that would be an appropriate issue for him to discuss
13 with you.

14 Q. Did you consider that, what a reasonable rate
15 of return would be, when you drafted your sentence in --
16 I mean it seems to me that should be encompassed in the
17 term you use, reasonable opportunities to succeed, but
18 maybe that wasn't a specific element that you considered
19 when you drafted that.

20 A. I think, you know, the problem I think here
21 is that as the FCC has made clear now in the TRO, the
22 question, and the analysis, the questions you ask and
23 the analysis you do in implementing the TRO is to look
24 at an efficient CLEC. Now an efficient CLEC is not
25 necessarily any CLEC that is existing in the market

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1 today. Why? Because the FCC says we can't -- it's not
2 a question of a particular business plan or how a
3 particular CLEC has constructed its business plan or
4 chosen to enter. So in both track 1 and track 2 there
5 are real -- there are means embodied in the TRO for
6 answering the question you have posed.

7 In the triggers analysis the FCC has said,
8 the fact that there are three self provisioning
9 providers in the market today using UNE-L or some other
10 form of loops to serve customers suggests that entry
11 without relying on UNE switching is economic. That's
12 why the FCC chose three and not two and not one. It
13 could have taken a lower trigger analysis.

14 In track 2 they're saying that the business
15 case models that are part of the proof that must be
16 shown to succeed under track 2 have to take into account
17 all of the considerations you have talked about, have
18 appropriate time horizon, have appropriate assumptions
19 about rate of return, have appropriate assumptions about
20 prices and rates and churn and all of those issues that
21 I'm sure you will hear debated in subsequent phases of
22 these hearings.

23 So I think that they're -- in track 1 the FCC
24 has said there's objective proof that if you find it
25 answers your question. In track 2 you have much more

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1 leeway to examine for example the competing models here
2 to determine which one, you know, answers the questions
3 most satisfactorily given what your concerns are.

4 COMMISSIONER OSHIE: Thank you, no more
5 questions.

6

7 E X A M I N A T I O N

8 BY JUDGE RENDAHL:

9 Q. Mr. Shooshan, I do have one question for you,
10 and if you would turn to Exhibit 3-T on page 36.

11 A. 3-T, that would be my responsive testimony.
12 I'm sorry, page 36?

13 Q. Page 36, and specifically the first
14 paragraph, number 1.

15 A. Yes.

16 Q. And it's an issue we haven't discussed yet,
17 and that has to do with transition plans which might
18 happen after a decision is made if a decision is made
19 that no unbundling is required.

20 A. Yes.

21 Q. You state on lines 4 and 5 that transition
22 plans are being addressed in a separate proceeding.
23 What separate proceeding are you referring to, or were
24 you not quite sure what was the plan here in Washington?

25 A. A combination of two things. One is yes, I

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1 wasn't quite sure at the time I wrote this what the
2 stages were going to be, and what actually I should have
3 said there was hot cuts are being considered in a
4 separate proceeding. The provisions relating to
5 transition plans are set out in the TRO. I believe it's
6 Paragraphs 528 to 532, and at least my understanding is
7 that those kinds of issues are not directly in any phase
8 of this proceeding right now, but I could be wrong about
9 that. But it was hot cuts that I understood was being
10 addressed in a separate proceeding or separate phase of
11 this proceeding.

12 Q. Okay. But do you think it's necessary if the
13 Commission were to make a decision that in certain
14 markets that no unbundling is required, that the
15 Commission does need to address transition plans at the
16 same time?

17 A. Well, I think what I'm saying is the TRO
18 provides for that, and I think you first start -- you
19 start by looking at the TRO and seeing -- and it
20 anticipates there will be those plans. Whether you
21 actually have to take any affirmative action there or
22 not is something I leave, you know, up to you at this
23 point, but I think you start by looking at those
24 paragraphs in the TRO and, you know, being guided by
25 those.

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1 JUDGE RENDAHL: Okay, thank you, that's it.

2 MR. KOPTA: Your Honor.

3 JUDGE RENDAHL: Mr. Kopta.

4 MR. KOPTA: Might I follow up on a question
5 that the Chairwoman was asking Mr. Shooshan?

6 JUDGE RENDAHL: Please go ahead, we have five
7 minutes.

8 MR. KOPTA: It won't take more than that.

9

10 C R O S S - E X A M I N A T I O N

11 BY MR. KOPTA:

12 Q. Good morning, Mr. Shooshan.

13 A. Good morning.

14 Q. Do you recall a discussion with the
15 Chairwoman about in which I believe you made a statement
16 something along the lines that UNE-L is not as
17 profitable as UNE-P?

18 A. Yes.

19 Q. So there's a significant cost difference
20 between UNE-L and UNE-P with respect to the CLEC
21 providing the service, correct?

22 A. I didn't characterize the cost difference,
23 and cost differences per se the FCC has said is not a
24 basis for finding impairment.

25 Q. But if it's not as profitable, doesn't that

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1 follow then that there are different costs for UNE-P
2 than for UNE-L?

3 A. It obviously -- there obviously are different
4 costs.

5 Q. Would you also agree that there are some
6 customers that could be served profitably with UNE-P but
7 not profitably with UNE-L?

8 A. I don't think there's any evidence in this
9 case to suggest that.

10 Q. Have you done any analysis as to whether
11 that's a possibility?

12 A. I have said before, I don't know how better
13 to say it, that, you know, UNE-P is a cheap way of
14 entering the market. It obviously is going to be
15 preferred by certain carriers not having -- having said
16 that, what's significant is the extent to which there
17 are competitors in the market not using UNE-P but using
18 UNE-L or some other distribution plan in combination
19 with their own switches. That I think is significant.
20 Whether the issue -- if the issue is a question of
21 profit margin for the competitors or the business plans
22 of one competitor versus another, I think the TRO is
23 pretty clear that that's not something this Commission
24 has the latitude to examine.

25 Q. Well, that's not really responsive to my

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1 question, which was, have you done any analysis as to
2 whether there are customers that can be served
3 profitably using UNE-P but can not be served profitably
4 using UNE-L in any of the MSAs that you have identified
5 in this proceeding?

6 A. No.

7 MR. KOPTA: Thank you, that's all I have.

8 JUDGE RENDAHL: Thank you, Mr. Kopta.

9 We're reaching that magic hour of 11:00,
10 Mr. Smith, I don't want to deprive you of your
11 opportunity to --

12 MR. SMITH: Well, I'm not sure what
13 Mr. Shooshan's travel plans are, but assuming he's not
14 leaving right away, perhaps the rational thing to do
15 would be to all read the order and then we come back.
16 Whenever we reconvene I just have a few minutes, but
17 it's more than a minute or two of redirect.

18 JUDGE RENDAHL: So probably no more than 15.

19 MR. SMITH: Clearly no more than 15.

20 JUDGE RENDAHL: Okay, then why don't we do
21 that after our lunch break at 1:30, and so why don't we
22 be off the record now and let everyone read the order,
23 we'll come back and probably take up the order at 1:30
24 to discuss how we need to proceed, and then we'll
25 continue on with Mr. Shooshan.

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1 CHAIRWOMAN SHOWALTER: We could, if it's only
2 15 minutes, we could just finish Mr. Shooshan if you
3 can, you know, not look at your computers.

4 JUDGE RENDAHL: I'm assuming there are folks
5 out there who are obtaining the order for you at this
6 point?

7 I see nods in the room.

8 So why don't we continue until we finish with
9 Mr. Shooshan.

10 (Discussion off the record.)

11 (Luncheon recess taken at 11:00 a.m.)

12

13 A F T E R N O O N S E S S I O N

14 (1:30 p.m.)

15

16 (Discussion off the record.)

17 JUDGE RENDAHL: We're back on the record
18 after an extended lunch break having many of us read
19 some or all of the D.C. Circuit Court of Appeals'
20 decision, and based on that and informal discussion by
21 all the parties and the Commissioners, Qwest has renewed
22 its motion to suspend the proceedings. That motion is
23 granted, so this proceeding will be suspended
24 indefinitely pending an understanding of what the FCC
25 will do in terms of seeking appeal or a stay or

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1 directing the states requesting an advisory or fact
2 finding role.

3 Because the proceedings will be suspended
4 indefinitely, we will need to address the issue, not
5 necessarily today but at a later date, the issue of what
6 we do with the record in this proceeding. The parties
7 have agreed that Mr. Shooshan does not have to stay here
8 indefinitely, and Qwest has withdrawn its request for
9 redirect, so there is no need for recross, so,
10 Mr. Shooshan, you are excused from the stand, you may go
11 home.

12 THE WITNESS: Thank you.

13 JUDGE RENDAHL: You do not have to stay here
14 for 60 days or longer.

15 THE WITNESS: Thank you very much.

16 JUDGE RENDAHL: And the Commission will issue
17 a notice to the parties setting aside some day for a
18 status conference when it becomes clearer when that
19 might be appropriate to determine the further status of
20 this proceeding and what to do with the record.

21 Have I captured the Commission's decision?
22 Any further comments the Commissioners wish to make?

23 CHAIRWOMAN SHOWALTER: I will just make one
24 further comment. I think that our original decision not
25 to suspend was correct, and today's is also correct, and

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1 all is not lost. I personally feel that because we did
2 start these proceedings, I, and I suspect the rest of
3 us, are more up to date, we're able to read the Court of
4 Appeals' order today with some intelligence, and we are
5 really just that much further ahead in this state on
6 this issue and able to follow it when things pick up
7 again. But I do appreciate everyone coming.

8 JUDGE RENDAHL: Yes, I would second that, and
9 I would also thank all of you for your patience in
10 putting together what we did to get here today, knowing
11 how difficult last week was for all. So I appreciate
12 all of your assistance in that respect and look forward
13 to seeing you all at some time in the future.

14 So this hearing is adjourned unless the other
15 commissioners have comments.

16 Thank you all, we're adjourned.

17 (Hearing adjourned at 2:00 p.m.)

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