BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation into U S WEST COMMUNICATIONS, INC.'s Compliance with Section 271 of the Telecommunications Act of 1996	)	Docket No. UT-003022 Volume 8 Pages 882 to 980
In the Matter of U S WEST COMMUNICATIONS, INC.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996	)	Docket No. UT-003040 Volume 8 Pages 882 to 980

A hearing in the above matters was held on September 18, 2000, at 2:05 p.m., at 1300 South Evergreen Park Drive Southwest, Olympia, Washington, before Administrative Law Judge ANN RENDAHL, Chairwoman MARILYN SHOWALTER, Commissioner RICHARD HEMSTAD, and Commissioner WILLIAM R. GILLIS.

The parties were present as follows:

WORLDCOM, INC., by ANN HOPFENBECK, Attorney at Law, 707 - 17th Street, Suite 3600, Denver, Colorado 80202.

NEXTLINK WASHINGTON, INC.; ELECTRIC LIGHTWAVE, INC.; ADVANCED TELECOM GROUP, INC.; by GREGORY J. KOPTA, Attorney at Law, Davis, Wright, Tremaine, LLP, 1501 Fourth Avenue, Suite 2600, Seattle, Washington 98101.

AT&T, by REBECCA DECOOK, Attorney at Law, 1875 Lawrence Street, Denver, Colorado 80202.

QWEST CORPORATION, by LISA ANDERL, Attorney at Law, 1600 Seventh Avenue, Suite 3206, Seattle, Washington 98191; and by KARA M. SACILOTTO, Attorney at Law, 607 - 14th Street Northwest, Washington, D.C. 20005; and via bridge line by STEVEN R. BECK, Attorney at Law, 1801 California Street, Suite 5100, Denver, Colorado 80202.

PUBLIC COUNSEL, by ROBERT CROMWELL, Attorney at Law, 900 Fourth Avenue, Suite 2000, Seattle, Washington 98164.

SPRINT, by ANDREW YORRA, Attorney at Law, 888 Southwest Fifth Avenue, Suite 1600, Portland, Oregon 97204.

METRONET, via bridge line by TERRY F. BERMAN, Attorney at Law, 601 Union Street, Suite 4400, Seattle, Washington 98101.

P R O C E E D I N G S

JUDGE RENDAHL: Let's be on the record. We are here this afternoon for a presentation to the commissioners on the revised initial order in Docket Number UT-003022, U S West's now Qwest's application for compliance with Section 271 of the Telecommunications Act of 1996, and U S West's now Qwest's Statement of Generally Available Terms or SGAT pursuant to Section 252(f) of the Telecommunications Act of 1996.

I am Ann Rendahl, the Administrative Law Judge in this proceeding, and here with me this afternoon are Chairwoman Showalter, Commissioner Hemstad, and Commissioner Gillis.

The format this afternoon is to take up each issue that's in dispute separately and give the two sides a certain amount of time to present the issue. And given that certain parties seem to take a lead role on those, we will let you decide who wants to take up the issue or how you wish to share the time.

The proposal is to take up the issues under checklist item number three initially, the access to right of ways and the 45 day issue, and give Qwest ten minutes and the other parties ten minutes to argue that issue. Likewise for the 45 day issue, ten minutes for each side.

MS. SACILOTTO: Ten minutes on each issue?
JUDGE RENDAHL: On each issue, yes.
Then we will proceed to checklist item number ten, the internetwork calling name data base issue, and each side will have five minutes to address that issue.
And then we will proceed to the checklist item number 13 issues. The issue of compensation for ISP bound traffic. Each side will have ten minutes to address that issue. And the other remaining checklist item 13 issues will be five minutes on each side.
Now it may seem like not very much time to address the issues, but we do only have three hours, and the commissioners and staff may have questions for the parties based on their arguments. So we suggest that given that we have briefings from the parties, you may wish to use your time as more rebuttal of the other side's arguments that they have most recently presented or however you think is appropriate. There is an easel and an overhead to the extent that may be useful to the parties in making your presentation.
One last administrative issue. It was brought to my attention that Qwest filed its response to Bench Request Number 23 and sent it to me directly. I did not realize that that was not circulated to the other parties. So if you have not already received a

copy, there are copies on the back table for you.
So before we proceed, I would like to take appearances from the parties starting with Ms. Sacilotto for Qwest.
MS. SACILOTTO: Good afternoon, Kara Sacilotto from the law firm Perkins Coie on behalf of Qwest Corporation.
MS. ANDERL: Lisa Anderl, in-house attorney representing Qwest.
MS. HOPFENBECK: Ann Hopfenbeck, in-house attorney representing WorldCom, Inc.
MS. DECOOK: Rebecca DeCook, in-house attorney for AT&T.
MR. KOPTA: Gregory Kopta of the law firm Davis Wright Tremaine on behalf of Nextlink Washington, Inc.; Electric Lightwave, Inc.; and Advanced Telecom Group, Inc.
MR. CROMWELL: Robert Cromwell on behalf of public counsel.
MR. YORRA: Andrew Yorra, Tonkon Torp, here on behalf of Sprint.
JUDGE RENDAHL: Thank you. Have you appeared here at the Commission before?
MR. YORRA: No.
JUDGE RENDAHL: Could you please spell your

name for the reporter, and give your address.
MR. YORRA: Andrew Yorra, Y-O-R-R-A, address 888 Southwest Fifth Avenue, Suite 1600, Portland, Oregon 97204.
JUDGE RENDAHL: Thank you. Is there anyone on the bridge line who wishes to make an appearance?
MS. BERMAN: Yes, this is Terry Berman of Miller Nash. I'm appearing on behalf of MetroNet.
JUDGE RENDAHL: Thank you. Is there anyone else on the bridge line wishing to state an appearance?
MR. BECK: Yes, this is Steve Beck, in-house attorney on behalf of Qwest.
JUDGE RENDAHL: Is there any other party on the bridge line?
Hearing nothing, we will proceed now with the first issue, which is the issue in the revised initial order concerning CLEC access to right of ways. Before you begin, if you would please address your comments, if you can, to certain paragraphs in the order, that would be very helpful for us following along. And particularly address your comments to what should be changed in that paragraph if you have concerns with a particular paragraph.
Let's proceed with Qwest's discussion on the issue of access to right of ways.

MS. SACILOTTO: Good afternoon, Commissioners. This disputed issue revolves around AT&T's request for access to Qwest's agreements regarding rights of way, including what AT&T believes would be included in agreements between Qwest and property owners, multiple dwelling unit property owners.

In a nutshell, Qwest has agreed to provide all of its right of way agreements and all of its agreements with multiple dwelling unit owners. The dispute between the parties centers only around the terms and conditions under which Qwest will provide those agreements to AT&T.

In our most recent round of comments on staff's revised order, which does not come to a conclusion one way or the other on this issue, we provided the Commission and staff with an update on the parties' negotiations on this issue. This has been an issue that the parties have negotiated in both Colorado and in Washington. And the status report, thankfully, has reduced the number of issues in dispute between the parties on this particular issue.

The issues upon which the parties have not yet reached agreement center around landowner consent to disclosure of the MDU agreements. AT&T believes that we should provide all MDU agreements without landowner

consent unless there's a confidentiality provision. Qwest is under the view that these agreements were designed to be two party agreements and that the property owners haven't appeared in this proceeding and may not appreciate having their private agreements disclosed to people who might use them as bargaining leverage against the property owners. So Qwest's position is simply that before we disclose any agreement that is not publicly recorded that we receive the consent of the landowner to do so.

The second issue that the parties have not yet reached agreement on is Qwest's opportunity to cure breeches that a CLEC might have when we provide access to them. Qwest's position here is quite simple. This is not a pro Qwest dispute. This is a pro competitive dispute. Qwest has an obligation to provide access to its rights of ways to all requesting carriers, and if a CLEC breech causes us to lose our right of way, we not only lose the ability to provide access to ourselves, we lose the right to provide access to any other CLEC who might be also getting access on that right of way. So Qwest believes that in order to protect its property rights it should have the opportunity to cure CLEC breeches.

AT&T has taken the position that this issue

and any harm that might inure to Qwest as a result of a CLEC breech of its right of way access would be cured by damages, but we believe that the onerous burdon of pursuing perhaps insolvent CLECs to recover monetary damages but also having to relocate our facilities to another right of way makes damages an inappropriate remedy in this circumstance.

The third issue is that Qwest believes that when we turn over a document that AT&T believes conveys a right of way that AT&T, in fact, treat it like a right of way and record it. That way anybody's property rights are protected from third parties who might assert that people do not have access. It's a simple recordation requirement that if you think a document contains a right of way, go ahead and record it.

And finally, in Colorado AT&T has suggested deferring the right of way agreement dispute to a further workshop on subloops. We oppose this deferral, because AT&T raised this issue in the context of a checklist item three issue. They believe that MDU agreements contain a right of way. We disagree with that. But if they do contain a right of way, this is the proper checklist item to close it. If the Commission is going to defer this issue, then it is an acknowledgement that MDU agreements do not contain right

of way, and this disputed issue should be eliminated for checklist item three. It should not hold up checklist item three compliance.

And other than that, it's quite clear that the parties have resolved quite a bit of the dispute on this checklist item or this disputed issue under this checklist item. We have agreed that we will provide access through an access agreement as opposed to a quitclaim as AT&T requested. We have agreed that landowner consent is not necessary for the access agreement. The parties have agreed that access to public right of ways should not be considered here because AT&T can just as easily get access to a public right of way from public entities as they can through Qwest. And finally, we have agreed to streamline the consent process.

So we believe that on the issues that remain in dispute on this particular disputed issue that the Commission should resolve them here in this particular checklist item and resolve them in favor of Qwest. There's really no reason to keep this item open, certainly not open in two checklist items, checklist item two which would deal with subloops, or this checklist item. It should be closed for this checklist item and not raised again in future workshops. We have

a lot of work to do in those future workshops, and if we keep issues open, we will never get all of that significant amount of work done.

JUDGE RENDAHL: Thank you. Is that all on this issue?

MS. SACILOTTO: It is. If I have a minute or so left at the end, I would like to perhaps use it for rebuttal.

CHAIRWOMAN SHOWALTER: I just have one question. Are these rights of way --

MS. SACILOTTO: Our position is that MDU's do not convey a property interest. Qwest's position is this is not a right of way. Qwest views a right of way as what is typically thought of as a right of way, an easement, something that's publicly recorded in property records. And so we believe that this issue shouldn't have been raised at all. It's not a question of a right of way.

CHAIRWOMAN SHOWALTER: So these are not recorded documents that you're talking about?

MS. SACILOTTO: Usually not. These MDU agreements tend not to be publicly recorded. When I say MDU, I mean multiple dwelling unit buildings, apartment buildings, office buildings, and things like that. They tend not to be recorded, and our view is they're not

recorded because they don't convey property rights. It's not an easement or a right of way as that term is understood in property law.

JUDGE RENDAHL: Any other questions?

COMMISSIONER HEMSTAD: Now does this encompass a 45 day issue or is that a --

MS. SACILOTTO: That's a separate issue, sir.

COMMISSIONER HEMSTAD: That's a separate issue, okay, I understand.

JUDGE RENDAHL: Commissioner Gillis, any questions?

COMMISSIONER GILLIS: No questions.

JUDGE RENDAHL: Ms. Sacilotto, I do have a question.

MS. SACILOTTO: Yes.

JUDGE RENDAHL: If you look at paragraph 28 of the revised initial order, it was my understanding, staff's understanding, during the workshop that Qwest did agree to defer the issue of MDU subloops to further workshops. And so I'm wondering if this is now a change of position here in Washington as opposed to maybe a position in Colorado.

MS. SACILOTTO: No, I don't think that it's a change of position at all. I mean we never believed that this issue should have been brought up in this

workshop at all. It's AT&T who raised the issue of MDUs and claiming that we had to provide MDU agreements as part of our checklist item three requirement. So it was our position all along that since they don't convey property rights, it was never a proper checklist item three issue. It's AT&T who had insisted that it be addressed in this particular checklist item. So all along we have thought that this was not an issue for this checklist item period.

JUDGE RENDAHL: So under paragraph 28, if that was a correct characterization of what occurred during the workshop, what is it that Qwest feels is appropriate to defer to the other workshop?

MS. SACILOTTO: Well, I mean I would eliminate this issue as a checklist item three issue all together and bring the checklist item three disputed issues down by one and have the only remaining disputed issue be the 45 day. But since AT&T has insisted that this be brought in the context of this checklist item, then I would resolve all right of way issues in this particular checklist item. If AT&T has other non checklist item three issues related to subloops, those can be addressed in that workshop. But to the extent they are complaining that we are not providing access to rights of way in the context of multiple dwelling units,

you know, it's one or the other, it's not both. So that's what we would request. Either end the right of way question here, or eliminate this as a disputed issue under checklist item three all together.

JUDGE RENDAHL: Thank you, MS. Sacilotto.

Commissioner Hemstad.

COMMISSIONER HEMSTAD: Pursuing a couple of your points, your first one that the landowner's consent is required, well, that's the point, is it required? Are you saying that as a matter of contract law it would be required, or are you saying that as just a matter of good policy?

MS. SACILOTTO: I think it could be both. Some of these agreements may contain a confidentiality provision in them. I have not reviewed every single agreement we have with property owners, but that could clearly be in an agreement, in which case we would require consent to disclosure of that so we don't violate the confidentiality provisions of the agreement. An agreement would be redacted solely to redact out monetary terms.

But barring that, when a property owner enters into an agreement with a private party, it's our belief that they are not agreeing that this agreement is public domain. When I enter into a contract with

another party, I don't assume that it's going to be provided to somebody who might be using that document to bargain against me essentially.

So we believe that not only could it be required as a matter of law, it should be required as a matter of public policy, particularly in this case where we haven't had property owners appearing in this setting to decide whether or not they think that their private agreements entered into with an expectation of privacy, as pretty much any contract is, distributed to companies that might be reviewing them to get a bargaining advantage.

COMMISSIONER HEMSTAD: Your third point I thought I understood when you first stated it, which was I think that AT&T should treat these documents as right of way agreements and record them.

MS. SACILOTTO: If they believe that a particular agreement contains a right of way and they are seeking access, we think they should treat it as a right of way and record it. That's the prudent thing to do when one has a real property interest to protect it from third parties.

COMMISSIONER HEMSTAD: But in further response, is it your position that these really aren't right of way agreements at all?

MS. SACILOTTO: Correct, that these MDU agreements do not convey right of ways.

COMMISSIONER HEMSTAD: Aren't those positions inconsistent?

MS. SACILOTTO: I don't think so. I mean we're just saying if you do believe that this is a right of way, then treat it like a right of way. If it's not a right of way, then let's eliminate this disputed issue from this checklist item.

CHAIRWOMAN SHOWALTER: What does it mean when you say to them treat it like a right of way? What are they supposed to do?

MS. SACILOTTO: Record it like an easement is recorded in the real property records.

CHAIRWOMAN SHOWALTER: But I'm having a hard time following. What they're after is what agreements you have.

MS. SACILOTTO: Exactly.

CHAIRWOMAN SHOWALTER: So you're saying you don't want to give it without the property owner's consent.

MS. SACILOTTO: Correct.

CHAIRWOMAN SHOWALTER: Where is this agreement of theirs that they would record?

MS. SACILOTTO: The same, the MDU agreement

that we have provided them access to. They are saying, okay, this provides a right of way and we want access to that right of way. Fine, we're happy to do that. But if you think this is a right of way, then let's treat it as if it were, and let's have it properly recorded so that in the future --

CHAIRWOMAN SHOWALTER: Are you suggesting that AT&T is able to record the right of way, so-called right of way, that you have with another customer?

MS. SACILOTTO: I don't believe that MDU agreements convey a right of way, and I think that's where the disconnect is. We just do not believe that this involves a right of way issue at all. But if it does, then record it.

CHAIRWOMAN SHOWALTER: A third party can't walk in and record an agreement between two other parties, can they?

MS. SACILOTTO: I mean I should say they want more than just the agreement. Obviously the request for the agreement is to have the underlying right of access. I'm not saying if you just look at an agreement and you decide you don't want access or you don't care, that you go and record it. I'm saying if you're going to say this gives me a right of way that I want to access, then let's go through the process of getting the right of way

recorded.
COMMISSIONER HEMSTAD: Okay, but I assume that Qwest doesn't record these now.
MS. SACILOTTO: No, generally not, not unless it's a true rate of way, what we believe is a true right of way.
COMMISSIONER HEMSTAD: All right. But then the call it untrue right of way you don't record, but it would be your position that AT&T should.
MS. SACILOTTO: If they think it's a right of way. I mean we don't. We don't think this is an appropriate question for checklist item three regardless.
COMMISSIONER HEMSTAD: But isn't that a decision that's made by the recording office as to whether it's appropriate to record or not?
MS. SACILOTTO: I suppose it would be something made by their lawyer. I mean they have to conduct their own inquiry on whether they think it conveys them a property right.
COMMISSIONER HEMSTAD: My point only is that doesn't the -- like in this county, the county auditor decides whether a document is recordable or not. In other words, I just can't take a piece of paper and say record this, and the auditor says, okay, fine. He will

look at it and say this is not a recordable document.
MS. SACILOTTO: In which case then our position would be vindicated. I mean we don't think that these convey a property right. All we're saying -- I think we're sort of coming at loggerheads, because we have never thought that this was appropriate under this checklist item in the first place. You know, we have agreed to go through this process because it has been set in motion, and we were trying to get checklist approval.

It's been Qwest's position consistently that MDU agreements don't convey real property interests and therefore don't even belong under this checklist item. We're not saying that we don't have to provide access to them or anything like that. We're just saying it doesn't belong under this particular checklist item.

And some of the difficulties that we're experiencing is because we have never treated these as being real property rights. We have always treated them as not being rights of way, not being easements, and haven't recorded them. AT&T is now the party that is claiming that they are rights of ways, and that's where the disconnect is coming. I understand it's quite difficult to understand, but that's why we're in this position.

00901
COMMISSIONER HEMSTAD: Maybe we better hear from AT&T.
JUDGE RENDAHL: Ms. DeCook, I'm assuming Ms. Hopfenbeck will --
MS. DECOOK: Well, actually --
JUDGE RENDAHL: -- address the issue.
MS. DECOOK: That's right, and it's not just AT&T who is the bad person. WorldCom joins me in this.
Let's put some framework about why we're asking for this information. First of all, the obligation under checklist item three is to provide nondiscriminatory access to poles, ducts, conduits, and rights of way that the utility owns or controls. So what does that mean? The whole issue surrounds whether U S West or Qwest owns or controls an interest in a piece of property or an access right in an MDU. That's the issue that is principally being debated here.
It's Qwest's position that whatever they're getting under these MDU agreements does not equate to a true right of way. Well, the Section 271, the Act, the progeny of section 224, which is really what defines what these poles, ducts, conduits, and rights of way obligations are, doesn't speak to true right of way. It really speaks to right of way, and it talks about a right of use, an easement. It doesn't care whether it's

recorded or not. We don't care whether it's recorded or not.

What the Act was trying to do was to give CLECs the same access to customers so that they could provide competitive services that the incumbent has, or in this case Qwest. And that's all we're asking for here. I think what you heard from Ms. Sacilotto is an attempt to diffuse the issue. The issue is just not the imposition of conditions that is at dispute. It's really the underlying access to the MDU space that Qwest uses.

Now the FCC in an order, Order Number 141 in, let me see if I can find it, in WT Docket 99217 has tentatively concluded that conduits within MDU's or risers within MDUs are not only conduits within the construct of the Act, but they're also right of way. They have asked for comments on this issue, and Chairman Connard has indicated that the Commission is going to issue its order on these very issues in two weeks. So that's why we're asking for a deferral of this issue, because we think it's important for the Commission to get the FCC's input on this important issue.

The whole issue of what control means in the context of Section 271 and Section 224 is the subject of that inquiry and is going to be considered and ruled

upon by the FCC. So does it make sense to defer this issue? It absolutely does. Does it have to be deferred to subloop? No, but I would add that Mr. Steese in Arizona is the one that indicated that this issue should be logically deferred to subloop. And our only point in deferring it to a later time is not so much to avoid a decision at this point. Our concern is that subloop has some natural MDU issues, because that's where subloop oftentimes resides.

The other reason that we have recommended deferral is because just two weeks ago, three weeks ago in Arizona, Qwest indicated that there was a new form of co-location that they were going to be offering called field co-location. And we believe that that will naturally have some right of way issues associated with it. Our concern is not so much that there be some delay but that we not be foreclosed from raising an issue because checklist item three has been briefed and resolved. We think irrespective of the fact that you may have briefed and resolved checklist item three, if field co-location comes up down the road, we should not be foreclosed from addressing right of way issues in the context of the field co-location discussion just because checklist item three has been briefed. And certainly I don't think you would expect that either.

Now to go to the issues of the various obligations that Qwest seeks to impose on CLECs, on the landowner consent issue, it's really our opinion that to the extent there is no confidentiality requirement in an MDU agreement, then the landowner can't have any expectation of privacy. Otherwise he would have negotiated a confidentiality provision. And just the fact that there is a confidentiality provision doesn't prevent it from disclosure in the context of these proceedings under appropriate confidentiality protective order.

The reason why these agreements are important is because they identify the very nature of Qwest's right in an MDU. How are we to determine whether Qwest controls the space that it occupies unless we look at those agreements. There's no way to do that. So we think that this is just a way to avoid providing those very MDU agreements that we need to see in order to ascertain what their ownership or control rights are in the MDU.

Second, Qwest has proposed that we be required to negotiate with the landowner an opportunity for Qwest to cure a breech. Well, it strikes me that we can't negotiate that on Qwest's behalf. That's something that Qwest has to negotiate.

Third, the recordation of right of way agreements, again, I think the whole issue of whether it's a true of right of way agreement is irrelevant. We shouldn't have to record right of way agreements for Qwest. It serves no purpose in terms of what we're trying to accomplish, which is to obtain the access that we're entitled to under the Act.

And I have already touched on the deferral issue, so I will close on that.

CHAIRWOMAN SHOWALTER: But so I'm clear, it's your view that what constitutes a right of way for our purposes is what the FCC, what the Telecom Act and the FCC says it is as opposed to an independent sort of legal view of something that's a property right or something that is recorded or some maybe a common law notion of what a right of way is.

MS. DECOOK: That's correct. There's Section 224 of the Communications Act, which has been in place for some time, has dealt with this issue over the years. And while there may be some parallels in terms of applying state law issues on state law requirements to determine a right of way, it's not limited to rights of way that have been recorded.

JUDGE RENDAHL: Ms. DeCook, do you -- I'm sorry, Commissioner Hemstad, do you have questions?

COMMISSIONER HEMSTAD: Why don't you go ahead.

JUDGE RENDAHL: Okay. Just on the same issue about paragraph 28 and the deferral that was discussed during the workshop, given your arguments, is it my understanding that the basis for the deferral during the workshops was the issue of the FCC proceeding and that we should wait until later to resolve the issue, or is this a new basis for deferral?

MS. DECOOK: Well, this is really a Qwest issue, because they're the ones that proposed the deferral to subloop. And I think the reason that they did was so that they could get a go ahead on what was at issue in checklist item three and then address the MDU issue in the context of a later checklist item. I believe frankly they have changed their position. It was only in Washington and Colorado that we heard for the first time that Qwest was of the opinion that MDU agreements were not a property right or an interest in real property. So that's the first we heard of it, and I believe that maybe what they're trying to do now is to get the issue closed and not deal with it in subloop. But, you know, only Qwest can answer why they have changed their position on this.

JUDGE RENDAHL: But you do believe it's

appropriate to defer particularly because of the FCC's proceeding?

MS. DECOOK: I think that's one way to do it. I think another way to do it would be to get the FCC order and have either further workshops or further briefing depending upon what that order says. It doesn't necessarily have to be in the context of subloop.

Our concerns are twofold. First, we think there's an FCC order that's going to come out that's going to speak to some of these issues, and we ought to take advantage of the information that's provided in the FCC order. Second, we believe that there are going to be potentially, and I can't say until we get there, right of way issues that are going to come up in co-location, in conjunction with field co-location and subloop. We don't want to be foreclosed, if it appears that they impact Qwest's obligation under checklist item three, we don't want to be foreclosed from raising them at that point.

So does that mean you can't go forward once you get the FCC decision and make a determination in checklist item three? I don't think so. I think you're making decisions conditioned upon things happening later. We can't predict what's going to happen later.

And so what I think is that we just have an understanding that if there is a legitimate right of way issue that comes up in a subsequent checklist item, we ought not to be foreclosed from raising that.

JUDGE RENDAHL: Thank you.

Commissioner Hemstad, I didn't mean to cut you off.

COMMISSIONER HEMSTAD: First on the deferral, are you urging deferral of just this narrow issue or the entire initial order?

MS. DECOOK: Oh, no, just this issue.

COMMISSIONER HEMSTAD: Just this slice?

MS. DECOOK: Right.

COMMISSIONER HEMSTAD: And I guess I didn't grasp your point on your response to the issue of curing a breech. I got your point as this is Qwest's problem and they should take care of it.

MS. DECOOK: Well, Qwest wants us to go to the landowner and negotiate for them a right to cure, Qwest's right to cure, or Qwest obtaining a notice of an opportunity to cure, to be more accurate. And I don't see how we can negotiate that for them. That's something that they're going to have to negotiate with the landowner, and I don't think it's appropriate to put CLECs in a position of negotiating with landowners for

something that Qwest is seeking as a right.
COMMISSIONER HEMSTAD: Okay.
JUDGE RENDAHL: Ms. Sacilotto, you have a couple of minutes, I believe.
MS. SACILOTTO: Okay, I will try to be very brief. Around the edges of this is a suggestion that for some reason we're opposed to be providing access to MDUs. That's not what this dispute is about at all. We have -- we're perfectly willing to provide access to property over which we have ownership and control. The definitions of conduit in the SGAT language that we have proposed includes multiple dwelling units in the definition of conduit.
All we are saying here is that we do not believe an MDU conveys a right of way. And MDU access is clearly going to be an issue in further workshops. Whether or not we provide access to MDUs is going to come up in the issue of subloop unbundling. So we are not saying that we don't have to provide or we're trying to shirk our responsibility, that we don't think multiple dwelling units are a property into which they can obtain access. This is simply a very limited dispute about whether or not they get these agreements and the terms and conditions under which they get them.
And while I hear AT&T saying that we are

changing our position on this, I have to say that I think it's exactly opposite. Because it was AT&T during the workshop for the first time raised this issue saying, well, this is a checklist item three issue. They're the ones who inserted it into this checklist item. We are perfectly happy to address MDU access in the subloop workshop. Our only request is that we do not keep checklist items open and hold issues open longer and longer because of some ephemeral issue that they can't identify. And indeed, we have already had our Arizona workshop on subloops. No right of way issue was raised there.

Don't keep it open. Eliminate it from this particular checklist item and defer it. That's what we have done for other checklist items when we have agreed to defer issues. For checklist item number nine, for example, two issues have been deferred to another workshop. Doesn't mean that we, you know, sort of keep everything else sort of floating around. We close it out, and we put it in a BOCs. It either stays in checklist item three, or it goes to checklist item two. Let's not keep both BOCs open.

COMMISSIONER HEMSTAD: I take it --

MR. BECK: Steve Beck on behalf of Qwest. I hate to interject from off the phone, but would it be

possible for me to just clarify one thing here?
MS. SACILOTTO: I would appreciate if you would.
He's been in the negotiations.
JUDGE RENDAHL: Very, very briefly.
MR. BECK: I apologize for interjecting, but let me just be clear here, that the dispute is not over whether we will provide access to MDUs even as right of ways. While it is our position that MDUs don't contain right of way, everyone who has been involved in these negotiations is aware and the record in this case shows that we are holding out the ability for them to come to us and get access to the MDU agreements and access to whatever right of way they can prove is in there. And it is not -- and it will be -- we won't fight them on it.
It will be between them and the landowner. If the landowner doesn't think there's a right of way to go in there, then the access agreement, you know, will be a dispute between the CLEC and the landowner. But Qwest is not going to jump in there and say, hey, that's my right of way. Qwest is just going to say, here's the access agreement, whatever right of way we have there, CLEC, you get, okay.
And we are not, although it's our fundamental

position we don't have to do that, we're doing it anyway. So that's not the dispute here. And it seems, you know, by the way this discussion has gone that AT&T seems to be saying that we are not providing that, and we are.

JUDGE RENDAHL: Thank you, Mr. Beck.

MR. BECK: That's all I wanted to add.

JUDGE RENDAHL: Thank you, Mr. Beck.

Commissioner Hemstad.

COMMISSIONER HEMSTAD: I have lost just where we were.

CHAIRWOMAN SHOWALTER: Well, it was about deferring BOCs 3 and BOCs 9 or one BOCs or the other.

COMMISSIONER HEMSTAD: What is your response to the suggestion that we defer for two weeks on this issue to see what the FCC has to say?

MS. SACILOTTO: Well, we have a process in place in Colorado that we had agreed to incorporate into Washington, which would -- I think we were going to brief disputed issues on the 26th of September, and we had agreed that we would provide those briefs to the Washington Commission as well. It's the same issue. That would get us close to -- I'm always sceptical when the FCC says it's going to do anything on any schedule, but yeah, I think that we could wait, have those briefs

filed, and see what the FCC has to say about it.
COMMISSIONER HEMSTAD: Okay, one final comment, and maybe we have beaten this to death on the time limit. On the question of recording versus no duty for anybody ever to record anything, it's only if the party wants to record something to give notice to the world that they have a property interest involved. But if I choose not to record something, of course there's no obligation on my part to do so.
MS. SACILOTTO: That's absolutely correct. We're not claiming that the Telecom Act, you know, imposes this duty. We just think that if it conveys a right of way, it's a prudent thing to do.
JUDGE RENDAHL: Are there any further questions from the Bench?
COMMISSIONER HEMSTAD: Now that we have taken 45 minutes.
JUDGE RENDAHL: No, when I said that there would be 10 minutes on each side, I wasn't incorporating in time for our questions in case you had questions about that.
Let's proceed to the 45 day issue and start with Ms. Sacilotto.
MS. SACILOTTO: I will try to -- this one hopefully will be a little bit easier.

To give a little bit of background to the commissioners, this issue arose originally in Arizona workshops. The question was, when Qwest is faced with an unusually large request for access to poles and conduit in excess of 100 poles and whatnot, a very large request, to accommodate a schedule that would give CLECs a predictable amount of time to expect a response to the inquiry to access, but also to provide Qwest with a reasonable amount of time to conduct a record inquiry and field verification.

The parties in Arizona negotiated a schedule that provided incrementally longer periods of time within which to respond to requests for access. It wasn't doubled as the amount of poles doubled, so 200 poles didn't take twice as long. We just asked for a little bit more time as the requests got very, very large. This was a proposal that WorldCom itself proposed to us. We looked at it, had some concerns, but said, okay, we will agree to it, we will do that, and we incorporated that into the SGAT.

Then in Washington, WorldCom pulled back on that and said, no, you have to respond to any request for access to poles regardless of how large the request is in 45 days, interpreting the FCC rule to require that amount of time for any request regardless of the size.

We disagree that the FCC rule even addresses this issue. It just doesn't seem to address the issue of a large request. And we believe that the schedule that was negotiated in good faith, indeed was proposed by one of the CLECs, is a reasonable accommodation.

However, in an attempt to resolve this issue and in the spirit of collaboration, we have recently in our comments on the revised initial order proposed a different schedule that tracks the FCC's pronouncements on very large requests in the Cavalier Telephone and Virginia Electric Power Decision, which the CLECs themselves cited as supporting their position. That SGAT language would say that Qwest is required to respond to any requests submitted by a CLEC within 35 days of receiving the attachment 1(b), which is the request for access.

To the extent that the request includes a very large number of poles, which would be more than 100 poles, Qwest would be required to begin approving and denying access no later than 35 days from the day of receiving the request, and it would be required to approve or deny access on a rolling basis. That is, at the time Qwest determines that it can provide access, conducting a record inquiry and field verification, it would begin approving or denying access as soon as it

could make that determination so that a CLEC would not be required to wait until all of the poles and all of the ducts are inspected and verified before receiving a response to their request.

We believe that this tracks what the FCC said about very large requests in the Cavalier Telephone decision, and so we have proposed that as consistent with the FCC's rules to resolve this issue.

JUDGE RENDAHL: Any questions from the Bench?

CHAIRWOMAN SHOWALTER: Well, I guess the only question I have is isn't the requirement that is in the draft revised order that you must answer yes or no to the request within 45 days, and if there is a good reason for no, isn't that allowed?

MS. SACILOTTO: Well, you know, if you -- we could say, no, we haven't gotten around to the field verification, but I doubt that the CLECs would approve that.

CHAIRWOMAN SHOWALTER: But that might not be a good reason.

MS. SACILOTTO: Right.

CHAIRWOMAN SHOWALTER: But if you have a good reason.

MS. SACILOTTO: Oh, sure.

CHAIRWOMAN SHOWALTER: But I guess the

question I'm asking is if the underlying issue is if you have a good reason for not being able to grant the request, either you can say it, that you don't have it within 45 days, or you don't get around to saying one way or the other until you can provide it. But what is the problem with having to say, we have a good reason for not providing this within the 45 days.

MS. SACILOTTO: That's not the dispute. The dispute is being able to make that determination when we are faced with an extremely large request for poles. It may be that we can provide access to the 300 poles, the 500 poles they want access to. We just need some time to make that determination. That's what we're asking for. We're not saying, you know, if we have that information, clearly we will provide it. That's what our proposed SGAT language would say. As soon as you can make that determination, make that determination.

What we are arguing is that to make that determination when you have a huge request could take a while. Field verification is not an insignificant effort. It requires going out to the field, physically looking at the pole, determining if the pole has a lot of stuff on it or if it's deteriorated due to age. For manholes, it requires looking in the manhole, pumping out water, putting in air, seeing if conduit has been

crushed, all of these things that Mr. Freeberg described in his testimony. To do these things when we're faced with a request for 500 poles or miles of conduit or manholes, all we're saying is to be able to make that determination and to say if we can grant or deny access could take longer.

And we believe the language we have proposed is consistent with the FCC rule. As you are able to provide an answer to that, you will do so, and you will start doing so within the 45 days.

JUDGE RENDAHL: Ms. Hopfenbeck, do you wish to address this issue or --

MS. HOPFENBECK: I will be addressing this issue.

JUDGE RENDAHL: Okay.

MS. HOPFENBECK: On behalf of both WorldCom and AT&T. Initially just to put one issue aside, WorldCom did at one point early on in the 271 process agree to a schedule of gradual provision of decisions on access, and we changed our position very early on in the 271 process. And this has been an issue now in Colorado and is now an issue in Washington and is an issue in every state in which 271 processes are going forward.

Putting that aside, let's address the legal question here, and that's what it is. U S West has

proposed some language which they characterize as paraphrasing the FCC's interpretation of its rules on access in Cavalier. We disagree that that language will resolve this dispute, principally because we disagree that the language proposed is consistent with the Cavalier decision.

It is WorldCom and AT&T's position that the FCC rule as interpreted by them in both Cavalier and earlier than that in In Re Bell South, which was FCC decision 98-271, that the FCC rules require decisions as to granting access or denying access to be made within 45 days. And that's what we're asking be incorporated into the SGAT. First of all, the rule, rule 1.1403.3(b) states that:

> If access is not granted within 45 days of the request for access, the utility must confirm the denial in writing by the 45th day.

It is our position that this language is unambiguous. The FCC interpreted that rule initially in the In Re Application of Bell South case in which it stated:

> A pole owner must deny a request for access within 45 days of receiving such a request or it will otherwise be deemed

granted.

Then in the Cavalier proceeding, which was a proceeding brought by a CLEC complaining about a utilities delay and denial of access in an appropriate time frame, the commission addressed the delay in the permitting process. And it cited its rule, it cited its previous statements on the construction of that rule, and based on that it went on to conclude that the respondent is required to act on each permit application submitted within 45 days of receiving the request.

Now U S West has argued that the term to act should be understood in this position as a beginning to act, that all they have to do is say yeah or nay on a portion of the large application. We believe that's an improper reading of the Cavalier decision. To act, if you look at the paragraph 15 that addresses this on page 6 of the Cavalier decision, the term act clearly references the action of denying or granting, and they're required to deny or grant the application within 45 days.

There is language in the Cavalier decision that deals with large orders in the decision. After saying we conclude they're required to act within 45 days, the commission goes on to say:

To the extent that a permit application

includes a large number of poles, respondent is required to approve access as the poles are approved so that complainant is not required to wait until all the poles included in a particular permit are approved prior to being granted any access at all.

Now U S West or Qwest argues that that sentence should be read as allowing them to act beyond the 45 days. We disagree. We believe that consistent with the FCC's goal that the utility who is charged with providing access not take any action to impede the installation or maintenance of equipment by competitive carriers, they are basically saying in large orders, don't wait until the 45th day to grant or deny the whole thing. But as you're working on the large orders within that 45 days, tell your competitors that you have granted access as soon as you begin to approve access to those poles.

So in short we believe that the law requires Qwest to provide the answer that access can be granted or will be denied based on legitimate grounds, and those grounds are safety, lack of capacity are among two of those grounds, within 45 days. Thank you.

COMMISSIONER HEMSTAD: What is the mechanics

of the circumstance, let's assume a large order and all or some portion of it is unable to be granted within the 45 days, the ILEC comes back and says, we can't do it for the described or justified reasons, what happens there?

MS. HOPFENBECK: It's my understanding that if access is denied, the ILEC is required to state the reasons for denial. And that once the reasons for denial are stated, the CLEC then has the opportunity to take steps to confirm the fact that there is no capacity available or -- but that definitely can go beyond the 45 days. It's that initial decision about whether to grant access or to deny it and the requirement to state your grounds within that 45 days that we're insisting on.

COMMISSIONER HEMSTAD: At any rate, that's all that's in front of us here today.

MS. HOPFENBECK: That's right.

CHAIRWOMAN SHOWALTER: Well, what about, maybe this isn't in front of us, but what about the grounds that, well, they asked for 500 poles, and we just haven't gotten to every one yet, so our reason is that this was such a big order that 45 days is too short a period to get around to every pole?

MS. HOPFENBECK: That's not a legitimate ground under the FCC rules.

COMMISSIONER HEMSTAD: But what would the remedy be for that if it's not legitimate?
MS. HOPFENBECK: The remedy would be an enforcement action to enforce the right -- I mean in the SGAT, assuming that the appropriate language is incorporated into the SGAT and that the SGAT is then adopted by a carrier as their interconnection agreement, then the remedy would be enforcement of that interconnection agreement before this Commission.
CHAIRWOMAN SHOWALTER: You know, I don't know what the biggest order imaginable or that's realistic is, but is there some size order that would simply be too difficult to assess within 45 days? I mean can someone say, give me everything in the country?
MS. HOPFENBECK: I mean in this particular instance, I think the answer has to be no the way the FCC has been viewing this issue. I mean they have been focusing on the need to establish guidelines to ensure that ILECs are not impeding access, taking actions that impede, you know, access to poles, conduits, ducts. And so I mean that's why they have adopted the 45 days. I mean I'm sure they heard that argument before they adopted that rule. But in this instance, there's a rule that's clear, and then the Cavalier decision that not only addresses that rule, but also takes into

consideration that they know there can be large orders, and in that instance, they should begin acting quickly and let the CLEC know as early as possible as those orders are being processed.

MR. KOPTA: If I might interject at this point.

JUDGE RENDAHL: Very briefly, Mr. Kopta.

MR. KOPTA: Thank you, Your Honor.

Nextlink also addressed this particular issue in some of the testimony they had filed. And in answer to your rather practical question, I think it's clear from the record that it's not simply a, gee, I would like to have all of the poles that you have in Seattle. It's incumbent upon the requesting party to map out exactly where the pole route is or the conduit route is. And I think based on what the CLEC has to do to identify the poles or identify the conduit runs, it's very specific as to where the route is going to be, how long the route is going to be, and that there's no reason, at least provided on this record, no evidence in this record, about how long they would take to do that kind of an analysis of any distance. That wasn't one of the things that from an evidentiary standpoint was included.

Unfortunately, for a very short conduit run for Nextlink, Qwest took the entire 45 days. And in

that time that they were processing orders, it was 45 business days for a very short run. So the experience of CLECs is that Qwest takes as long as it can take. And unless you have a time limit, then there will not be a limit on when there is a response to yeah or nay, whether that conduit run or pole run will be available.

JUDGE RENDAHL: I was just going to give Ms. Sacilotto an opportunity to rebut unless you have a very brief comment.

MS. HOPFENBECK: I just have one other point to make, which is that the proposed language, not only is it inconsistent with Cavalier, the proposed language also is completely open ended and is unacceptable for that reason as well.

JUDGE RENDAHL: Ms. Sacilotto.

MS. SACILOTTO: I have two very quick points. I would disagree with Ms. Hopfenbeck's interpretation of the Cavalier decision as saying -- under her interpretation, you would have less than 45 days to respond to a pole inquiry for a very large number of requests, a very large number of poles. That seems counter intuitive. The FCC is not pulling back. Under her interpretation, you have to give a response right away even if it's less than 45 days. That's not what the rule requires, and that's not what they're

addressing here. What they're saying is just the opposite. If you have a very large number of requests, this is how you do it. As you provide, as you can confirm whether or not you can provide access, then you respond. So I would say she is reading the rule backwards to the intent of a large request.

And with respect to Mr. Kopta's point where he is claiming that we always take the 45 days and his reference to the discussion on the record, I think the record is very clear that within that 45 days was quite a bit of time when the ball was in Nextlink's court, and we were simply waiting for either approval to move forward or a check in the mail.

And to answer your question of how big can a request be, in one state, in the state of Washington, we have had requests for as large as 100,000 poles. So you can -- oh, in one state, but not in Washington. In other states, we have had carriers ask for as large of a quantity as 100,000 poles. So, you know, a request can be pretty large, and so I believe that they are interpreting the Cavalier decision backwards to say that when you have a request of that nature that you would provide -- you would have to respond in less than the 45 days.

JUDGE RENDAHL: Thank you. Are there any

further questions from the Bench?
Thank you, let's move on now to the issue on checklist item number ten and try to finish that as quickly as possible.
Ms. Sacilotto or Ms. Anderl, do you wish to address that issue?
MS. SACILOTTO: I will be addressing it, but I believe that we should be in a respondent category on this, so I will let Ms. Hopfenbeck or Ms. DeCook answer first.
JUDGE RENDAHL: Ms. Hopfenbeck.
CHAIRWOMAN SHOWALTER: Could you be sure to point us to the part in the revised order where we are so we don't have to look for it.
MS. HOPFENBECK: Yes, actually that would be fine. Page 36 is where the discussion on checklist item 10 begins. The order starts discussing the parties' various positions on page 38.
JUDGE RENDAHL: Do you have a paragraph reference on your --
MS. HOPFENBECK: Yeah, paragraph 141 is the beginning of the discussion. The parties' positions are recited beginning at paragraph 146. The AT&T and WorldCom position is addressed at paragraphs 152 to 154, and the discussion and analysis is at paragraph 162.

This is an issue in which WorldCom, and actually it really is principally a WorldCom issue, not an AT&T issue, where WorldCom believes that the Commission should reconsider the staff's determination. The basis for WorldCom's position, WorldCom's position is that Section 271(C)(2)(b)(10) that requires the ILEC to provide nondiscriminatory access to data bases and associates signaling that are used in the transmission routing or other provision of telecom services requires them to provide not simply a per dip or per query access to the ICNAM data base, which is the Internet work calling name data base, but rather that in order to provide nondiscriminatory access to that data base, it should be the provision of the entire data base to the CLEC.

The calling name data base is used for the provision of a telecom service, specifically caller ID service. In the absence of being provided with the entire data base, the CLEC doesn't have access at parity and doesn't have -- to that unbundled network element or the same access that Qwest has for its own services, I mean for its own use. And the CLECs are essentially disadvantaged in their provision of caller ID service as compared to Qwest's ability to provision that service unless they have access to the entire data base.

That's all our position -- that's really the sum of our position on that issue.

JUDGE RENDAHL: Any questions from the Bench for Ms. Hopfenbeck.

COMMISSIONER HEMSTAD: Maybe you stated it, but I missed it. What is the FCC's -- what is your understanding of the FCC's position on that?

MS. HOPFENBECK: The FCC addressed access to signaling and data bases most recently in the advanced services order, and that discussion begins at paragraph 402 of that order and continues through many paragraphs. At paragraph 410, the FCC states that access to the CNAM data base among others should be granted at the signal transfer point.

The reason why WorldCom is taking a position that the Commission should go further in this case is that if you look at the advanced services order, you realize that in that order the FCC clarified for the first time that the calling name data base was included among the data bases that needed to be provisioned as unbundled network elements. The other data bases had already been, as of the first report and order in the local competition order, data bases that they had directed access be provided for.

The calling name data base and access to that

has a different purpose than the other data bases in the sense that the other data bases are necessary for transmission and routing of calls, and per dip and per query access is adequate. This is a data base that is used in order to provide a service, and if you don't have access to the entire data base, you can't manipulate the data to provide service in a fashion that you as the CLEC want to provide to the service. Qwest provided Caller ID, and then it turned and used the data to provide enhanced Caller ID. Basically so long as all we have is per dip and per query access, we are limited in providing a service that looks the same as the service that's provided by the ILEC.

COMMISSIONER HEMSTAD: I see. But in any event, I understand your position, and I take it you don't see the FCC order as limiting our ability.

MS. HOPFENBECK: That would be true on this issue, yes.

JUDGE RENDAHL: Any further questions from the Bench?

Ms. Sacilotto.

MS. SACILOTTO: Thank you. We believe that in the UNE remand order and in Rule 319 that the FCC has clearly spoken on this issue. This is not an issue that has been ambiguous. This is not an issue that wasn't

recently before the FCC. This is one that they have addressed less than a year ago. And the FCC has been clear in its UNE remand order in paragraph 402 and continuing that incumbent LECs must provide access to their calling name data base on a query response basis only. In particular, Rule 319(E)(2)(a) incorporates this per query requirement and confirms that incumbent LECs must provide access at their signaling transfer points, not as a bulk transfer of the entire data base, which is what WorldCom is asking for, for purposes of a switch query and response. So really what WorldCom is asking for is something that goes far beyond what the FCC considered.

In its recent 271 order, the FCC confirmed that a 271 proceeding is not the forum in which a party can raise any issue that they might have, any request for service or an element and defeat a BOCs application. Rather it is a limited review of whether the BOCs complies with current established FCC rules. WorldCom, in fact, admitted at the workshop that our SGAT is entirely consistent with the FCC rules, so there's really no other inquiry there.

As far as WorldCom's claims now that a per query response is somehow discriminatory or prohibits them from providing the service they seek to offer,

those are questions that should have been brought to the FCC at the time that it addressed this issue. This is one that they very recently addressed. They just added the calling name data base to the list of call related data bases. These are arguments that properly should have been brought to that forum. When the FCC determined that access to this data base is provided on a per query response by means of a physical access at the STP, it answered the question, that that access is, in fact, nondiscriminatory.

Further I would say that all of the arguments that WorldCom has attempted to raise in its comments and here about its ability to provide all of these different services and whatnot should have been made frankly in the record. And we find that there's no support for many of the statements that we have been seeing in their filed papers on this. But the more important point, frankly, is the one I previously made. These were ones that should have been raised to the FCC. When they determined that a per query access is what a BOCs must provide or any incumbent LEC, they answered the question that that access is nondiscriminatory. So our SGAT is fully compliant with the FCC's UNE remand order, as WorldCom itself admitted.

COMMISSIONER HEMSTAD: I take it then it's

your position that this Commission doesn't have the authority to go beyond your interpretation of the FCC order?

MS. SACILOTTO: Not for a type of UNE that the FCC has already addressed. The FCC did give state commissions authority to identify additional UNEs that may not be addressed in Rule 319, but it did not give state commissions authority to revise the Rule 319 elements, and that's really what WorldCom is asking.

Also, to be clear, we're not saying that this might not be something that WorldCom could raise in negotiations and perhaps if some proper terms could be put around it or whatnot, maybe the parties could agree to something. We don't think that there's any basis in the law for them to get what they want. It's conceivable though that the parties could negotiate this.

JUDGE RENDAHL: Thank you.

Ms. Hopfenbeck, do you have any brief couple minute rebuttal?

MS. HOPFENBECK: Initially just a few observations. With respect to the FCC's comments that the 271 proceeding is not the forum to bring up new issues, I would say that those comments are addressed to that proceeding that is before the FCC at the point in

time when the application has been filed and pending there. Until such time just as -- just as, you know, the FCC will be bound at the time it reviews the application by the law at the time the application is filed with them, this Commission can exercise its authority review, we believe, in determining what constitutes nondiscriminatory access to data base in the case -- in the situation of the CNAM data base.

That's all I have.

JUDGE RENDAHL: Thank you.

We are going to take a break at some point. Do we want to go ahead and try to address the ISP issue, or do you think it's appropriate to take a break now and come back? Any thoughts from the Bench?

Any preferences from the parties?

MS. SACILOTTO: I would like to request a break just for the sole purpose of being able to put post its on my revised order for the paragraphs. I think that might move things or assist you guys, and so I would like to -- I tried to do it, but I didn't finish.

JUDGE RENDAHL: Okay, let's take a 15 minute break then and be back at 25 to. We will be off the record until 25 to. Thank you.

(Recess taken.)

JUDGE RENDAHL: Let's be back on the record. Before we go into the issue of reciprocal compensation for Internet bound traffic, Mr. Yorra, is it Yorra for Sprint, Mr. Yorra, am I mispronouncing your name?

MR. YORRA: Yorra.

JUDGE RENDAHL: Yorra, I neglected to ask you if you could put your fax, phone, and E-mail address on the record. If you could do that, and then we will move on to the next issue.

MR. YORRA: My fax number is (503) 972-3827, phone number (503) 802-2127. What was the third thing?

JUDGE RENDAHL: And your E-mail address.

MR. YORRA: E-mail is andrewy@tonkon.com, T-O-N-K-O-N.

JUDGE RENDAHL: Thank you.

Okay, let's proceed with the issue of reciprocal compensation for ISP bound traffic. And Ms. Sacilotto, I will start with you on this issue, because I think Qwest does have the starting position on this one. Ms. Sacilotto.

MS. SACILOTTO: Thank you very much.

JUDGE RENDAHL: You have ten minutes. Excuse me for interrupting.

MS. SACILOTTO: I will try assiduously to stay within that. Let me begin by saying that this

involves paragraph 199, 200, up to 202 of the staff's revised initial order. That's where this issue is addressed.

Let me begin by saying that Qwest is fully aware and mindful of the Commission's past orders on reciprocal compensation for Internet bound traffic. Although Qwest respectfully does not agree with those orders, it is implementing them. Qwest has and continues to pay reciprocal compensation for Internet bound traffic under its interconnection agreements where it has been ordered to do so in Washington. Thus as far as compliance with its interconnection agreements is concerned and applies to this Commission's determinations regarding checklist item three, Qwest has and is complying with its interconnection agreements.

Qwest's exclusion of Internet bound traffic from the reciprocal compensation provisions of its SGAT should not negate that compliance. Section 251(b)(5) does not mandate that Qwest pay reciprocal compensation for Internet bound traffic. Indeed, state commissions across the country have lawfully declined to order reciprocal compensation for this type of traffic. Thus it's clear that reciprocal compensation for Internet traffic is not an obligation under Section 251 of the Act.

Because Section 251(b)(5) does not mandate reciprocal compensation for Internet bound traffic, Qwest can exclude this traffic from its reciprocal compensation provisions of its SGAT and continue to meet the requirements of checklist item 13. This is clear in a number of the FCC's orders in the 271 context. Most importantly in its Bell Atlantic New York order, the FCC determined that inter carrier compensation for Internet bound traffic is not a reciprocal compensation issue and therefore not a checklist item 13 issue. This was in paragraph 377 of its order.

Staff and the CLECs may argue that the D.C. Circuit's vacature of the ISP, of the FCC's ISP declaratory ruling, somehow undercuts the FCC's pronouncements in Bell Atlantic, but it does not. The D.C. Circuit vacated the ISP declaratory ruling because the FCC had not fully explained its rationale. It did not vacate that rule on the merits.

In addition, that ruling didn't address reciprocal compensation in a 271 setting. It didn't address the issue at all. It didn't address the Bell Atlantic New York order. Even with the vacature, there's no FCC order that requires incumbent LECs to pay reciprocal compensation for this Internet bound traffic, thus we believe that the Bell Atlantic New York order is

still valid and standing.

In addition, in the SPC Texas order, the most recent order, the FCC declined to address this issue, saying that it was inappropriate to do so while the issue was on remand. So we believe that the FCC has always steered clear of this issue in a 271 setting, and we believe the Commission should do so likewise.

We also believe that this is not an SGAT issue. The Commission need not and should not require Qwest to include reciprocal compensation for Internet bound traffic in its SGAT. Section 252(f) provides that the SGAT must comply with 251. But Section 251 does not mandate reciprocal compensation for Internet bound traffic. Therefore the SGAT complies with Section 251 regardless of the exclusion.

Also it's important to realize that in this setting, it's very different than the Commission's past orders. In those proceedings, parties came to the Commission, they asked them to resolve this issue, and they were bound by the Commission's determinations. Here no CLEC is bound to execute the SGAT. The SGAT is simply an option for those CLECs who chose to execute it. It in no way diminishes our obligation to negotiate and arbitrate interconnection agreements with any requesting carrier who requests that we do so. It in no

way diminishes the ability of any competitive LEC to pick and choose from other valid interconnection agreements. And indeed, it's an option that is fully attractive to those CLECs who don't focus their business on serving Internet service providers. Indeed a CLEC McLeod has already executed the SGAT in all of its provision, including the reciprocal compensation provisions.

So we believe that it is simply an option, an option that should be permissible to CLECs, whether they choose to execute the SGAT in whole or in part. If they believe that they have a right to recover reciprocal compensation for Internet service traffic, they are free to negotiate that before the Commission, and they are free to opt into any agreement that provides it. The SGAT in no way precludes that and therefore in no way precludes any of their rights under Section 251.

JUDGE RENDAHL: Any questions from the Bench for Ms. Sacilotto?

CHAIRWOMAN SHOWALTER: Not yet.

JUDGE RENDAHL: And who wishes to address this issue for the CLECs?

MR. KOPTA: I will, Your Honor.

JUDGE RENDAHL: Thank you, Mr. Kopta.

MR. KOPTA: This marks, I think, the fifth

proceeding in which I have appeared before this Commission representing parties on this same issue, and each time the Commission has ruled the same way, and yet here we are again. I don't know what I can say that I haven't already said or that the Commission has said before with respect to this particular issue. I think it's clear that this Commission has taken a stand on this issue and that Qwest has not provided any basis for the Commission to issue a different decision.

COMMISSIONER HEMSTAD: Well, what about the point that this is now a different environment, the 271 environment?

MR. KOPTA: Well, we don't think that it makes any difference. I would respectfully disagree with counsel for Qwest that the D.C. Circuit decision has no impact. In fact, it vacated the FCC's ISP order, and it was the ISP order on which the FCC relied in its Bell Atlantic decision. The whole premise for treating this or deciding that this traffic was Interstate for jurisdictional purposes, the D.C. Circuit, if you read their opinion, pretty much said, we don't buy it, based on what you guys were saying before this, it looks local to us, so we'll give you another shot at trying to explain why it's not local, but in the meantime it's gone.

So we're back to where we were before February 1999 when every single state commission, including this commission, concluded that it was local traffic subject to reciprocal compensation, decisions that were upheld by every single federal district court. And in proceedings to enforce interconnection agreements that were made during that time, every single court of appeals has concluded that reciprocal compensation is to be paid for this traffic, including the Ninth Circuit in upholding a decision by this Commission.

So I think if you're talking about the state of the law, our position is the Section 251 does require reciprocal compensation for ISP bound traffic. Even if we were to assume for argument's sake that the FCC eventually gets around to coming up with a rationale that the D.C. Circuit will buy and essentially will do the same thing that it did before and authorize state commissions to require reciprocal compensation for ISP bound traffic based on something other than Section 251, I'm a little puzzled by Qwest's position that it's not a 271 issue. They have relied almost exclusively on their SGAT to demonstrate compliance with Section 271. And now all of a sudden, they're switching and saying, oh, well, under our interconnection agreements, we're in compliance, so don't pay any attention to what we have

in our SGAT.

Certainly we would agree that the interconnection agreements should be the focus of this Commission's determinations. But to the extent that the Commission does look to the SGAT, then I don't think that Qwest can evade what's in its SGAT by saying, oh, well, that's not required under Section 251, and therefore look to the -- look to what we're doing now, not to what we're going to do in the future for other carriers.

With respect to the SGAT, this is a consolidated docket that reviews both Section 271 compliance and the SGAT. And Ms. Sacilotto neglected to mention that under Section 252(f), which authorizes an SGAT, Congress has also authorized the Commission to ensure that the SGAT is compliant with state decisions as well as with Section 251. And I think it's clear that this Commission has ruled on this issue. And as the revised draft order provides, it should remain consistent on that decision and refuse to approve the SGAT until such time as Qwest brings it into compliance with this Commission's prior decisions.

As far as Ms. Sacilotto's representation that other carriers can negotiate this issue apart from the SGAT, I think this Commission knows what the result of

that will be. Every time it has been an issue for negotiation, it has ended up being arbitrated or otherwise brought before this Commission for resolution. I would like to see this issue put to rest once and for all as opposed to continually relitigating it and taking up this Commission's time as well as resources to constantly relitigate an issue that has already been decided.

CHAIRWOMAN SHOWALTER: Can you just help me out. I think it's Qwest's position that we are precluded from requiring reciprocal compensation, I think. Maybe you can confirm that. Is it your position that we're required to include this, or we have the discretion to require?

MR. KOPTA: In the wake of the D.C. Circuit's decision, I think that to the extent that this Commission interpreted the Act, Section 251, to require reciprocal compensation for local traffic and considered ISP bound traffic to be local traffic, then there are no alternatives. The Act requires reciprocal compensation.

CHAIRWOMAN SHOWALTER: So that is we have previously interpreted what local traffic is. Is that what -- and therefore to be consistent with that previous decision, there's no alternative in your view to requiring this. I'm trying to get a sense of where

the discretion rests, if at all.
MR. KOPTA: No, and I understand the dilemma. That's probably a bit of a moving target in terms of is it local, is it not local. My interpretation of what the Commission decided early on was that ISP bound traffic is local traffic subject to reciprocal compensation under Section 251 of the Act. So to the extent that the FCC's ISP order is not in effect, which is what we are living with today, then that legal interpretation would require reciprocal compensation for ISP bound traffic as a prerequisite to compliance with Section 271. It's only if this Commission were to decide that, gee --
CHAIRWOMAN SHOWALTER: To reverse ourselves in some way?
MR. KOPTA: Well, not necessarily to reverse, but to choose a different rationale for deciding to allow for reciprocal compensation for ISP bound traffic, that it's not really the Act that requires it, but that it's the Commission's independent state authority to require payment for services rendered, if you will, or whatever other rationale that you can glean from the ISP order if you assume that it once again becomes effective, that the FCC essentially did what it did before once it had the chance to take a look at the D.C.

Circuit's decision and decide what it wants to do.
So to the extent that the Commission itself decides that this traffic is not local, that somehow it's interstate, which without the FCC, it's kind of difficult to see how the Commission here would do that, but if it were to do that, then we almost have to default to the ISP order and say, well, gee, what did the FCC say the Commission could do under these circumstances.
But again, you're treading on dangerous ground, because that order is not in existence anymore, and there's no guarantee that that's what the FCC is going to do again. So I think the safest thing is we're back to where we were before the ISP order was issued in February of 1999 and say it's local, it's subject to reciprocal compensation just like any other local traffic.
CHAIRWOMAN SHOWALTER: Thanks.
JUDGE RENDAHL: Any further questions from the Bench on this issue?
Ms. Sacilotto, I believe you have a couple of minutes in rebuttal.
MS. SACILOTTO: I have only a few very brief remarks. The D.C. Circuit did not vacate the FCC ISP declaratory ruling on the merits. That's clear. They

simply remanded it for a fuller explanation, so to characterize them as reaching the ultimate merits of this is incorrect.

And also the court cases that counsel cites, in many instances they involved interpretations or enforcements of interconnection agreements that were entered into long before the ISP declaratory ruling had been issued, and they involved the unique wording and circumstances of those agreements.

The MFS decision that counsel referenced is not applicable here. There the Ninth Circuit relied solely on the ISP declaratory ruling and said essentially that the Hobbs Act forecloses us from reviewing this issue, and so we have to uphold what the state Commission did. Well, along with what counsel likes vacated from that ruling is also the D.C. Circuit's statement saying that, you know, if an incumbent LEC is aggrieved by a state commission's determination on compensation in this regard that they are free to seek appropriate relief, so that undercuts any standing that the Ninth Circuit's decision had.

We are not trying to evade our SGAT in this proceeding at all. Our position is simply that Section 251 does not mandate reciprocal compensation for this traffic, and therefore by excluding it, we are not not

complying with our obligations. It is simply an option that CLECs are free to choose or not to choose depending on what they believe will suit their marketing plans. It's not an evasion. It is simply an option.

Finally we are quite aware of what the Commission has decided in the past, and while we respectfully disagree with that, we would also submit that those decisions are being reviewed in the cost docket, and with a fuller explication and a fuller examination of this issue, we hope that the Commission will reverse its course on this issue.

JUDGE RENDAHL: No further questions from the Bench?

Let's move on then to the next issue under checklist item 13, and that would be the tandem definition.

Ms. Sacilotto, would you like to take the initial stab at this one?

MS. SACILOTTO: Yes, and I will be very brief.

JUDGE RENDAHL: Now we have for each of the remaining issues, we have allocated about five minutes per side, so just keep that in mind.

MS. SACILOTTO: I will be brief. It's our position that under the Act, carriers should be

compensated for the services that they perform. The FCC's rule 711(a)(1) provides that symmetrical rates apply when carriers provide the same services. The FCC's local competition order at paragraph 1090 provides that a CLEC switch should be treated as a tandem if it serves the same geographic area and performs the tandem functions. This paragraph recognizes that tandem switching imposes additional costs because there is, in fact, an additional switching function. We believe that SGAT Section 7.2.4.2.1 is consistent with these pronouncements because it provides that if a CLEC meets the tandem definition but it only switches traffic once, it receives the tandem rate.

Our view that CLECs should not receive both tandem and in office switching is grounded on principles of symmetry. Qwest does not recover both of these charges unless it performs both functions, end office and tandem switching. CLECs can avoid Qwest's tandem charge by directly connecting to Qwest's end offices. There's no way for Qwest to avoid those charges, and we believe that our position is consistent with the Commission's past orders which look at functionality, but most particularly the AT&T Wireless decision that we discussed in our prior briefing.

JUDGE RENDAHL: Thank you.

Any questions from the Bench at this point?
Hearing nothing, who will take the argument?
MS. HOPFENBECK: I will.
JUDGE RENDAHL: Ms. Hopfenbeck.
MS. HOPFENBECK: The tandem switching issue is addressed at paragraphs 203 through 219 of the revised initial order. There are three issues. The first is the question of what the appropriate tandem definition is. The CLECs take the position that U S West's definition is too narrow and inconsistent with FCC rule 51.711(a)(3). U S West's definition essentially states that a tandem switch is one that actually serves the same geographic area as the ILEC switch. The rule is broader than that, the FCC rule which says that a switch is entitled to tandem treatment if it serves, not actually serves, serves a geographic area comparable to the area served by the ILEC's tandem switch. The CLECs are recommending that the Commission adopt the staff's recommendation that the definition be changed to mirror the FCC rule.
The second issue is the appropriate standard in defining whether tandem treatment is appropriate. The CLECs believe that the only factor to be considered, and this is an area where we disagree with staff's recommendation, is geographic scope of the switch, and

that that is consistent with again FCC rule 51.711(a)(3) that simply states, where a CLEC switch serves the geographic area comparable to the area served by the ILEC's tandem switch, the appropriate rate is the ILEC's tandem interconnection rate. There's no mention of functionality in that rule. It's limited to geographic scope.

The third issue is the question of what the appropriate rate is once the switch is determined to be one that's entitled to tandem treatment. Again the rule states that when the tandem -- when a switch is determined to be entitled to tandem treatment, the rate should be the ILEC's tandem interconnection rate. The interpretation of that phrase should or the meaning of that phrase should be reconciled with the concept that reciprocal compensation is to be symmetrical under the FCC rules. And in this case, the only way to have a symmetrical rate is to have -- is to understand that the ILEC's tandem interconnection rate is a combination of the end office termination transport and tandem switching. That's the rate that the CLECs should be -- should receive for their switch that is determined to be entitled to tandem treatment. That is the rate that the CLECs pay to the ILEC when the tandem is used in routing their calls.

That's all I have.
JUDGE RENDAHL: Thank you.
Any questions from the Bench on this point?
Ms. Sacilotto, do you wish to take a minute to respond?
MS. SACILOTTO: No, I believe that our points are fully addressed in our numerous briefs.
JUDGE RENDAHL: Thank you.
Okay, then let's proceed on to the next issue, which is the issue of the host remote.
And I believe at this point, Ms. DeCook, are you prepared to go forward on this issue?
MS. DECOOK: That would be mine, Your Honor.
JUDGE RENDAHL: Thank you.
MS. DECOOK: Again, this is a joint AT&T WorldCom position. I think to understand our position on this, you need to understand what a remote post relationship is. A remote is essentially line modules that have been removed from the host switch to a remote switch. Trunk modules remain at the host switch. There are no trunk modules on the remote switch. Why is this important? It's important because Qwest has argued and the staff has agreed that the umbilical, the link between the host and remote, is an interoffice facility that consists of trunks. Well, it can't be. It can't

be because there are no trunk modules on the remote, and there are no trunk modules on the line side of the switch to which it connects. What is it? More likely what it is is some sort of loop aggregation technology. Should Qwest be compensated for it? We don't believe so, because it is loop aggregation technology.

However, if you conclude that Qwest is entitled to compensation for that umbilical, then CLECs who employ similar technology such as sonnet and DLC, which again is just another form of loop aggregation technology, should also be permitted to charge those same costs, prices to the ILEC for termination of traffic over the sonnet or the DLC.

Now the staff has gone on to say, agreeing again with Qwest, that because no evidence was presented by the CLECs of the cost associated with sonnet or DLC technology that we are not able to symmetrically charge for those costs if Qwest is permitted to charge for that umbilical. Well, we disagree, and the reason is that under the rules of symmetry, we have no obligation to come forward and demonstrate costs in any way. We're entitled to charge the same rate for the same facilities or even not for the same facilities. We're entitled to assess the same rate as the CLEC or the ILEC assesses the CLEC for transport and termination.

And it's only if we believe that our sonnet or DLC technology is higher in cost and we come forward and demonstrate that to you that we wouldn't be entitled to some different rate. The FCC has made it clear that the presumption is that whatever the ILEC's costs are, those will be the same costs that will be incurred by the CLEC, and we're entitled to charge the ILEC that rate. So we believe that staff got it right the first time, and we would recommend that the initial draft order be reinstated.

JUDGE RENDAHL: Thank you.

Are there any questions from the Bench on this particular issue for AT&T?

Okay, I have a few, Ms. DeCook, on this issue.

MS. DECOOK: Sure.

JUDGE RENDAHL: Just to try to clarify where we are, Ms. Strain is going to put up on the overhead an exhibit from the workshop. It's Exhibit 164, which I believe is an AT&T exhibit, and is a description of the -- no, that's a Qwest exhibit, excuse me. It's Exhibit 164, and it's a demonstration of a host remote mechanics, I guess. Can everyone see that? And showing up on an overhead is a version of Exhibit 164 labeled host remote at the top, and it's TRF-14 as well.

Looking at that diagram, in the CLEC network, what is the equivalent to the facility described as umbilical in the diagram?

MS. DECOOK: That would be a sonnet ring or digital loop carrier.

JUDGE RENDAHL: Okay. And if the CLEC were to receive compensation symmetrical to the transmission between Qwest's host and remote, what facility would it be charged on?

MS. DECOOK: I'm sorry, could you restate that?

JUDGE RENDAHL: If a CLEC, if AT&T were to receive compensation symmetrical to what Qwest receives for transmission between Qwest's host and remote, what facility would AT&T charge that compensation for?

MS. DECOOK: It would be for the sonnet ring or the digital loop carrier.

JUDGE RENDAHL: I guess at what point from -- is it from a point on the sonnet ring --

MS. DECOOK: Yes.

JUDGE RENDAHL: -- to a customer? I mean I'm trying to --

MS. DECOOK: No, because the point on the sonnet ring or the DLC where the loop departs the sonnet ring or the DLC is really the dedicated portion to the

loop, which is more akin to the line from the U S West remote to the telephones. The portion that would be assessed would be for a sonnet ring from the hub of the ring to the CLEC's switch, or on a DLC, from the remote terminal to the CLEC's switch. Those would be equivalent loop aggregation technology similar in nature to the umbilical.

JUDGE RENDAHL: Okay. And does the fact that your end offices will now be treated as tandems compensate you for any of the equivalent costs associated with the host remote architecture?

MS. DECOOK: Well, AT&T's tandems are not yet treated --

JUDGE RENDAHL: Assuming that they would be.

MS. DECOOK: Probably not. It's not clear to me how tandem transport would be applied in that context.

JUDGE RENDAHL: It's true, isn't it, that the Qwest access tariff contains a provision that allows Qwest to charge tandem transmission rates for traffic on a host remote umbilical?

MS. DECOOK: I don't know.

JUDGE RENDAHL: And do you know if Qwest's umbilicals carry traffic for more than one customer?

MS. DECOOK: As loop aggregation technology,

they would. The theory is that all loops are aggregated onto facilities such as sonnet ring. I may be talking past my headlights here, but it is true that they may no longer be dedicated. They're combined onto a facility and then transported from the remote to the line site of the host's switch.

JUDGE RENDAHL: Okay. So when you're talking about loop aggregation technology, you're distinguishing that from a traditional dedicated loop?

MS. DECOOK: I'm not sure in the loop aggregation technology whether or not the line remains dedicated or if the bits and bytes are separated somehow and passed over the facility. I mean I think this is a factual question that I can't answer.

JUDGE RENDAHL: Okay, thank you.

That's all I have. Any questions?

CHAIRWOMAN SHOWALTER: No.

JUDGE RENDAHL: Ms. Sacilotto.

MS. SACILOTTO: Yes, this issue is addressed around paragraphs 227 through 230 of the staff's revised order, and we believe that the staff's revised order is undoubtedly correct. We believe that the record evidence as opposed as to arguments support Qwest's argument that the umbilical is not a loop. The FCC defines a loop as a non-traffic sensitive facility.

It's dedicated to an end user's premises. When a customer is not using its loop, its loop remains idle.

Mr. Freeberg testified that the umbilical is not included in Qwest's loop cost studies. That was in the hearing date on the 22nd at page 422 of the transcript. He also testified that it is the remote and not the host that provides the dial tone to end users served by the remote, thus the remote is a switch that serves the loop, and the umbilical is not merely an extension of that loop. The remote is a switch in its own right, as Mr. Freeberg testified. If the umbilical were severed, that remote could switch traffic between end users served by the remote, and the remote is also listed in the lurg as a switch. It is a switch that is providing service to the loops, not the host. He also characterizes the umbilical in his rebuttal testimony as providing interoffice transport.

In addition, Qwest has cited industry publications that distinguish between shared interoffice transport facilities such as the umbilical and loops which are not shared facilities and that are not traffic sensitive. We also cited the FCC separations rules, which treats host remote situations as traffic sensitive, which is different than a loop.

This is not a loop. This loop aggregation

technology is something quite new that we're hearing about. This was not presented, and we don't believe that the record supports it in this particular proceeding.

We also believe that the CLECs are missing staff's point when staff claims that if they want recovery for their nodal transport, they have to come forward with their own cost study. The CLECs essentially claimed in their briefing and at the workshop that they should get recovery for their long loops, but Qwest doesn't recover its loop costs for a reciprocal compensation. Paragraph 1057 of the FCC's local competition order precludes recovery of loop costs in reciprocal compensation, hence the umbilical is not included in our loop studies, and our loop costs are not included in our reciprocal compensation studies. The umbilical is segregated out of the loop studies, and the loops are not in the reciprocal comp studies.

Therefore if the CLECs want recovery for something that they characterize as their long loops, then they are asking for compensation for a cost or an element that is not included in Qwest's cost studies, and that in the words of the FCC is a request for asymmetrical compensation, compensation that is not reflected in the incumbent LEC's cost studies, and that

is something that they must bring to the Commission separate and apart from this proceeding if they want to recover that. And that's provided in paragraph 1089 of the local competition order.

You know, also in response to your question, Judge Rendahl, to Ms. DeCook, we believe that if the Commission were to grant the CLECs' position on tandem treatment of the switch, then they would be compensated for this facility. They would be receiving tandem transmission on every single call, and therefore any call that would arguably involve a host remote situation would be included. To give them an additional tandem transmission recovery would be double recovery.

JUDGE RENDAHL: Thank you. I have one question for you, Ms. Sacilotto, and that is if facilities that exist on the CLEC network between the CLEC end office and the CLEC customer perform the same function that the umbilical does, do you pay the CLECs compensation for that function?

MS. SACILOTTO: I don't believe that they do provide the same function. The end office switch in a host remote situation would -- the switching of the lines occurs at the remote.

JUDGE RENDAHL: Well, for example, if traffic that travels on the sonnet ring gets multiplexed to the

end user, do you pay for that, for that function?
MS. SACILOTTO: This to me is a question that AT&T should have raised when they wanted compensation for this. All that we have heard in the record is a characterization of their facilities as being what they characterize themselves as a long loop, and I don't know if their loops are longer than ours or not, but I do know that if what their facility is is a loop, it's not included in reciprocal comp.
JUDGE RENDAHL: I guess I'm still curious though. Currently does Qwest pay any reciprocal compensation for transportation between the sonnet ring and what gets multiplexed to the end user? Do you know if that's occurring or not?
MS. SACILOTTO: I don't want to answer incorrectly. You know, the rates that have been set for reciprocal compensation have been set not with their facilities in mind. They were our cost studies and our facilities in mind. I don't know how, without the CLECs providing more information and saying how those two would line up, how that would line up one to one, if that's clear. I mean it's based upon our cost studies and our costs when the reciprocal and symmetrical rates were set.
JUDGE RENDAHL: Okay. And then one last

question. Do you know if the Qwest access tariff contains a provision allowing Qwest to charge tandem transmission rates for traffic on a host remote umbilical?

MS. SACILOTTO: I believe that that might be contained in Mr. Freeberg's testimony, the answer to that question. If not, I do recall that being discussed in the transcript. I could provide you with that page at a later date if you want. But it was my understanding, frankly, that when Mr. Freeberg testified in that regard, I believe he said that it was included. And at that point, Mr. Argenbright then backed down from his opposition to the host remote determination, so that's why it sticks in my head.

JUDGE RENDAHL: Thank you.

Ms. DeCook, do you have a short rebuttal?

MS. DECOOK: Yes. First, I believe that Qwest's argument misses the mark. The issue is, is Qwest's assertion that these are trunk facilities accurate, and Mr. Freeberg testified that the trunk, in this proceeding in the workshops at page 596 of the transcript, that the trunk modules remain at the host. That means that there can not be trunk connections in between the host and the remote. And the relevance of that is that then there -- this is not interoffice

facilities. It is loop aggregation facilities, and that's more akin to the sonnet and the DLC links that the CLEC has on its network that Mr. Wilson testified to in the workshops in Washington. So their representation that there has been no discussion about sonnet and DLC and what those represent in a CLEC's network is inaccurate.

Second, I believe that if you order the full panoply of tandem interconnection rates for the CLEC that we would be able to recover symmetrical costs, and that would include not only tandem switching but tandem transport and termination, end office termination. And if that were to occur, then that would take care of this issue.

JUDGE RENDAHL: Thank you.

Are there any questions from the Bench?

Okay, let's proceed on to the next issue, which is the commingling ratcheting issue. And again, who would like to take that issue up, Ms. Hopfenbeck?

MS. HOPFENBECK: I will do that. The commingling ratcheting issue is discussed at paragraphs 231 through 251 of the revised initial order. This is an issue on which WorldCom and AT&T believe that the staff really got it right the first time in the draft initial order. And I have to preface my comments by

saying that it was not clear to WorldCom and AT&T exactly what it was that led staff to change its position here.

What I will say is that the issue is a very -- is a much simpler one than I think it has been portrayed by Qwest in its arguments, and that is this, that what we're looking for is a decision that says that when a special access facility is devoted, when spare capacity on a special access facility is devoted to providing interconnection service, which Qwest agrees they're willing to do, the issue is how should that facility be priced.

And it's the position of the joint interveners that the Act requires that interconnection service be priced at TELRIC rates. Therefore, whatever portion of that private line facility that is used for interconnection should be priced at TELRIC with the remainder that could be a combination of idle capacity and capacity that's used to provision special access priced at private line rates.

Qwest has argued that and has tried to confuse the issues, I think we think, by discussing this as a commingling issue and similar to the issues that have been addressed by the FCC in their supplemental order and their supplemental order for clarification,

and we disagree that this is a commingling issue.

In the supplemental order, the FCC was addressing the circumstance where an IXC seeks to convert a special access facility to a loop transport combination, basically to take the whole facility, and instead of purchasing it out of the private line tariffs, purchase it out of the UNE tariffs and get the benefit of the UNE tariffs despite the fact that a portion of the traffic being carried on that facility is interexchanged switch access service as opposed to local traffic.

Now the Commission -- the FCC has put a temporary prohibition on that except in the circumstance where the CLEC can establish that every one of the DS-1s on a DS-3 private line facility is carrying a significant amount of local. That prohibition sort of sums up what the difference is between this issue and that issue.

The issue being addressed in the prohibition and in the supplemental order is an issue of how do you price circuits where both local and switched access service or special access service are being provisioned over the same facilities. Here we're talking about a DS-3, a portion of which is used exclusively for local interconnection service and a portion of which is used

exclusively to provision special access. There's no arbitrage in that scenario the way there is in the commingling scenario perhaps, and that's really what the FCC is concerned with. They didn't want to consider the question of repricing access services in the context of local competition order.

Here we're not asking -- we're not making a proposal that impacts the pricing of special access. We're saying that what needs to happen here is that to the extent a facility is used for special access or is idle because it's originally a special access facility, it should be priced at special access rates. And to the extent it is used for interconnection, it must be priced at TELRIC under the Act.

That's sums it up. Thank you.

JUDGE RENDAHL: Any questions from the Bench on this issue?

Ms. Sacilotto.

MS. SACILOTTO: Thank you. Well, we believe that staff's revised initial order reflects the careful look that they gave to this issue, and staff correctly concludes that this provision of the SGAT, which is 7.3.1.1.2, gives CLECs the engineering efficiency, which is what they really claimed they wanted, and it gives it to them at a significant cost saving. What they simply

want is more.

And what shouldn't be lost here is that the CLECs are arguing from a host of negatives. They haven't cited anything in the Act or the FCC orders that affirmatively gives them any right to what they're asking for. What they're saying is, well, the commingling doesn't really apply, and what the FCC rejected doesn't really apply, and the supplemental order doesn't really apply, but we haven't seen anything that gives them permission to use facilities that are voluntarily purchased out of a special access or private line tariff for purposes of running interconnection facilities.

And I would disagree with counsel for WorldCom that their proposal doesn't impact pricing of special access facilities. It does. Those special access facilities are set at tariffed rates. Those tariff rates assume some portion of the facility may be used for local traffic, and it sets a tariff rate for the entire facility. If part of that facility is ratcheted down to TELRIC, then they are, in fact, affecting the tariffed rate of that facility.

And regardless whether their views that the FCC order doesn't precisely address their issue, it's real close. And what they proposed to the FCC in their

ex parte comment that the parties have discussed at length in their brief is the staff recognized very similar. Using the spare circuits on a special access facility, multiplexing them onto a DS-3, and having those rates ratcheted down to TELRIC, that is something that the FCC did not accept in its supplemental order clarification, and we believe that it's extremely similar to what the CLECs are proposing in this proceeding.

So in our view, if the Commission were to grant their request, it would be modifying tariff rates, tariff rates set by the FCC, which only the FCC has the ability to modify, or tariff rates that have already been set by this Commission. What's important is that we don't require CLECs obviously to get their interconnection facilities through these tariffs. They're free to purchase them at TELRIC rates. This is an accommodation to allow them to use spare capacity that they might have on previously purchased special access or private line circuits for local interconnection facilities. And as staff recognized, any way you look at it, this is a great benefit for them, and we believe that their order got it right.

JUDGE RENDAHL: Any questions?

I have one question, Ms. Hopfenbeck, and you

have a couple of minutes or a minute or so I guess in rebuttal, but I can't recall, did you cite a section of the Act or FCC rules that requires TELRIC rates for a portion of DS-3s used for interconnection?

MS. HOPFENBECK: Well, the Act didn't -- the Act requires that interconnection be priced at TELRIC, and that's what I was referring to.

JUDGE RENDAHL: Okay, thank you.

MS. HOPFENBECK: In response to Ms. Sacilotto's comments, I would simply reiterate that we're not -- there's no dispute between the parties that a portion of this private line facility can be used to provide interconnection service. U S West has agreed that that spare capacity on an interconnection -- on a special access circuit may be used for interconnection. Once you get beyond that, the next question is, how should it be priced. We're simply saying that to the extent that a certain number of DS-1s on a DS-3 are used for interconnection, they should be priced and must be priced under the Act at TELRIC. The remainder are priced under the private line rates.

JUDGE RENDAHL: Thank you.

MS. HOPFENBECK: I guess I will add one other thing, which is just on the ex parte and the supplemental order, is that that circumstance was not --

neither the supplemental order nor the ex parte were dealing with interconnection provisioned over special access facilities. It's always a question of converting special access to UNE combinations, essentially EELS.

JUDGE RENDAHL: Thank you.

Okay, let's proceed to the next issue, which is the single point of interconnection per LATA/inter local calling area trunking facility question.

MS. SACILOTTO: Thank you. Referencing back to those numerous briefs and comments that we have filed on this issue, I'm here to say that we are going to rest on those.

JUDGE RENDAHL: Thank you.

Did the CLECs have any comments?

MS. DECOOK: Absolutely. This is a proposal that requires a CLEC to pay both reciprocal comp and private line rates on the transport or completion of a call within a local calling area. The FCC has been clear that a call that originates and terminates within the same local calling area must be assessed reciprocal comp. Instead Qwest creates an arbitrary virtual POI within the local calling area where the two calls are being completed and says that reciprocal comp will be exchanged between the parties for the transport to that virtual POI. And then from the virtual POI to the CLEC

who has established a single point of interface outside of that local calling area, they will assess private line rates. And this is just -- flies in the face of the FCC rules and the Act.

The Act says -- the Act doesn't look at and the FCC rules don't look at how a call is transported. The FCC rules say if a call originates and terminates within the same local calling area, reciprocal comp shall be assessed. It is CLECs' position that Qwest's attempt to levy private line charges for that call completion is contrary to the FCC rules and seeks to impose upon the CLECs, dictate the CLECs' point of interconnection for purposes of reciprocal comp, which is contrary to the single POI, point of interconnection, decisions that have been rendered in the Ninth Circuit, which say that CLECs are entitled to establish a single POI at their discretion. They don't have to establish POIs in every local calling area.

The FCC has filed an amicus brief in the Oregon District Court where they say CLECs have the discretion to determine the most efficient point of interconnection for the CLEC. If that means they want to establish a single point of interconnection, that's what the Act permits them to do. It doesn't give the ILEC -- the Act doesn't give the ILEC the discretion to

dictate where CLECs must interconnect, but that is what Qwest's Inter LCA proposal does by forcing the CLEC to establish a virtual POI in every local calling area. Thank you.

JUDGE RENDAHL: Ms. Sacilotto, do you have any rebuttal?

MS. SACILOTTO: I have no rebuttal.

JUDGE RENDAHL: Are there any questions from the Bench on this issue?

Okay, I have no question on this issue, so we can proceed to the last issue, which is the issue of symmetrical compensation, for lack of a better description.

Ms. Sacilotto.

MS. SACILOTTO: Yes, I think I will take the laboring oar. We agree with staff's initial and revised decision that the record is insufficient on the CLECs' claims that they should recover some of the cost elements that they were seeking to recover in this proceeding, such as co-location costs or long loop costs through reciprocal compensation. We believe that the inadequacies in the record are fully described in our briefs. These are inadequacies not only in legal support but also in factual support. We have mentioned some of them a little bit earlier. Costs aren't

included in reciprocal compensation. No FCC rules contemplate sharing co-location costs between incumbent LECs and their competitors, let alone through reciprocal compensation.

The record is clear by AT&T's own admission that co-location is used primarily to access UNEs. There has been no presentation about how the costs of co-location would be allocated between UNEs and interconnection. It is also optional. CLECs can get interconnection through other means besides using co-location, such as mid span means or entrance facilities. And there are just many, many other examples, no evidence that co-location is the least cost means for this. So we believe that the record is wholly inadequate.

Where we depart from staff is keeping this issue open for another workshop. There is no reason to do so. This issue relates solely to what should be recovered through reciprocal compensation. It doesn't relate to the terms and conditions of co-location or the terms and conditions of interconnection. This was a proposal to get these cost elements through what the CLECs called symmetrical reciprocal compensation. They had three days to make their case and then an additional day in the follow-up workshop. We agree with staff that

the case wasn't properly made here. But even more important, we don't think this is the proper proceeding to even raise this kind of an issue.

This is a brand new issue that AT&T has developed. Their witness during the workshop stated that this is something that hasn't been brought to the Commission before in its prior cost docket proceedings. It is one that has just been proposed to AT&T's own economists, and these are issues that would affect the entire industry, not just Qwest, not just these CLECs.

And so we believe that really the proper forum for this kind of a radical change in the views of reciprocal compensation should at a minimum be brought to the Commission in its cost dockets where its cost experts are present and could really address these issues. But even, we think it's really something that they would have to seek guidance or relief from the FCC on this. It's not proper in the context of a 271 proceeding to bring such novel claims and expect the state commission to determine whether or not we comply with claims that really don't have much support in the record of the evidence. So we would recommend closing this issue and not holding it open to a future workshop.

JUDGE RENDAHL: Thank you.

Any questions from the Bench at this point?

Ms. DeCook, are you --
MS. DECOOK: That would be me again.
JUDGE RENDAHL: -- going forward on this issue?
MS. DECOOK: I will take the oar this time. These are really two issues. The issues are symmetrical compensation, and the second issue is hidden cost. The symmetrical compensation issue is not new. It's not novel. It stems from a whole myriad of proposals, the tandem switch proposal, the single POI, the Inter LCA proposal, Qwest's refusal to allow CLECs to interconnect at the access tandem which is the top of the network. All of those proposals are nonsymmetrical, and AT&T's point is the FCC requires symmetrical reciprocal comp.
The upshot of Qwest's SGAT is to limit the reciprocal comp that it pays to CLECs and to increase both the reciprocal comp payment and other payments that the CLECs must make to Qwest, thus creating on inequitable environment. One of AT&T's proposals for resolving that issue was to force interconnection at the top of the network. That's obviously not the only mechanism that this Commission has for resolving this issue. The Commission could also require U S West to make its SGAT symmetrical, and we have certainly advocated that outcome in this proceeding. And if that

outcome is produced, then you have created an equitable symmetrical environment for reciprocal comp, which is what the FCC mandates.

Now the long loop issue is only an issue because of Qwest's proposals. If Qwest were acting in a reciprocal symmetrical way and were presenting proposals which would give the CLECs adequate reciprocal comp, that would not be an issue. But their proposals result in the CLEC not getting fully compensated for its costs.

And the whole purpose of the symmetrical rate requirement is that the FCC recognized that there were different network architectures. The CLEC had one kind of architecture, the ILEC had another. It concluded that their costs should be similar. Therefore it set the ILEC costs of transport and termination as the proxy for what the CLECs should get for reciprocal comp. That's the whole purpose of the symmetrical rate requirement. Qwest's proposals simply do not allow for the FCC symmetrical rate requirements to be put in place here in Washington. We would request that they be put in place in Washington.

As for the co-location costs, AT&T was not asking for any remedy in this proceeding on those costs in this particular workshop. It provided evidence of those costs as a means to show the fact that CLECs are

paying more to Qwest than Qwest is paying to CLECs. AT&T believes that those are issues that are appropriate in the next workshop, and it indicated as much throughout the course of the workshop. It acknowledged that there are intricacies, there are relationships, linkages between the interconnection workshop and the reciprocal comp workshop. And that was one of the issues that it raised at the outset of the workshop, that there were going to be some discussions about things that would legitimately be raised in the next workshop in the context of the first workshop in order to put everything in context. So we believe that it's appropriate for those issues to come forward in the co-location workshop, and we intend to bring them there.

Thank you.

JUDGE RENDAHL: Okay, I have no questions on this issue.

MS. SACILOTTO: May I have just a brief rebuttal?

JUDGE RENDAHL: Yes, you may.

MS. SACILOTTO: Sorry, just two points really. It's quite clear in the FCC's rules the carriers are responsible for getting the traffic across their own loops. And so to the extent that that is shown as evidence of asymmetry, it's not. It's excluded

from the calculation all together.

As far as AT&T saying it's seeking no remedy on co-location and it just brought this as an example, well, then I would say that there is no issue here, that this was, you know, maybe some discussion but certainly not something that should be held over to another workshop.

What I hear Ms. DeCook saying, all of these things that she is talking about are things that could have or were inadequately addressed in this particular workshop. But I don't see any reason why they have been prejudiced that would require sending this on for further discussion. We can discuss things and discuss things and discuss them through all of the workshops, but at some point, the reason for dividing them up by checklist item was to reach closure on them, and there has been no reason presented why closure can not and should not be reached in this particular proceeding.

There's no prejudice, there is no evidence that they have cited that is only available in the next phase of the proceeding. Indeed if they have some claims about this, there's a cost docket going on right now, there's plenty of other avenues. But we would submit that there's just simply no basis for cost recovery claims that are put under the guise of

reciprocal compensation and asymmetrical compensation to be carried over to a workshop where those issues aren't being addressed. We have a lot of work ahead of us in those workshops, and we should address the issues to which those workshops are devoted.

JUDGE RENDAHL: Any further questions?

Okay. Not that I want to fill up all the time that we have, but if any party has any brief closing remarks, and I mean very brief, why don't we take those now, and then we will conclude.

Ms. Sacilotto.

MS. SACILOTTO: Mine are not terribly substantive. I would just like -- we have been talking today a lot about the disputes that the parties have, but I think that to get a sense for the Commission of what has gone on at the first workshop, it's really we all deserve a pat on the back for the disputes we resolved. It's important to note that of the seven checklist items that were at issue, we haven't even talked about four of them. We resolved all of the disputed issues on those, and we came into the workshops with some disputes. It's not that we walked into this one with a workshop completely baked. We had some negotiation to do. We did it in Washington, we did it in Colorado, and we resolved four of the checklist

items. Only three of them have disputed issues for checklist item ten. There's only one for checklist item three. There's two, perhaps one left remaining, and so the parties have made some significant efforts here.

We appreciate the collaborative process that's been going on here. We appreciate staff's assistance in that. And in looking at this, that the workshop process is working to air these disputes and to resolve them. And while we have spent a lot of time talking about what remains outstanding, the Commission should be aware of how many things have been closed.

JUDGE RENDAHL: Thank you.

CHAIRWOMAN SHOWALTER: I want to discourage closing comments. I'm sorry, but I think we could really use the next ten minutes or so to confer on those issues, and so if it doesn't go -- unless you've got something that needs to be covered that you really didn't say, I'm sorry to interrupt, but --

JUDGE RENDAHL: That's fine.

CHAIRWOMAN SHOWALTER: I know that we may need to go, and it would help if we had a little bit of conference time.

JUDGE RENDAHL: Okay, well then unless anybody has anything that pressing that we need to say at this point, we will be in recess. Thank you very

00980
much for coming today. We will be off the record.
(Hearing adjourned at 4:50 p.m.)