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BEFORE THE WASHINGTON

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UTILITIES AND TRANSPORTATION COMMISSION

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4 In Re Petition of) DOCKET NO. UT-980948
5 US WEST COMMUNICATIONS, INC.,) VOLUME XIII
6 for a Declaration Order) Pages 596-761
7 Ending Imputation of Revenues)
8 Derived from Transferred)
9 Yellow Pages Publishing)
10 Business.)
11 _____)

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A hearing in the above matter was

11

held on July 28, 1999, at 12:45 p.m., at 1300

12

Evergreen Park Drive Southwest, Olympia, Washington,

13

before Administrative Law Judges ROBERT WALLIS and

14

LAWRENCE BERG, and CHAIRWOMAN MARILYN SHOWALTER and

15

COMMISSIONERS RICHARD HEMSTAD and WILLIAM R. GILLIS.

16

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The parties were present as

18

follows:

19

US WEST COMMUNICATIONS, INC., by
20 Lisa A. Anderl, Attorney at Law, 1600 Seventh Avenue,
Room 3206, Seattle, Washington 98191, and Douglas N.
21 Owens, Attorney at Law, 1325 Fourth Avenue, Suite
940, Seattle, Washington 98101.

22

THE COMMISSION, by Gregory
23 Trautman, Assistant Attorney General, 1400 South
Evergreen Park Drive, S.W., Olympia, Washington
98504.

24

PUBLIC COUNSEL, by Simon ffitich,
25 Assistant Attorney General, 900 Fourth Avenue, #2000,
Seattle, Washington 98164.

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1 TRACER, by Arthur Butler, Attorney
2 at Law, Ater Wynne, 601 Union Street, Suite 5450,
3 Seattle, Washington 98101.

4 AARP, by Ronald Roseman, Attorney
5 at Law, 2011 14th Avenue East, Seattle, Washington
6 98112.

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Barbara L. Spurbeck, CSR
Court Reporter

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00600

1 JUDGE WALLIS: Let's be back on the record
2 for the July 28, 1999 session in the matter of Docket
3 Number UT-980948. Today we are going to begin with
4 the testimony of Michael Brosch, witness for Public
5 Counsel, to accommodate Mr. Brosch's travel schedule.
6 I'm going to ask Mr. Brosch to rise and raise your
7 right hand, please.

8 Whereupon,

9 Michael L. Brosch,
10 having been first duly sworn by Judge Wallis, was
11 called as a witness herein and was examined and
12 testified as follows:

13 JUDGE WALLIS: Please be seated. Mr.
14 ffitch, you may proceed. Let me note for the record
15 that I have earlier identified the exhibits to the
16 court reporter and I am asking her at this point to
17 insert the description of those exhibits so that they
18 are identified on the record as though I were to read
19 them now.

20 In conjunction with the appearance of
21 Witness Michael Brosch, the witness has presented a
22 number of exhibits, consisting of prefiled testimony
23 and associated documents, and other parties have
24 identified documents that they may wish to present
25 during his testimony on cross-examination. I'm going

00601

1 to identify those for the record at this time.

2 Exhibit 601-TC for identification is the
3 direct testimony of Michael Brosch. Exhibit 602 for
4 identification is Exhibit MLB-1, Publishing
5 Agreement. Exhibit 603 is Mr. Brosch's presentation,
6 designated Exhibit MLB-2, graph. Exhibit 604 is
7 Exhibit MLB-3, response to Data Request 02-014.
8 Exhibit 605-C is Confidential Exhibit MLB-4, 1984
9 Financial Package, dated December 12th, 1983.

10 Exhibit 606 for identification has no
11 document associated with it. Exhibit 607-C is the
12 Confidential Exhibit MLB-5, US West Direct Management
13 Projections. Exhibit 608-TC is the surrebuttal
14 testimony of Michael Brosch. Exhibit 609 is Exhibit
15 MLB-6, a letter from Max Johnson to Dennis Okamoto.
16 Exhibit 610 for identification is the deposition
17 transcript of Michael Brosch.

18 Exhibit 611-C is US West response to Data
19 Request WUTC 02-021. Exhibit 612 is response to Data
20 Request PC 04-050. 613 is US West response to Data
21 Request PC 04-052. 614 is US West response to PC
22 03-009. 615 is the response to Data Request PC
23 08-092. 616 for identification is US West response
24 to Data Request PC 08-096.

25 617 for identification is Public Counsel

00602

1 response to US West Data Request Three. 618 is
2 Public Counsel request or response to US West Data
3 Request 16. 619 for identification is Public Counsel
4 response to US West Data Request 17. 620 for
5 identification is Public Counsel response to US West
6 Data Request 21. 621 for identification is Public
7 Counsel response to US West Data Request 25.
8 622 for identification is WUTC Staff
9 response to US West Data Request One. 623 for
10 identification is Staff response to US West Data
11 Request 3-36, and Exhibit 624 for identification is
12 the Staff response to US West Data Request 38. That
13 concludes my list of potential exhibits for Michael
14 Brosch.

15 Now, Mr. ffitch.

16 MR. FFITCH: And Your Honor, I'm just
17 prepared to go ahead and just lay a foundation for
18 the offering of the exhibits at this time.

19 JUDGE WALLIS: Yes, please do.

20 D I R E C T E X A M I N A T I O N

21 BY MR. FFITCH:

22 Q. Good afternoon, Mr. Brosch.

23 A. Good afternoon.

24 Q. I'd like to draw your attention to the
25 testimony and exhibits that you prepared in this

00603

1 proceeding. Those have been identified and numbered,
2 and we are referring to Exhibits 601-TC through
3 605-C, Exhibit 606 has no exhibit associated with it,
4 Exhibits 607-C through 609 are additional exhibits to
5 your -- excuse me, additional exhibits and your
6 surrebuttal. And let me just stop there and ask, do
7 you have those?

8 A. I think I do, but not by number, if we
9 could step through them. I apologize.

10 JUDGE BERG: Perhaps I could provide the
11 witness with an exhibit list, which would facilitate
12 that process.

13 JUDGE WALLIS: Would you please, Your
14 Honor?

15 MR. FFITCH: I have an extra here, too,
16 Your Honor, if that would help.

17 THE WITNESS: Thank you.

18 JUDGE BERG: You're welcome.

19 Q. Do you have that now, Mr. Brosch?

20 A. Yes, I do.

21 Q. And were those exhibits prepared by you or
22 under your direction?

23 A. Yes, they were.

24 Q. And with regard to the testimony and the
25 attachments, and particularly with regard to the

00604

1 testimony, if I were to ask you those same questions,
2 would your answers be the same today?

3 A. They would, with one substantive
4 correction.

5 Q. And would you state that correction,
6 please?

7 A. Yes. Please refer to Exhibit 608, the
8 surrebuttal testimony, at page 48, line 16. The
9 dollar figure five point --

10 JUDGE WALLIS: Excuse me, Mr. Brosch.
11 Could you slow down, so that we can all catch up with
12 you?

13 THE WITNESS: The dollar figure 5.1 should
14 be changed to read 5.4. That's the only substantive
15 change.

16 Q. Again, that is page 48 of your surrebuttal
17 testimony, Exhibit 608-TC, line 16. And would you
18 just state the correction one more time, please?

19 A. Yes, 5.1 should be 5.4.

20 MR. FFITCH: Thank you. And it's my
21 understanding that there are some additional
22 typographical corrections, four of them, and we will
23 submit those with a letter prior to the conclusion of
24 the hearing.

25 JUDGE WALLIS: Thank you.

00605

1 MR. FFITCH: Your Honor, I'm going to offer
2 Exhibits 601 through 609, noting that 606 is marked
3 no exhibit.

4 MS. ANDERL: No objection, Your Honor.

5 JUDGE WALLIS: The exhibits are received.

6 Q. In addition, we have -- you should have
7 there, Mr. Brosch, supplemental exhibits. Exhibit
8 610 is a copy of your entire deposition transcript.
9 Exhibits 611-C, 612 and 613 are US West responses to
10 data requests, and those are offered by Public
11 Counsel as supplemental exhibits.

12 A. Yes, I have those.

13 MR. FFITCH: And it's my understanding that
14 we have an agreement with US West that those be
15 treated as supplemental exhibits and can be offered
16 for the record, so I would offer them at this time.

17 MS. ANDERL: That's correct, Your Honor. I
18 believe we discussed this at the prehearing on
19 Monday.

20 JUDGE WALLIS: The exhibits are received.

21 MR. FFITCH: The witness is available for
22 cross.

23 JUDGE WALLIS: Ms. Anderl.

24 MS. ANDERL: Thank you.

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

00606

1 BY MS. ANDERL:

2 Q. Good afternoon, Mr. Brosch.

3 A. Good afternoon.

4 Q. I'm Lisa Anderl, representing US West
5 Communications. I believe you and I have spoken
6 during your deposition.

7 A. Yes.

8 Q. Mr. Brosch, have you read all of the
9 testimony filed in this docket by all of the other
10 witnesses?

11 A. I believe so, yes, although some of it some
12 time ago.

13 Q. But are you generally familiar with Dr.
14 Selwyn's testimony?

15 A. Generally, yes, I am.

16 Q. And Mr. Perlman's?

17 A. Yes.

18 Q. Mr. Golden's?

19 A. Yes, generally.

20 Q. Ms. Koehler-Christensen's?

21 A. I believe so, yes.

22 Q. Mr. Inouye's?

23 A. Yes.

24 Q. And Ms. Strain's testimony, as well?

25 A. I believe so, yes.

00607

1 Q. Mr. Brosch, you're not an attorney; is that
2 correct?

3 A. That's correct.

4 Q. And none of your testimony here today is
5 intended to render a legal opinion on the legal
6 impact of any of the transactions or any of the cited
7 or discussed orders in your testimony, is it?

8 A. I believe that's correct, yes.

9 Q. Mr. Brosch, during the 1983-'84 time frame,
10 I believe your direct testimony states that you were
11 employed at an accounting and public utility
12 consulting firm; is that correct?

13 A. Yes, that's described at page two of my
14 direct testimony, Exhibit 601-TC.

15 Q. Where was that firm located? It doesn't
16 say.

17 A. In Overland Park, Kansas, a suburb of
18 Kansas City.

19 Q. Were you involved as a witness or as a
20 consultant in Docket U-83-159 before the Washington
21 Utilities and Transportation Commission during any
22 time that that docket was open?

23 A. No.

24 Q. What about Docket U-86-156, if I were to
25 ask you the same question?

00608

1 A. I believe the answer's no. Is that one of
2 the dockets attached to the Company's petition?

3 Q. Yes, it is.

4 A. I was not involved in that personally.

5 Q. But you were both a witness and a
6 consultant in Docket Number UT-950200; is that
7 correct?

8 A. Yes.

9 Q. For Public Counsel?

10 A. I'm trying to recall. I believe I was
11 sponsored jointly by Tracer and Public Counsel.

12 MR. FFITCH: Do you need to check? Is
13 there some information you could check there in order
14 to give an answer?

15 THE WITNESS: I started to, but I only have
16 the directory imputation section of that testimony
17 with me. So subject to check, I believe I had two
18 clients in that proceeding.

19 Q. That's fine. If you need to clarify that
20 later, there won't be any problem with your doing
21 that. And you have three clients in this docket; is
22 that right?

23 A. Yes.

24 Q. And is that Tracer, Public Counsel, and
25 AARP?

00609

1 A. Yes, it is.

2 Q. During your deposition, Mr. Brosch, we
3 discussed your experience and qualifications to
4 conduct a valuation of a business. Do you recall
5 that?

6 A. Yes, I do.

7 Q. And isn't it correct that you told me
8 during that deposition that you did not have any
9 degrees, certificates, or formal training in the
10 field of business valuation?

11 A. What I said is I have a business
12 administration degree that certainly encompasses
13 formal training in business operations, management,
14 accounting, financial analysis, many of the core
15 competencies involved in business valuation, but if
16 your question is have I taken a course designated as
17 a business valuation course, the answer would be no.

18 Q. And do you have any degrees or certificates
19 in the field of business valuation?

20 A. No, I told you then --

21 Q. That's okay. We can just -- you can tell
22 me now. If the answer is no, that's fine.

23 A. My certificate is as a CPA.

24 Q. Are you a member of any professional
25 organizations that are specifically related to

00610

1 business valuation?

2 A. Not specifically, no. I'm a member of the
3 American Institute of CPAs and the Kansas and
4 Missouri Societies of CPAs.

5 Q. It's correct, isn't it, that you have never
6 been retained by a buyer or a seller to value a
7 Yellow Pages publishing business?

8 A. I've never been retained for the specific
9 purpose of valuing the Yellow Pages business
10 enterprise, that's correct.

11 Q. And isn't it also true that you have never
12 been retained by a party to the sale of any kind of
13 business, either the buyer or the seller, to conduct
14 a valuation of that business for purposes of the sale
15 transaction?

16 A. I believe that's correct, yes.

17 Q. Are you appearing on behalf of your clients
18 here today as a business valuation expert?

19 A. I'm appearing for the purposes stated in my
20 testimony, which include estimating the value of the
21 business.

22 MS. ANDERL: Your Honor, I believe that was
23 a yes or a no question. If the witness could be
24 directed to answer.

25 JUDGE WALLIS: Is the witness able to

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1 provide a yes or no answer to the question?

2 THE WITNESS: The best answer I have is the
3 one I gave, Your Honor.

4 JUDGE WALLIS: Very well.

5 THE WITNESS: I don't understand the
6 significance of the specific words being proposed to
7 me.

8 Q. Very well. Mr. Brosch, do you know what a
9 trademark license is?

10 A. I believe so, yes.

11 Q. Can you tell me?

12 A. I believe a trademark license would be the
13 granting of the right to use a trademark.

14 Q. For a specific period of time?

15 A. It could be, yes.

16 Q. And how did you gain that understanding
17 that you just described for me of what a trademark
18 license is?

19 A. I'm not sure. Probably from my experience
20 somewhere. I don't have specific reference of when I
21 first encountered that concept.

22 Q. Have you ever reviewed a trademark license?

23 A. Yes.

24 Q. In what context?

25 A. In a Southwestern Bell proceeding in

00612

1 Oklahoma in approximately 1989, I sponsored testimony
2 recommending that there be a royalty imputed to the
3 credit of Southwestern Bell Telephone Company for the
4 use of various intangible assets of the telephone
5 company certain nonregulated affiliates, including
6 the wireless business and the terminal equipment
7 affiliate. In connection with that testimony, I
8 researched examples in general industry, where
9 licenses are granted, in particular, the franchise
10 industry; reviewed a number of surveys and various
11 forms of compensation for the rights to use the
12 intangible assets of franchisors.

13 Q. Do you know the difference between a
14 trademark license and a consent to use mark?

15 A. I'm not sure I understand that distinction
16 without more information.

17 Q. Do you have any firsthand knowledge of or
18 have you ever analyzed the sale of a business which
19 included a trademark license as part of a sales
20 agreement?

21 A. I don't recall any as I sit here.

22 Q. What about the transfer of a business which
23 included a trademark license?

24 A. I'm not sure what you mean by transfer.
25 Could you define that?

00613

1 Q. You and I discussed at length in your
2 deposition the difference between the word transfer
3 and sale. We can get into that a little bit more
4 later, and perhaps we will, but as you understand the
5 word transfer and as you've used it in your testimony
6 in this docket, the question was the same as the one
7 I had previously asked, except for using the word
8 transfer instead of the word sale.

9 In other words, the question is, do you
10 have any firsthand knowledge of or have you ever
11 analyzed the transfer of a business which included a
12 trademark license?

13 MR. FFITCH: Well, Your Honor, the witness
14 has asked for some clarification of the use of the
15 term transfer, and Counsel's comments didn't provide
16 that. I'm not sure if the witness could answer, but
17 he did ask for some clarification and did not receive
18 it.

19 JUDGE WALLIS: Let's start by asking the
20 witness if he understands the question.

21 THE WITNESS: Well, there was reference to
22 my testimony, and I'm trying to understand the
23 distinction between the two questions. I think my
24 answer is the same, but I want to be sure that I
25 understand the distinction you're making between

00614

1 transfer and sale.

2 JUDGE WALLIS: I'm going to use that as the
3 springboard for a request to the witness to listen to
4 the questions, and if they call for a yes or no
5 answer, to make that yes or no answer. It will
6 expedite the process and help us all.

7 THE WITNESS: Certainly.

8 MS. ANDERL: I believe the witness had a
9 question pending from me, which is the distinction
10 between a transfer or sale. I believe he indicated
11 he wasn't sure what distinction I was intending to
12 make.

13 Q. Is that correct, Mr. Brosch?

14 A. That's correct.

15 Q. I would refer you to your deposition, which
16 has been marked and admitted as Exhibit 610 in this
17 proceeding, page 35.

18 A. All right. Let me answer your question
19 this way.

20 Q. Do you now understand the distinction that
21 I'm attempting to make? I can continue to refer you
22 to a line, if you wish. As you recall, we discussed,
23 for approximately four or five pages there, kind of
24 ending on page 35, the distinction between the word
25 "transfer" and the word "sale," as you used it in

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1 your direct testimony.

2 A. Yes.

3 Q. Does that refresh your recollection?

4 A. I recall that we went back to it a number
5 of times, and I know that distinction's important to
6 you. Let me answer this way. In my experience with
7 particular reference to the Yellow Page transactions,
8 I've attached to my testimony the publishing
9 agreement which provides for the transfer of certain
10 rights to use the trade names and marks of PNB for a
11 specified period of time. Is that responsive to your
12 question?

13 Q. It may be. Do you understand that portion
14 of the publishing agreement to constitute a trademark
15 license?

16 A. Yes, it grants certain rights for a period
17 of time.

18 Q. To use trade names or trademarks?

19 A. I think so. Let me find it. Yes,
20 Paragraph 10.01 refers to the consideration of the
21 recitations, terms and conditions, and in exchange
22 for, among other things, the right to use and publish
23 subscriber listings and right to publish exchange
24 service directories and the exclusive right to use
25 the name, logo, and trademarks of the telephone

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1 company. And I believe that agreement has a
2 specified term.

3 Q. So you understand that portion of the
4 publishing agreement, then, to constitute a trademark
5 license, as you've previously described it in your
6 answer to me?

7 A. Yes, a right to use. That's right.

8 Q. So back to my question. Do you have any
9 firsthand knowledge of or have you ever analyzed the
10 transfer of a business which included a trademark
11 license? Do I understand correctly that your answer
12 would be yes?

13 A. Yes, it would. And in particular, I have
14 reviewed the transactions related to the US West
15 Direct formation and the various publishing
16 agreements.

17 Q. Mr. Brosch, did you assist Public Counsel
18 in this docket in responding to data requests that US
19 West propounded to Public Counsel?

20 A. Yes.

21 Q. And did you also review, in the preparation
22 of your testimony, US West's responses to data
23 requests that Public Counsel propounded?

24 A. Yes.

25 Q. Would you please look for me now at the

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1 documents that have been identified as Exhibits 614
2 through 621 for the record?

3 A. Yes. Allow me just a moment to correlate
4 the numbering.

5 Q. Certainly.

6 A. I have those before me.

7 Q. With regard to 614, 615, and 616, do you
8 recognize those as data request responses from US
9 West which you reviewed and referenced -- reviewed in
10 the preparation of, and then subsequently referenced,
11 in your direct and surrebuttal testimony?

12 A. Yes, with respect to 615 and 616, that's
13 certainly correct.

14 Q. And with regard to --

15 A. I don't recall the reference I may have
16 made to 614.

17 Q. Let me direct you to page 24 of your direct
18 testimony, which is Exhibit 601-TC.

19 A. You said page 24?

20 Q. Yes.

21 A. I'm there. Yes, I see the reference at
22 line 21.

23 MS. ANDERL: Your Honor, I'd move the
24 admission of those three data request responses at
25 this time.

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1 MR. FFITCH: No objection.

2 JUDGE WALLIS: They are received.

3 Q. And Mr. Brosch, with respect to the next
4 five exhibits in line, which are all Public Counsel's
5 responses to various US West data requests, do you
6 recognize those as true and correct copies of the
7 responses that Public Counsel provided?

8 A. I believe them to be complete, true, and
9 correct copies of the responses. I was actually
10 somewhat upstream of the service process, so I can't
11 say with certainty that they are. I would accept a
12 representation to that effect.

13 Q. You're the only witness for Public Counsel,
14 though; is that right?

15 A. Yes.

16 MS. ANDERL: Your Honor, we move the
17 admission of these five exhibits, as well, 617
18 through 621 inclusive.

19 MR. FFITCH: No objection.

20 JUDGE WALLIS: The exhibits are received.

21 MS. ANDERL: Thank you.

22 Q. Mr. Brosch, let's go back to the testimony
23 that you gave in Docket Number UT-950200. You
24 provided written testimony in that proceeding, did
25 you not, written prefiled testimony?

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1 A. Yes, I did.

2 Q. And were you also cross-examined?

3 A. I believe so.

4 Q. Do you recall whether or not you assisted
5 Public Counsel in any post-hearing process, including
6 the preparation of any briefs at any stage of that
7 proceeding?

8 A. I don't recall any significant involvement.
9 There may have been conversations surrounding the
10 preparation of the briefs in the rate case, but I
11 don't have specific recall beyond what I just stated.

12 Q. Isn't it correct that in Docket Number
13 UT-950200, you filed direct testimony with the
14 Commission containing the following statement --
15 well, I'm sorry, strike that. That you told the
16 Commission that imputation was necessary because of
17 US West's decision, and here I quote, "to remove the
18 directory publishing business from the telephone
19 company's operations?"

20 MR. FFITCH: Could you assist the witness
21 with time and place, format of that statement to the
22 Commission? Are you referring to testimony or --
23 written testimony or hearing testimony?

24 MS. ANDERL: I believe I asked him if he
25 filed testimony, which would make it the written

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1 prefiled testimony.

2 MR. FFITCH: I think you actually modified
3 that statement to ask him if he told the Commission,
4 which seemed a much more general question.

5 THE WITNESS: I think I found your
6 reference.

7 Q. Do you recall?

8 A. I have, at page 14 of my direct testimony
9 that was prefiled in that case, a question: Do you
10 agree with USWC that the imputation of directory
11 revenues should be discontinued? Answer: No, the
12 imputation of directory revenues is only necessary
13 because of the parent entity's decision to remove the
14 directory publishing business from the telephone
15 company's operations and financial results at
16 divestiture.

17 And then I continue with further
18 explanation.

19 Q. And is it correct that that page of your
20 testimony is included in this record as a portion of
21 Exhibit 103, which is Mr. Inouye's CTI-1? Just for
22 clarification, so that it is clear, I don't believe
23 Mr. Inouye was asked about that exhibit. As I recall
24 the format, there are four or five summary pages at
25 the beginning, and then the actual excerpted pages

00621

1 from various briefs and testimonies behind that.

2 A. I find, at page six of the exhibit you
3 referenced, quotation of one sentence of that which I
4 just read.

5 Q. Will you accept, subject to your check,
6 that Mr. Inouye also included page 14 of your direct
7 testimony later in his exhibit?

8 A. Yes, I see page 14.

9 Q. And is it also correct, Mr. Brosch, that in
10 that same piece of direct testimony, at page 16, you
11 stated that PNB, quote, "transferred its directory
12 publishing assets and operations to a separate
13 affiliate," close quote?

14 JUDGE BERG: Excuse me, Ms. Anderl, but is
15 that part of CTI-1?

16 MS. ANDERL: I'm sorry. Yes, it is, as
17 well.

18 THE WITNESS: Yes, I find at page six an
19 excerpt of one sentence, and then later in the
20 exhibit a copy of page, sentence, from which that
21 excerpt is derived.

22 Q. On page -- well, let me do as we have been
23 admonished to do and make the reference to the
24 exhibit number first. Your Exhibit Number 608-TC,
25 which is your surrebuttal testimony, I don't know if

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1 you need to reference the page or not, but on page 32
2 of that testimony, you appear to disagree with Mr.
3 Inouye's testimony that the transfer was not voided
4 by lack of consideration. And you state there in
5 your testimony that, in effect, the Commission
6 treated the transfer in publishing agreements as if
7 they were voided. Is that a fair characterization of
8 your testimony?

9 A. Yes, the testimony says, "The periodic
10 imputation amounts were calculated in a manner that
11 treated the transfer and the publishing agreements as
12 if they were, in fact, voided," with further
13 explanation.

14 Q. You've read the Supreme Court decision in
15 this docket -- or in the rate case docket, have you
16 not?

17 A. Yes.

18 Q. Do you recall what the Supreme Court stated
19 with regard to the issue of whether or not the
20 publishing agreement contracts were voided by the
21 Commission?

22 A. I don't recall a reference to the term
23 voided. Could you direct me to what you have in
24 mind?

25 Q. Do you have a copy of the Supreme Court

00623

1 decision available to you?

2 A. Yes.

3 Q. If you'd reference page 98 of that
4 decision?

5 A. I'm encountering a formatting problem. I
6 have several different formats with various page
7 numbers, none of which reach near 98.

8 JUDGE WALLIS: Let me hand the witness a
9 copy of the official Washington publication.

10 THE WITNESS: Thank you. All right. I see
11 page 98.

12 Q. Do you see a paragraph that ends there in
13 the middle of the page with a citation to RCW
14 80.16.050?

15 A. Yes, I see that.

16 Q. And do you see the sentence before that
17 citation?

18 A. I see a sentence that says, "The power the
19 Commission exercised here was not to void the
20 contract between the contracting parties, but to,
21 quote, 'revise and amend the terms and conditions,'
22 end quote, of the contract as necessary to protect
23 the ratepayers."

24 Q. Do you agree with the Supreme Court, that
25 that is what the Commission did?

00624

1 MR. FFITCH: Your Honor, I'm aware that Ms.
2 Anderl has prefaced all her remarks with a general
3 disclaimer about asking the witness for legal
4 opinions, but I'll just -- I feel it necessary to
5 note that the witness is now being asked to interpret
6 statute and Supreme Court opinions.

7 JUDGE WALLIS: I don't believe he is. I
8 believe he's merely being asked whether he agrees
9 with that or not, and that, I believe, is within his
10 testimony, so I believe the question is proper.

11 MR. FFITCH: Thank you, Your Honor.

12 MS. ANDERL: Thank you.

13 Q. Do you have the question in mind, Mr.
14 Brosch?

15 A. Yes, I do. Certainly, the decision says
16 what it says. I'm trying to find your reference to
17 my testimony, because I don't think there's a
18 conflict. My testimony talks about how imputation
19 was calculated, and that the result of imputation,
20 the way it's calculated, treated the transfer and
21 publishing agreements as if they were voided. I
22 don't think that contradicts the statement here, that
23 the Commission -- the power the Commission exercised
24 here was not to void the contract. Essentially, we
25 get to a result through a different approach.

00625

1 Q. You're not suggesting in your testimony
2 that the Commission actually voided the contracts
3 between the parties?

4 A. To my knowledge, they did not void the
5 contract. The orders are attached to the Company's
6 petition that indicates the Commission's statement as
7 to -- various statements as to what it thought of and
8 intended to do with the publishing agreement.

9 JUDGE WALLIS: Mr. Brosch, again, I'm going
10 to suggest that you listen to the question and
11 respond to the question, which in this case called
12 for your belief, and not a statement about what the
13 Commission did. If Ms. Anderl or Mr. ffitch desired
14 to go further, then they have the opportunity to ask
15 that question. We understand that you do have a
16 limited time with us, and we want to make the best
17 use of that time for your benefit and for ours.

18 THE WITNESS: Certainly. I was attempting
19 to explain my answer.

20 Q. So was your answer -- and I have to
21 confess, I don't remember exactly how I read the
22 question, so I can't -- I don't think it's fair to
23 ask you now was your answer yes or no, but are you
24 contending that the Commission voided the contracts
25 between the parties?

00626

1 A. No.

2 Q. Do you contend that the Commission voided
3 the transfer?

4 A. No.

5 Q. Mr. Brosch, I'd like to ask you if you
6 agree or disagree with the following statement that
7 I'm going to read to you: Effective January 1, 1984,
8 PNB transferred all of its directory operations,
9 assets and liability to Landmark Publishing.

10 A. I agree with the statement. Yes, I agree
11 with the statement.

12 MR. FFITCH: Do you have a source for that
13 statement, Counsel, you want to share with the
14 witness?

15 MS. ANDERL: No. I'd be happy to discuss
16 it with you, Mr. ffitch, off the record. However, I
17 didn't hear an objection to my question. The
18 question was asked and answered. I --

19 MR. BUTLER: Could I ask that the question
20 and answer be read back?

21 (Record read back.)

22 Q. Mr. Brosch, can you tell me, is it your
23 position or Public Counsel's position in this case
24 that PNB either failed to fully disclose or
25 misrepresented any material aspects of the asset

00627

1 transfer and initial publishing agreement to the
2 Commission?

3 A. I can't speak for Public Counsel, but I
4 have not made that contention.

5 Q. Is there another witness that you're aware
6 of who can speak for Public Counsel?

7 A. To my knowledge, I'm the only witness for
8 Public Counsel.

9 Q. Mr. Brosch, let's talk a little bit about
10 the difference between a transfer and a sale, as I
11 alluded to earlier. In your deposition, beginning at
12 about page 31 and ending at page 35, Exhibit 610, you
13 and I discussed that. You stated in your deposition
14 that the term "sale," as distinguished from
15 "transfer," relates to the receipt of consideration.
16 Is that correct, that that is what you believe?

17 A. That's certainly one of the statements that
18 I made in the dialogue in deposition that you refer
19 to.

20 Q. Are there any other differences between
21 transfer and sale that you can think of as you sit
22 here today?

23 A. That's certainly the most significant
24 distinction. No others come to mind.

25 Q. Would you agree with the use of the word

00628

1 "compensation" instead of the word "consideration."
2 In other words, would you use those terms
3 synonymously in your testimony?

4 A. In what context?

5 Q. In the context that we were just
6 discussing, the difference between a transfer and a
7 sale?

8 A. I suppose one could use them
9 interchangeably, although I tend to think of
10 consideration as being more of a transaction-related
11 concept, whereas compensation can be a more periodic
12 concept, compensation of employees, for example, or
13 the right to use something.

14 Q. Where do you arrive at those definitions or
15 distinctions between the two terms?

16 A. Just top of mind. I don't have a specific
17 reference or a dictionary with me.

18 Q. So would you agree with the statement that
19 the difference between a transfer and a sale, in your
20 mind, is whether or not consideration or compensation
21 is exchanged?

22 A. I would accept that that is a distinction
23 between a transfer and a sale, yes. One could
24 transfer without consideration. A sale generally
25 implies consideration, at least as I think of it.

00629

1 Q. What is required for a transfer to take
2 place?

3 A. Physically moving something from one place
4 to another.

5 Q. Can you transfer an intangible?

6 A. I think you can, in terms of transferring a
7 right to use, granting authority to use it.

8 MR. FFITCH: Your Honor, I just think I
9 need to state for the record -- I don't want to
10 interrupt Ms. Anderl's cross, but many of these
11 questions are essentially legal questions. I know
12 she's done her preliminary waiver, but I didn't do a
13 preliminary blanket objection, and maybe I should
14 have. Obviously, the witness can answer as a
15 non-attorney, but many of these questions are just
16 directly asking for legal opinions, and I think I
17 just need to get that on the record. I'm fine with
18 the witness answering to the best that he can.

19 JUDGE WALLIS: Yes, we understand that.
20 That's consistent with the treatment of other
21 witnesses in this proceeding, considering the nature
22 of their testimony on these areas, which are suffused
23 with legal principle. It can be important to
24 understand how they used those principles in their
25 testimony, and the area's proper want for

00630

1 investigation.

2 MR. FFITCH: Thank you, Your Honor.

3 Q. Is a physical movement of something from
4 one place to another necessary for a transfer?

5 A. Not in all instances. For example, part of
6 what was transferred in late 1983 was cash, and
7 certainly cash can move in relatively non-physical
8 terms or sense.

9 Q. Have you ever transferred money from your
10 savings account to your checking account?

11 A. Yes.

12 Q. Do you think that the cash moved in a
13 physical sense in that transfer?

14 A. Well, in that it wasn't converted to
15 currency and moved across the counter, perhaps not
16 that physical, but certainly the transaction
17 occurred.

18 Q. So I ask you again, what is required for a
19 transfer to take place? If you can describe that for
20 me, in addition to -- or other than the physical
21 moving of assets from one place to another or
22 property from one place to another?

23 A. That's the way I think of it. Moving
24 something.

25 Q. Okay. But you've just agreed with me that

00631

1 that doesn't have to happen for a transfer to take
2 place; isn't that right?

3 A. I'm confused by your question. You don't
4 have to have a physical object moving, but you can
5 move cash, using the example I spoke of. Perhaps if
6 you explain what distinction you're after. I'm not
7 tracking with your question.

8 Q. Perhaps you could explain for me what part
9 of the question you don't understand?

10 A. I think of transferring something as moving
11 it by accounting entry, by physical movement, by
12 causing an employee to be paid out of someone else's
13 payroll. A change takes place.

14 Q. And any one of those things could be
15 described as a transfer?

16 A. Well, I've said in my testimony that
17 employees, for example, were transferred and the cash
18 was transferred. There was a movement of something
19 from one entity to another.

20 Q. How do two companies transfer employees
21 from one company to another?

22 A. From my experience, the employee is advised
23 of the change in status and, more often than not,
24 their check is drawn on a different entity after the
25 change than before the change. Often accompanying

00632

1 the change is some shift in responsibility or
2 reporting relationships to other employees. But
3 that's how I think of it.

4 Q. Okay. So as I understand your testimony,
5 the one constant element of all of these different
6 types of transfers is that some sort of a change
7 takes place?

8 A. That's a common theme, yes.

9 Q. Is there anything else necessary for a
10 transfer to take place?

11 A. Transfer is a relatively broad term. I'm
12 not sure what you mean. I've talked about moving
13 things, moving cash, moving people. I only know how
14 to explain by example.

15 Q. What is required for a sale to take place?

16 A. Again, this isn't a dictionary definition,
17 but I think of a sale as being a transaction in which
18 there is an exchange of something for value received.
19 For the consideration, for example, that we spoke of
20 earlier.

21 Q. And how do you come to that understanding
22 of what is required for a sale?

23 A. Personal experience, professional
24 experience.

25 Q. Is a sale, as you have just described it,

00633

1 different from a true sale, as you've used that
2 phrase in your testimony?

3 A. I believe, without reference to the
4 testimony, that the context of my use of the term
5 "true sale" added the dimension of reasonableness of
6 consideration or adequacy of consideration.

7 Q. Anything else?

8 A. That's all I recall without referring to
9 the testimony.

10 Q. As you sit here today, is there anything
11 else that you would testify is required for a true
12 sale, in addition to that which you have described to
13 be required for a sale?

14 A. I think required may be too strong a term.
15 I tend, from experience, to think of a true sale as
16 perhaps being more carefully memorialized in some
17 writing, but I suppose that's not required, which I
18 believe was a word in your question.

19 Q. It was.

20 A. There certainly can be a verbal agreement
21 to effect a true sale.

22 Q. Do you recall, Mr. Brosch, that I asked you
23 in your deposition whether or not the absence of a
24 sales agreement is conclusive evidence that no sale
25 occurred?

00634

1 A. That sounds familiar. Do you have a
2 reference for me?

3 Q. I do. I was wondering if you could tell me
4 today what your answer would be to that question?

5 A. I hope it would be the same.

6 Q. I don't mean to trick you. It's on page 40
7 of Exhibit 610.

8 A. At page 40 of the deposition transcript, I
9 said, "Certainly the existence of a sales agreement
10 would be evidence of a transaction." You asked me if
11 the absence of one is conclusive that a transaction
12 did not occur, and I said I don't know.

13 Q. Is that your answer today?

14 A. Yes.

15 Q. As well?

16 A. Yes, it is.

17 Q. When you talk about the adequacy of
18 consideration, what do you mean by adequate
19 consideration?

20 A. That it -- that the consideration be
21 reasonable in light of the value of what was
22 exchanged for the consideration.

23 Q. Would a sale at fair market value
24 constitute adequate or reasonable consideration?

25 A. I would think so. The normal convention is

00635

1 that fair market value represents the price resulting
2 from interaction between disinterested and relatively
3 informed buyers and sellers under no compulsion to
4 buy or sell.

5 Q. So you would agree that a sale at fair
6 market value would meet the definition that you've
7 established for a true sale?

8 A. I think in most instances it would. I
9 can't think of an exception.

10 Q. That was my next question. Thank you. Is
11 there such a thing as a sale for less than fair
12 market value, in your mind?

13 A. There certainly can be, yes.

14 Q. How would that occur?

15 A. An example would be someone under financial
16 pressure and a compulsion to sell might receive
17 compensation that would be less than what would
18 otherwise be thought to be fair market value.

19 Q. Does that circumstance, in your view,
20 establish that no sale occurred?

21 A. Not necessarily.

22 Q. Is there such a thing as an imprudent sale?

23 A. Probably, yes.

24 Q. Do you have in mind what an imprudent sale
25 might be?

00636

1 A. I think with some time, I could identify
2 some regulatory findings of imprudence with respect
3 to certain sales. One that comes to mind is capacity
4 sold out of a steam-fired electric generating unit in
5 Missouri in a case years ago that the Missouri
6 Commission found to be imprudent.

7 Q. Would you accept, subject to your being
8 able to check this in Exhibit 103, CTI-1, that Public
9 Counsel made the following statement in its brief to
10 the Washington Commission in Docket 950200, and I'm
11 quoting now: "USWC spun off Yellow Pages and is not
12 receiving fair value for it. The imputation of
13 revenues serves to account for this, quote,
14 'imprudent sale,'" close quote.

15 A. I'm not clear on your question. Are you
16 asking me if that's what it says?

17 Q. Would you accept, subject to your check,
18 that that is a statement contained in the Public
19 Counsel brief to the Commission in 950200?

20 A. Yes, I didn't write it down. I'm not sure
21 I can check it. Perhaps if you point me to it, we
22 can do it together and be done with it.

23 Q. Do you have Mr. Inouye's testimony?

24 A. Yes.

25 JUDGE WALLIS: I'm going to interject here

00637

1 and ask if the witness could accept that, subject to
2 check, and perhaps on the break consult with Ms.
3 Anderl and Mr. ffitch, it would allow us to focus
4 during the oral session on questions and answers and
5 still afford you the opportunity to verify that the
6 statement is correct.

7 THE WITNESS: I understand. I don't know
8 if I'll have the benefit of what was read to me to
9 check against the document. That's my only
10 reservation. Perhaps that can be provided.

11 MR. FFITCH: If Counsel has the brief here.
12 Do you have it?

13 MS. ANDERL: I have both the brief and my
14 question written out, which I read. We can do that
15 now or on the break.

16 JUDGE WALLIS: Let's do it now.

17 MS. ANDERL: All right.

18 JUDGE WALLIS: I'm sorry, you don't have it
19 right immediately in front of you, but you have it in
20 the room? If we can avoid taking time for that right
21 at the moment, let's do it.

22 Q. Mr. Brosch, we've talked about sales and
23 transfers. Now let's talk about rent --

24 A. All right.

25 Q. -- and leases. What are the attributes of

00638

1 a rental or lease agreement?

2 A. I would expect such an agreement to have a
3 granting of a right to use in exchange for some
4 consideration equal or approximately equal in value
5 to the value of that grant for some defined period of
6 time or, alternatively, indefinitely into the future.

7 Q. So a right to use for a defined period of
8 time, along with some consideration?

9 A. Yes, that's the normal convention.

10 Q. Is there anything else?

11 A. There's usually a definition with some
12 specificity of exactly what asset or property the
13 granting relates to, and some additional specificity
14 with respect to the form and amount of the
15 consideration given for that grant.

16 Q. What is your definition of the term rent as
17 you use it in your testimony? And if you need some
18 references, I can provide those to you, but if you
19 can give me an answer without specific reference,
20 that will be fine, as well.

21 A. I believe, without referencing any specific
22 context, my general use of the term rent is the value
23 exchanged for the receipt of the grant of a right to
24 use something.

25 Q. Do you mean something different when you

00639

1 use the term economic rent?

2 A. Probably not. Do you have a reference?

3 Q. I do. Exhibit 608, which is your
4 surrebuttal testimony, page five, line 24. And just
5 so that the record is clear, the word "rent" on line
6 24 is in quotations there, preceded by the word
7 economic.

8 A. Yes, I'm referring here to the economic
9 value or consideration associated with the use of
10 certain assets in the context of imputation.

11 Q. Okay. So when you use the term "economic
12 rent" there, you do or you do not mean to distinguish
13 it from the term "rent", without the word "economic"
14 as a modifier?

15 A. Well, let me put it this way. What I meant
16 by putting quotation marks around rent is that
17 imputation may not have been labeled rent, but it had
18 the effect of providing consideration for the use of
19 assets.

20 Q. Mr. Brosch, you earlier described your
21 understanding of the trademark license as the
22 granting of the right to use a trademark, possibly
23 for a specific period of time. Is that accurate?

24 A. I think so.

25 Q. Would you describe the compensation given

00640

1 in exchange for that trademark license as rent on
2 that trademark license or rent on the trademark?

3 A. It could be called rent, it could be called
4 a royalty. It's often referred to as a royalty or a
5 license fee. There are various relatively
6 interchangeable labels that might be assigned.

7 Q. In your profession, is it typically
8 referred to as rent or more typically referred to as
9 a royalty or a license fee?

10 A. I don't know that I have an opinion one way
11 or the other. Certainly, regardless of label, a form
12 of economic rent.

13 Q. In Exhibit 610, which is your deposition at
14 page 37 -- I don't know if you need to refer to it or
15 not -- you stated that there was a transfer for
16 consideration in or about 1984. My question to you
17 is what transfer are you talking about there?

18 A. What I'm talking about there is the
19 transfer that is the subject of the Company's
20 application for approval, ultimately addressed in the
21 order in Cause Number FR-83-159, except for those
22 items transferred pursuant to publishing agreement,
23 rather than the itemized list of more physical
24 assets.

25 Q. What consideration are you talking about?

00641

1 CHAIRWOMAN SHOWALTER: Counsel, can you
2 tell me what page of the exhibit you're on?

3 MS. ANDERL: I'm sorry. I'm still on page
4 37 of Exhibit 610.

5 CHAIRWOMAN SHOWALTER: Thank you.

6 THE WITNESS: Well, in the context of the
7 first part of my answer, I'm talking about the
8 fractional share of the Landmark stock.

9 Q. Let me just stop and make sure that we're
10 clear. We're discussing your answer on line 22 of
11 that page, and we're talking about the phrase
12 "transfer for consideration;" is that right?

13 A. That's right.

14 Q. Okay.

15 A. And there, my reference to consideration is
16 the .21 fractional share of the Landmark stock.

17 Q. Under your definition, Mr. Brosch, was this
18 transaction a sale?

19 MR. FFITCH: Excuse me, Your Honor. May I
20 ask for a clarification of the term "this
21 transaction" in the question?

22 Q. Was this transfer for consideration a sale?

23 A. I believe that initially it was, yes,
24 although the fact of the dividend of all of the
25 consideration to the parent troubles me with

00642

1 inclusively calling it a sale. The consideration was
2 fairly fleeting in its retention by the seller.

3 Q. Well, now, before when we talked about what
4 is required for a sale to take place, I understood
5 that it was a transfer or an exchange of something
6 for a value received. Did you mean to add to that
7 definition of a sale requirement that the seller
8 retain the value received for a specific period of
9 time?

10 A. No, what I had in mind is that the seller
11 be under no compulsion to immediately surrender all
12 of the consideration to its corporate parent.

13 Q. Is that a condition that you would impose
14 or want to have included in the definition of the
15 word "sale", as you've used it in your testimony,
16 then?

17 A. Well, I'm not sure. You've asked me very
18 general definitional questions and then pointed me
19 here to a specific transaction. So I have a little
20 difficulty rigorously applying a very general
21 definition to a specific transaction without
22 considering the reality of the transaction.

23 Q. Well, now, Mr. Brosch, I'm not asking you
24 at this point whether or not you considered this to
25 be a true sale, as you've used that phrase in your

00643

1 testimony. I'm simply asking you whether this was a
2 sale, as you've used that word in your testimony.
3 And I believe I understood your answer to be a
4 qualified yes; is that correct?

5 A. I suppose, for a fleeting instant, there
6 was a sale, yes.

7 Q. What happened after that fleeting instant
8 was over? Was there no longer a sale?

9 A. Well, again, what I'm troubled by is
10 whatever compulsion the seller may have been under to
11 surrender all of the consideration to the parent as
12 part of the transaction. That's described in the
13 Company's application, and I understand that that's
14 what occurred. There's some question in my mind here
15 whether we can have a sale under those circumstances.
16 I understand the distinction we talked about earlier
17 with respect to a true sale, and I certainly believe
18 a true sale didn't occur here.

19 Q. Now, Mr. Brosch, if you were to sell your
20 house and immediately surrender all of the
21 consideration to the bank to pay off your mortgage,
22 does that make that transaction any less of a sale?

23 A. Under those circumstances, probably not.
24 I would be receiving, in return, forgiveness of the
25 debt, of course.

00644

1 Q. Is it your testimony that any sort of a
2 transfer takes place in a rental or lease agreement?

3 A. Yes.

4 Q. What type of a transfer?

5 A. Transfer of the right to use the assets of
6 the lessor.

7 Q. Is the right to use a tangible asset or an
8 intangible asset?

9 A. It can be either one.

10 Q. How could the right to use be a tangible
11 asset?

12 A. It's pretty tangible if, for example, I
13 have the right to use a physical asset for a defined
14 period of time.

15 Q. Right, correct, but aren't you there
16 talking about two separate things, a physical asset
17 and the right to use it, or do you not understand the
18 distinction there?

19 A. I'm not sure I'm tracking with all of the
20 distinctions you're making here. Perhaps an example
21 would be helpful.

22 Q. Is it your testimony, Mr. Brosch, that the
23 right to use an asset, as distinguished from the
24 asset itself, is something tangible or intangible?

25 A. Probably characterize it as intangible.

00645

1 Q. And if the right to use an asset is
2 transferred under a lease agreement from the owner of
3 the asset to the person paying the rental payment,
4 how does that transfer? How is that transfer
5 effected? Is it physically moved from the owner?

6 A. It might be. When I rent a vehicle with
7 the airport, I move the vehicle and I have the right
8 to do that.

9 Q. I'm talking about the right to use as an
10 intangible asset. How is that intangible asset
11 transferred between the lessor and the lessee?

12 A. If it's a physical asset, the lessee is
13 probably given the right to occupy or otherwise use
14 the asset. In case of real estate occupancy, in the
15 case of the rental car example I gave you, the right
16 to drive it off the lot, use it for personal use,
17 return it at a designated time.

18 Q. Well, let's say it is a real estate
19 transaction. How is the right to use the rented real
20 estate transferred from the landlord to the tenant?

21 A. If I understand your question correctly,
22 it's probably done through a lease agreement or a
23 rental agreement in some form.

24 Q. Is there any physical moving of something
25 from one place to another in that instance?

00646

1 A. I might be handed the keys. Is that what
2 you mean?

3 Q. I don't know. I'm asking you.

4 A. That's the only physical movement I can
5 imagine under the circumstances you gave me, aside
6 from the tedium of moving in my furniture, perhaps.

7 Q. Can you direct me to any Commission order
8 in any docket of which you're aware where the
9 Commission describes imputation as rent?

10 A. I don't think so. I've not exhaustively
11 searched for that term, so I can't say that it's not
12 there somewhere, but I'm not aware of its existence.

13 Q. Can you direct me to any place in the
14 Supreme Court decision, which we have previously
15 discussed, where the court describes imputation as
16 rent?

17 A. I would give you the same answer.

18 Q. When a sale occurs, when is the value of
19 the thing sold fixed?

20 A. Most typically, it is fixed at the time of
21 the transaction, the sale event.

22 Q. Can you sell something -- for example, a
23 business -- under an installment contract?

24 A. Yes.

25 Q. When does the sale event occur under an

00647

1 installment sales contract?

2 A. I would expect that the sale event would
3 occur when there is an exchange of the obligation to
4 perform under the installment contract for the assets
5 being purchased.

6 Q. Would the value of the assets or the price
7 typically be fixed at that point in time?

8 A. Yes.

9 Q. Would full consideration be paid at that
10 time?

11 A. It certainly could be. The obligation to
12 pay under an installment contract could be viewed as
13 the full amount of the consideration from the sale.

14 Q. Mr. Brosch, have you ever given or received
15 a gift?

16 A. Yes.

17 Q. Do you agree that the item given or
18 received in that circumstance was transferred as a
19 result of the gift transaction?

20 A. Yes.

21 Q. What is your understanding of the phrase
22 to, quote, "give something away," close quote?

23 A. To transfer it without consideration in
24 return.

25 Q. Is it your testimony in this docket, Mr.

00648

1 Brosch, that a true sale was required to effect the
2 transfer of the Yellow Pages publishing business from
3 PNB to US West Direct?

4 A. Required by who?

5 Q. I'm asking if a true sale was required, in
6 your mind, or is it Public Counsel's position that a
7 true sale was required to effect the transfer of the
8 Yellow Pages publishing business from PNB to US West
9 Direct?

10 MR. BUTLER: I'm going to object to the
11 question to the extent that the reference to Public
12 Counsel includes reference to Tracer. Mr. Brosch is
13 a witness sponsored, in part, by Tracer, and he's
14 capable of testifying to his own opinion, but he does
15 not speak for Tracer. I will speak for Tracer and
16 will state Tracer's position at the appropriate time.
17 Mr. Brosch is not in a position to do that.

18 JUDGE WALLIS: The witness, in response to
19 an analogous question earlier, made that point with
20 reference to Public Counsel, and we will understand
21 the witness to state his own opinion unless he does
22 state that he knows and is authorized to speak for
23 another party.

24 THE WITNESS: My answer to your question is
25 no.

00649

1 Q. Mr. Brosch -- go ahead.

2 A. My answer to your question is no.

3 Q. What was required, if not a true sale?

4 A. To effect the transfer of the directory
5 business?

6 Q. I believe I said the Yellow Pages
7 publishing business, but using those terms
8 synonymously?

9 A. I believe what was required to effect the
10 transfer was the entry into a publishing agreement
11 and the transfer of the assets and employees
12 associated with that business, in particular, the
13 assets identified in the Company's application in
14 1983.

15 Q. Is it your understanding that the purpose
16 of the publishing agreement was to accomplish or
17 describe the transfer of physical assets?

18 A. Let me refer to the agreement to answer
19 that. I'm not entirely sure what the appropriate
20 answer is. The agreement speaks to and defines
21 certain obligations that have a physical dimension to
22 them, such as obligations to produce certain numbers
23 of directories at certain times, to include listings.
24 Most of the specified granting of rights has to do
25 with intangible assets. There are elements of the

00650

1 agreement that talk about physical performance of
2 certain obligations by the parties.

3 Q. I believe my question was is it your
4 understanding that the purpose of the publishing
5 agreement was to accomplish or describe the transfer
6 of the physical assets?

7 A. One of its purposes was to define the
8 rights and obligations of the party, which includes
9 certain actions with certain physical assets.

10 MS. ANDERL: Your Honor, I believe this is
11 under one of those yes or no questions. If I could
12 ask that the witness be directed to answer yes or no
13 and then provide an explanation.

14 JUDGE WALLIS: Yes, I am going to ask the
15 witness to respond with a yes or no answer.

16 THE WITNESS: I believe that the publishing
17 agreement was required to effect the transfer. As to
18 the physical assets, I think those were transferred
19 outside the publishing agreement.

20 Q. Is your testimony that the publishing
21 agreement was required to effect the transfer? Is
22 that what you just said?

23 A. It was required to effect the transfer of
24 the business, because it defines the rights and
25 obligations of the parties to the agreement.

00651

1 Q. Well, do you know what the date of the
2 publishing agreement was, the first publishing
3 agreement entered into between the parties?

4 A. The one I have in front of me bears a date
5 as of the 18th of June, 1984, on the front. I'm not
6 sure if it has a different date at the back or not.

7 Q. Do you know when US West Direct began its
8 directory publishing business operations?

9 MR. FFITCH: Your Honor, the witness is
10 still answering the previous question, I believe.

11 MS. ANDERL: Oh, is he? I'm sorry. I
12 thought he was through.

13 THE WITNESS: I was searching. I found
14 only one date in the signature block, and that
15 appears to be June 13th, '84.

16 Q. I apologize, I didn't mean to cut you off.

17 A. As to when the publication of directories
18 shifted, just after the agreement date, there's a
19 statement that this agreement is to be effective
20 January 1, 1984.

21 Q. Do you recall when the Commission entered
22 its order approving the transfer of assets in Docket
23 83-159?

24 A. I'm looking at the Fourth Supplemental
25 Order in Cause Number FR-83-159.

00652

1 Q. I believe --

2 A. My copy has a -- excuse me.

3 Q. Sorry, I didn't mean to interrupt.

4 However, I believe you want to be looking at the
5 Second Supplemental Order.

6 A. Thank you.

7 Q. Do you have that? I'm sorry, I misspoke,
8 as well. It's the order granting application in
9 part, FR-83-159?

10 A. I see that, and my copy has a service date
11 December 30, 1983, and it's said to be effective on
12 the same date.

13 Q. On your Exhibit 608, which is your
14 surrebuttal testimony, you state, at page 14, that
15 there is no reference in the publishing agreement to
16 principal payments associated with an installment
17 sale. Do you recall that testimony? It's at lines
18 one and two.

19 A. Yes, I see that.

20 Q. Do you consider that fact to be
21 determinative of anything in this case?

22 A. I hesitate with respect to determinative.
23 I mean, it says what it says. I think the import of
24 that is the publishing agreement is not evidence of
25 the installment sale theory, as I understand Mr.

00653

1 Inouye's testimony, which this is responsive to.

2 Q. Is there any reference in the publishing
3 agreement to rental or lease payments?

4 A. It's an exhibit. I don't think so. But I
5 don't know that I've read it recently enough to know
6 conclusively.

7 Q. The publishing agreement? Is that what
8 you're referencing?

9 A. Yes.

10 Q. That's your Exhibit 602, MLB-1, is it not?

11 A. It is, and I don't recall use of the word
12 "rent" in the agreement. There are 16 pages. It may
13 be in here somewhere.

14 Q. Do you think if it were in there, you would
15 have mentioned it in your testimony?

16 A. Possibly, if it would add meaning to my
17 testimony.

18 Q. If the terms "rental agreement" or "lease
19 payments" had been in that publishing agreement, do
20 you think that that would have added meaning to your
21 testimony?

22 A. I hope that my testimony deals more with
23 the substance than careful definitions of particular
24 words. I don't know whether it would have added
25 anything or not. The agreement says what it says.

00654

1 Q. Let me go back and clarify, then, in terms
2 of what your understanding is of the purpose of the
3 publishing agreement. Is it your testimony today
4 that your understanding of the purpose of the
5 publishing agreement was to accomplish the transfer
6 of the publishing business itself?

7 A. Yes, it was a key element of defining what
8 business responsibilities were transferred. The
9 agreement defines the rights and obligations of the
10 party, one of which -- of the parties, one of which
11 is the US West Direct company.

12 Q. Are you aware of whether or not US West
13 Direct enters into publishing agreements with
14 telecommunications companies other than US West
15 Communications or PNB for the purpose of defining the
16 rights and obligations of the parties as to the
17 publication of directories?

18 A. I believe they have entered into agreements
19 with other parties, yes.

20 Q. Is it your testimony that the purpose of
21 those publishing agreements was to accomplish the
22 transfer of the publishing business from those
23 telecommunications companies to US West Direct?

24 MR. FFITCH: I'm just going to object, Your
25 Honor. There's no foundation for these questions.

00655

1 The witness hasn't received any information about any
2 of these publishing agreements. They're not in the
3 record. He's being asked to speculate about
4 publishing agreements that we know nothing about.

5 MS. ANDERL: He seems to be comfortable
6 answering the questions, Your Honor. It certainly
7 seems related to his testimony.

8 JUDGE WALLIS: Let's let the witness
9 respond, if he's able. If he's not, he can say that
10 he isn't.

11 THE WITNESS: I have seen publishing
12 agreements between the Direct company and other
13 telephone companies that were effective and dated
14 much later than the early 1984 time frame. I would
15 not consider those agreements to have any
16 definitional importance to the creation of the Direct
17 company, what was transferred into the Direct
18 company, in terms of assets or rights and obligations
19 in 1984.

20 Q. Can you explain to me why, in your opinion,
21 the publishing agreement was necessary to accomplish
22 the transfer of the business itself?

23 A. Yes, the publishing agreement first sets
24 forth the rights to use certain assets that are of
25 key and important value to the publications, the

00656

1 product of the Direct company. The agreement sets
2 forth, in fairly specific terms, certain obligations
3 to perform in the publishing and distribution of
4 directories, and it sets forth a compensation
5 arrangement between the parties that defines what
6 remains in the way of obligations between the two
7 parties, among other things.

8 Q. Isn't it true that a recitation of the
9 obligations to perform in the publishing and
10 distribution of directories would be necessary in any
11 type of a publishing agreement, whether there were a
12 transfer of business between related corporate
13 entities involved or not?

14 A. I'm not entirely sure I understand your
15 question. Let me try by answering that if I were
16 interested in having directories published by US West
17 Direct, I might enter into a publishing agreement
18 that did not transfer any other obligations beyond
19 the defined rights and obligations in the publishing
20 agreement.

21 Q. And so if the, for example, Michael Brosch
22 Telecommunications Company wished to have its local
23 exchange directories published by US West Direct, do
24 you understand that a publishing agreement defining
25 the rights and obligations -- the obligations to

00657

1 perform might be necessary between the
2 telecommunications company and the publishing
3 business?

4 A. Yes, I would expect there to be some
5 agreement memorializing those rights and obligations.

6 Q. Would you expect that agreement to contain
7 some terms with regard to compensation?

8 A. It certainly might, yes. I suppose it
9 depends on what I brought to the table.

10 Q. Might the agreement also contain a
11 provision whereby the publisher receives a license to
12 use the telecommunications company's name for the
13 duration of the publishing agreement?

14 A. That's certainly a possibility.

15 Q. And those elements could all be present in
16 a publishing agreement which was not designed to
17 effect the transfer of the business?

18 A. I suppose so.

19 Q. Then what is it about the publishing
20 agreement that is marked as Exhibit 602 that makes it
21 different from the hypothetical agreement that you
22 and I have just talked about that makes this
23 publishing agreement one, in your understanding, that
24 was either designed to or necessary to accomplish the
25 transfer of the publishing business?

00658

1 A. This is the agreement at the inception of
2 the publishing business that set forth the key
3 relationships between the telephone company and the
4 publishing business that defined what was transferred
5 and the value of the Direct company subsequent to the
6 transfer, unlike the hypothetical Michael Brosch
7 Telephone Company example, which, while it may have
8 some impact on the financial performance of the
9 publishing company, certainly would not be comparable
10 to the import of the original publishing agreement
11 and those that followed between US West
12 Communications and US West Direct.

13 Q. Let me see if I understand your testimony
14 here, And the reason we started talking about the
15 publishing agreement is because I asked you some
16 questions about whether or not it was your testimony
17 that a true sale was required to effect the transfer
18 of the Yellow Pages publishing business, and I
19 believe, in the context of your answer, you brought
20 up the publishing agreement; is that correct?

21 A. I really don't recall where we started on
22 the publishing agreement.

23 Q. Is it your testimony today that you're not
24 aware of any legal requirements for a true sale to
25 take place in order to effect the transfer of the

00659

1 Yellow Pages publishing business from PNB to US West
2 Direct?

3 A. I don't have an opinion with respect to --
4 MR. FFITCH: Objection, Your Honor. That
5 is a direct request for a legal opinion.

6 MR. BUTLER: There's no other way to
7 interpret that question.

8 MS. ANDERL: Well, Your Honor, if I may,
9 Mr. Brosch's testimony is replete with what is or
10 isn't required, what is or isn't permitted, what both
11 the Commission and the Supreme Court have done in
12 various proceedings. I don't think that this is any
13 more or any less of a question which calls for a
14 legal conclusion. I'm asking him if he's aware of
15 whether there are any legal requirements. I think
16 it's perfectly permissible.

17 MR. FFITCH: The question itself, as
18 phrased, is a request for legal requirements, Your
19 Honor. And certainly Counsel is being allowed a lot
20 of latitude here on these numerous questions asking
21 for essentially legal opinions, and I understand that
22 and I have a continuing objection. I'm not going to
23 interrupt every time, but this particular question
24 is, I think, objectionable in the direct request for
25 legal requirements and --

00660

1 JUDGE WALLIS: Consistent with the earlier
2 rulings, I'm going to say that the objection would be
3 overruled and that the witness would be allowed to
4 answer. The witness' answer is not to be interpreted
5 as a legal opinion, we understand that he's not a
6 lawyer, and the weight that would be given to his
7 answer would be treated accordingly. He does talk in
8 his testimony about the nature and the effect of the
9 transaction, and I think that the area is a proper
10 one for inquiry.

11 THE WITNESS: I'm not aware of legal
12 requirements one way or the other.

13 Q. Are you aware of any regulatory
14 requirements that a true sale take place to effect
15 the transfer of the business?

16 A. I have not researched regulatory
17 requirements that might apply under those
18 circumstances.

19 Q. Do you agree that the directory publishing
20 business -- you have testified that the directory
21 publishing business was a regulatory asset of PNB?

22 A. I don't recall. If you can point me
23 somewhere, I might be able to track with you.

24 Q. Exhibit 601-TC, which is your direct, page
25 13.

00661

1 A. Could you give me a line number?

2 Q. I'm about to, unless I've got my line and
3 page references reversed between the surrebuttal and
4 the direct, which is a possibility. If I may have a
5 moment, Your Honor?

6 JUDGE WALLIS: Would this be an appropriate
7 time for a break?

8 MS. ANDERL: Sure, that would be fine.

9 JUDGE WALLIS: Let's be off the record.

10 (Recess taken.)

11 JUDGE WALLIS: Let's be back on the record
12 after our afternoon recess. I'm going to enjoin both
13 the attorneys and the witness, again observe that we
14 have a limited time, ask that folks focus on issues
15 that are important to the proceeding and to your
16 participation in the proceeding. And I'd also again
17 ask the witness to focus on the question, answer with
18 a yes or no when the question calls for a yes or no,
19 and that will assist all of us in expediting the
20 process and concluding the proceeding in time for the
21 witness to get his plane back home. Ms. Anderl.

22 MS. ANDERL: Very well. Thank you, Your
23 Honor. I had found the reference to regulatory asset
24 in Mr. Brosch's testimony that I wanted to ask him
25 about. It is in his surrebuttal, which is Exhibit

00662

1 608, and it is on page five, lines 24 and 25.

2 Q. Mr. Brosch, do you see your testimony
3 there, where you state, "There has never been any
4 WUTC approval of a transfer of the regulatory asset?"

5 A. Yes, I see that.

6 Q. What do you mean when you -- what do you
7 mean by regulatory asset there?

8 A. I'm trying to use it in the context of the
9 testimony that's referenced on the next page. What I
10 mean by regulatory asset is an asset that has a claim
11 on it for the benefit of ratepayers.

12 Q. What asset are you talking about?

13 A. Well, that's the difficult part of this.
14 The asset that I'm talking about is essentially the
15 value of the business that is not reasonably
16 apportioned under the publishing agreement. The
17 regulatory asset is the ongoing claim set forth in
18 Commission orders to impute revenues for the benefit
19 of customers recognizing that the customers are
20 entitled to that benefit, that regulatory asset.

21 Q. So the regulatory asset is not the business
22 itself?

23 A. I don't consider it that. I consider it a
24 claim on the business.

25 Q. Now I've lost a good number of the pages of

00663

1 my cross-examination. If you'll just bear with me.

2 JUDGE WALLIS: Let me note for the record
3 that the witness, Public Counsel and Counsel for US
4 West did have the opportunity to confer over the
5 break regarding the subject to check. And let me ask
6 Mr. ffitch what the result of that was?

7 MR. FFITCH: We're satisfied with the
8 reference, Your Honor.

9 JUDGE WALLIS: Very well. Thank you.

10 MR. FFITCH: Except for one correction, I
11 believe, which was that the reference was to Public
12 Counsel brief, and just, more specifically, it was
13 the Public Counsel reply brief in 950200.

14 MS. ANDERL: That's correct.

15 JUDGE WALLIS: Thank you.

16 Q. So the regulatory asset is not the
17 business, but rather a claim?

18 A. Yes, I view it as, from the Company's
19 perspective, a liability; from the regulator's
20 perspective, an asset, in the form of a claim to
21 certain benefits from the business that was
22 improperly transferred pursuant to the publishing
23 agreement.

24 Q. When was the regulatory asset created?

25 A. In substance, at the time of transfer and

00664

1 implementation of the publishing agreement. In
2 reality, probably the first time the regulator took
3 some action with respect to those transactions. Sort
4 of a question of does it exist if it hasn't been
5 stated yet.

6 Q. Referencing that same passage in your
7 testimony, you state that there has never been any
8 WUTC approval of the transfer of the regulatory
9 asset. Is it your testimony today that US West or
10 PNB failed to obtain any necessary approvals from the
11 Commission for the transfer of the regulatory asset?

12 A. That's not part of my testimony. I don't
13 know whether there has been any failure or not. I've
14 not asserted that there has been.

15 Q. Have you asserted or are you asserting that
16 there are any approvals necessary for the transfer of
17 the regulatory asset?

18 A. It's my understanding that approval was
19 necessary for the publishing agreement, and as I said
20 earlier, the publishing agreement and the
21 Commission's treatment of it is what gives rise to
22 the regulatory asset. I'm not sure how to answer
23 your question another way.

24 Q. Did the Commission disapprove the
25 publishing agreements or just the fees to be paid

00665

1 under them?

2 A. The Commission, if I recall correctly, and
3 the orders obviously state in greater detail, but my
4 recollection is that the Commission approved the
5 publishing agreement, but reserved the rate-making
6 treatment for consideration in subsequent
7 proceedings.

8 Q. So what approval, what WUTC approval of the
9 transfer of the regulatory asset in that instance was
10 necessary, if any?

11 A. In the context of this testimony, I am
12 explaining that the Commission has not previously
13 found that ratepayers no longer have claim to the
14 business.

15 Q. A lot of negatives in that answer.

16 A. Well, let me back up. Line 23, Imputation
17 amounts ordered by the Commission represent the
18 income stream or economic rent produced by the
19 regulatory asset. The Commission has yet to order
20 that there should be any change in that treatment of
21 the publishing fee, and with that in mind, there's
22 been no Commission approval of the transfer of the
23 claim, or the asset.

24 Q. So all you're really saying in this
25 testimony is that the Commission has not yet ordered

00666

1 an end to imputation; isn't that right?

2 A. That's the essence of this passage, yes.
3 That's the context.

4 Q. Do you understand how Mr. Inouye uses the
5 term "regulatory asset" in his testimony?

6 A. Well, I've quoted his testimony, and I
7 think he takes literal reference to certain passages
8 from other documents in characterizing it as, as I
9 say on the next page, as a former regulatory asset
10 that was walked away from.

11 Q. Are you using the term "regulatory asset"
12 in the same way?

13 A. I think so and hope so, but I have to say
14 I'm not certain what precisely he had in mind.

15 Q. You quote the Commission in your
16 surrebuttal testimony there on page five, out of the
17 15th Supplemental Order, and the Commission, at line
18 17, uses the phrase regulatory asset. Is it your
19 intent to use the term regulatory asset in your
20 testimony the same way as you understand the
21 Commission to be using it in the 15th Supplemental
22 Order?

23 A. I don't take issue with the Commission's
24 use of that. As I said earlier, I think of it as the
25 Commission continuing to assert jurisdiction and

00667

1 impose imputations because the Commission has not yet
2 found there to have been a true sale, a complete and
3 permanent transfer of the business.

4 Q. Are you aware of whether or not, in any
5 prior transactions between any companies that the
6 Commission regulates, whether the Commission has
7 required either a sale or a true sale, as you have
8 described those transactions, to transfer a business
9 operation between wholly-owned affiliates?

10 A. I have not researched that and I don't
11 know, one way or the other.

12 Q. Do you think the answer to that question
13 might be important with regard to your formulation of
14 an opinion in this case?

15 A. It's my belief that the Commission should
16 consider individual transactions in the context of
17 their authority and responsibilities and take
18 appropriate action. I did not imagine that I would
19 find, had I conducted the research, any transaction
20 comparable to this one that the Commission might have
21 dealt with previously.

22 Q. You've stated in your testimony, and I
23 don't think you'll need a page reference for this,
24 but that an incomplete or partial sale event took
25 place in 1984?

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1 MR. FFITCH: Your Honor, I would request
2 Counsel actually give a page reference for the
3 witness, if he would like one, rather than
4 instructing the witness that he doesn't need one.

5 JUDGE WALLIS: Well, I don't recall Ms.
6 Anderl instructing the witness that he didn't need
7 one, but offering. And I interpret it as a means to
8 expedite the hearing. If the witness does need a
9 page reference to verify the citation, then the
10 witness can ask for it.

11 THE WITNESS: Please.

12 MR. FFITCH: I don't mean to slow down the
13 hearing, but I just want to -- I believe the witness
14 should be given a chance to look at the page that
15 he's being -- the language that's being quoted to him
16 narrowly.

17 Q. Let me verify that my page and line
18 reference is correct. Exhibit 601, which is your
19 direct, page five, line 18, as well as line 15.

20 A. I see that. May I have the question again?

21 Q. I think the question was simply is it your
22 testimony. The question I'd gotten out so far was,
23 is it your testimony that you have stated that an
24 incomplete or partial sale event took place in the
25 1984 time frame; is that correct?

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1 A. Yes.

2 Q. What was sold?

3 A. The partial sale event I'm referring to
4 here is referenced on line 12, the physical assets
5 and employees, and what I have in mind is that
6 transitory retention of the consideration and the
7 fact that the publishing agreement constituted the
8 balance of the sale or transfer of the business.

9 Q. So with the publishing agreement, it was a
10 full sale?

11 A. With the publishing agreement, all of the
12 elements were in place to transfer the business.

13 Q. And my question for you is focused on your
14 testimony with regard to the incomplete or partial
15 sale event. I guess what was incomplete or partial?
16 I'm trying to understand, and let me just explain to
17 you the difficulty that I'm having. Maybe you can
18 respond. Was the entire sale event incomplete or
19 partial, or were only pieces of the business sold?

20 A. The assets referenced on line 12 were
21 transferred in a transaction that resulted in
22 consideration that was not retained by the seller.
23 The balance of the business, the rights and
24 obligations we spoke of previously that are addressed
25 in the publishing agreement, represent the balance of

00670

1 what occurred, effective January 1, 1984, for
2 inadequate compensation that was later and
3 consistently addressed by the Commission's imputation
4 adjustments.

5 Q. What is it about the transaction that makes
6 you describe it as a sale, even with the modifiers
7 incomplete or partial?

8 A. There was, for a brief instant, some
9 consideration given for the cash and physical assets
10 that were transferred. The asset -- the
11 consideration, the fractional share that I spoke of
12 earlier, was then dividended to the parent. So the
13 sale wasn't really complete in the sense that the
14 consideration wasn't retained.

15 Q. Why does that make it not complete if
16 compensation was received by the, quote, unquote,
17 seller?

18 A. Because it appears, from the discussions
19 that I've been involved in with respect to the
20 transaction, that part of the deal was that there
21 would be an instantaneous passage of all of the
22 consideration to the parent.

23 Q. How long would PNB have to have retained
24 the sale of stock in order for you not to describe it
25 as an incomplete or partial sale?

00671

1 A. I don't have a specific period in time
2 beyond immediately surrendering it.

3 Q. And are there any texts or references or
4 authorities upon which you rely for your contention
5 that dividending of consideration to the parent
6 somehow makes the transaction less than a full sale,
7 or is that simply your opinion?

8 A. I don't have at my fingertips any such
9 reference that you might be looking for. It is my
10 opinion that the essence of the transaction was that
11 the seller did not retain meaningful consideration
12 for the assets that were transferred.

13 Q. Is it the fact the seller did not retain
14 the consideration that is determinative in your mind,
15 or is there also an element as to the adequacy of the
16 consideration that causes you to characterize the
17 event as an incomplete or partial sale?

18 A. With respect to the transfer of the
19 physical assets in 1983, my concern is with the
20 retention of the consideration.

21 Q. You don't question the adequacy of the
22 consideration?

23 A. Not with respect to those physical assets,
24 no, or the cash.

25 Q. Okay. Do you question the adequacy of the

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1 consideration if, in fact, what was transferred was
2 the entire directory publishing operation in exchange
3 for the 21 percent share of stock?

4 A. I don't think that is a fact. I think the
5 publishing agreement defines the transfer of the
6 business, as I said earlier. And certainly there was
7 inadequate consideration with respect to the transfer
8 of the business, including the physical assets and
9 the rights and obligations under the publishing
10 agreement.

11 Q. But it was not inadequate as to the
12 physical assets; is that right? Consideration was
13 not inadequate?

14 A. As far as I know, it was not inadequate,
15 yes, that's right.

16 Q. Mr. Brosch, I have maybe a very few
17 questions for you about a document that was filed
18 with the Commission on June 30th, 1999, by Tracer,
19 Public Counsel, and AARP. It is a motion for summary
20 judgment. I don't believe that the Commissioners or
21 the Administrative Law Judges have it on the bench,
22 but I also do not believe that it's necessary for the
23 bench to have it to refer to. Let me just ask the
24 question, and then, if you would like to take a look
25 at the document --

00673

1 MR. FFITCH: I would object at this point

2 --

3 Q. -- Counsel could provide it for you.

4 MR. FFITCH: -- to the extent that -- I
5 guess I haven't heard a question yet, but it appeared
6 this is a legal motion filed as a statement of
7 position by Public Counsel, and I don't believe there
8 are affidavits from Mr. Brosch attached to it. So to
9 the extent he's being asked to discuss or state
10 positions of the Public Counsel office, as opposed to
11 being asked about his own testimony in this case, I
12 would just make that objection.

13 JUDGE WALLIS: Why don't we wait and see
14 what the question is. Let me ask if the witness and
15 Public Counsel have the document available?

16 THE WITNESS: I do not.

17 MR. FFITCH: I'd like to take a moment to
18 get it out of the file.

19 JUDGE WALLIS: May that be provided,
20 please?

21 MS. ANDERL: Your Honor, may I share my
22 copy with the witness?

23 JUDGE WALLIS: Before we continue, let me
24 ask if, Mr. ffitch, you have that in front of you?

25 MR. FFITCH: I'm just locating it now in

00674

1 the voluminous pleading file of this case, Your
2 Honor. I do have it now.

3 JUDGE WALLIS: Where in the document is
4 your reference, Ms. Anderl?

5 MS. ANDERL: It's on page five, line 23.

6 Q. Mr. Brosch, I'm handing you a motion for
7 summary judgment filed by your clients on June 30th,
8 1999, in this docket. Have you ever seen that
9 document before?

10 A. I think so. I believe I received a copy
11 and scanned it some time ago.

12 Q. Could you please read the sentence that
13 starts on line 23, beginning with the word "second"
14 aloud.

15 JUDGE WALLIS: What's the purpose of this,
16 Ms. Anderl?

17 MS. ANDERL: As soon as he reads that, I
18 have one question for him.

19 JUDGE WALLIS: Okay.

20 THE WITNESS: Right here?

21 MS. ANDERL: Yes.

22 THE WITNESS: "Second, Public Counsel and
23 Tracer acted in reliance on USWC's commitment by
24 refraining from challenging the merger."

25 Q. Okay. Mr. Brosch, my only question for you

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1 -- I think my only question -- is can you speak today
2 with regard to any reliance that Public Counsel or
3 Tracer might have placed on US West's commitment,
4 other than as set forth in that motion?

5 MR. FFITCH: I'm going to object, Your
6 Honor. Mr. Brosch has appeared as an expert witness
7 on behalf of Public Counsel in proceedings, and his
8 positions have been in testimony. To be asked about
9 the reliance of his client, if you will, in a legal
10 matter, I think is an objectionable question. The
11 positions of Public Counsel are taken by the Public
12 Counsel's office.

13 JUDGE WALLIS: Ms. Anderl.

14 MS. ANDERL: Yes, I don't know if Tracer
15 also objects on the same basis.

16 MR. BUTLER: Yes, I do.

17 MS. ANDERL: However --

18 MR. BUTLER: I'd also note that Mr. Brosch
19 was not retained by Tracer in any capacity in that
20 case, so he couldn't possibly have been in any
21 position, even improperly, to speak for Tracer.

22 MS. ANDERL: I'll retake my seat, Your
23 Honor. I don't think I need to be up here any
24 longer.

25 JUDGE WALLIS: Have you concluded your

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1 response to the objection?

2 MS. ANDERL: I have not, Your Honor. I
3 simply wish to point out, in response to the
4 objections, that this is the only witness sponsored
5 by these parties, and if we can't inquire of him as
6 to that representation made in the pleading, given
7 that there are no affidavits attached to the motion,
8 I would simply ask of whom we are to inquire.

9 MR. FFITCH: I guess I would just repeat,
10 Your Honor, that Mr. Brosch is not an employee of the
11 Attorney General's office.

12 JUDGE WALLIS: You needn't repeat any
13 statement that you've previously made. I think the
14 objection is well-taken and it should be sustained.

15 MS. ANDERL: Very well, Your Honor.

16 Q. Mr. Brosch, if you're still on your
17 surrebuttal testimony, which may have been where we
18 last were, may not have been, Exhibit 308, page 16?

19 A. Three-oh-eight?

20 CHAIRWOMAN SHOWALTER: Six-oh-eight.

21 Q. Six-oh-eight.

22 A. Sixteen?

23 Q. Page 16, yes.

24 A. All right.

25 MR. FFITCH: I'm sorry, Ms. Anderl. I'm

00677

1 not following. What's your reference?

2 MS. ANDERL: Surrebuttal testimony, Exhibit
3 608, page 16.

4 MR. FFITCH: Thank you.

5 Q. At line five there, Mr. Brosch, you use the
6 word "consideration:"twice, and at line ten, you use
7 the word "compensation." I had earlier asked you
8 about whether you were comfortable using those terms
9 synonymously, and given that I now have a specific
10 page and line reference to point to you where you do
11 use both of those words in your answer, I would like
12 to ask you if you are comfortable using those terms
13 synonymously?

14 A. No, I'm not comfortable with that.

15 Q. What's the difference between the meaning
16 of the word consideration there and the word
17 compensation?

18 A. It's on the same line as I described
19 earlier. Consideration, I consider in the context of
20 a point in time transaction, consideration received
21 in return for what was conveyed to the acquiring
22 party. When I make reference here to imputation
23 needed to provide the compensation to regulated
24 operations, I'm talking about the periodic amount of
25 calculated imputation that compensates for the

00678

1 inadequacies of the publishing agreement. One's a
2 point in time concept, the other is a sort of
3 ongoing, periodic concept. It's a subtle
4 distinction, but that's the way I think of it.

5 Q. So if it's not all given at once at a point
6 in time, it's not consideration?

7 A. Let me help you here. If it were
8 consideration, for the initial transfer that we've
9 been talking about, I expect that it would be defined
10 in amount at that point in time. The imputation
11 amount that I refer to as compensation here is
12 variable in amount, depending upon the achieved
13 income of the Washington part of the directory
14 publishing operation in any particular test year. In
15 other parts of the testimony, I've explained the
16 significance of that.

17 Q. Mr. Brosch, in terms of the fees that you
18 received for the services that you provide in a
19 docket such as this one, which would be the more
20 applicable term to use to describe those fees that
21 Public Counsel and AARP paid? Is that consideration
22 or is that compensation?

23 A. I'm not sure I would make the distinction
24 in that context. I suppose if it were fixed in
25 amount at a particular point in time, it might be

00679

1 more akin to consideration. If I were transferring
2 assets, rather than providing services, I might think
3 of it more as consideration. Since I'm providing
4 services on an hourly basis, I think of it more as
5 compensation.

6 Q. And what basis do you have for making those
7 distinctions between the meanings of those words?

8 A. I don't understand your question. I've
9 tried to explain. I don't know what you would have
10 me say.

11 Q. Do you have an understanding of the
12 difference between the words as you've used them,
13 other than, say, perhaps the time period over which
14 the monies or the -- let's say monies are received or
15 paid?

16 A. Well, yes. I tried to make that
17 distinction with specific reference to this
18 testimony. The imputation, which I characterized as
19 compensation, is variable in amount, depending on the
20 financial performance, the risks and returns of the
21 directory publishing business from one test period to
22 the next. On the other hand, consideration, in the
23 context of this testimony, relates to those things
24 transferred back in 1983.

25 Q. If you sell a business on an installment

00680

1 sales contract, is it possible that the payment for
2 the business could be variable and paid out over
3 time, depending on how the business performed?

4 A. I would think that's possible, yes. You
5 could have variable consideration. And if, using
6 your hypothetical, my personal performance impacted
7 on the performance of the business, I might view some
8 of that variation to be compensation to me for my
9 time and effort in influencing performance, if I
10 understood your example.

11 Q. But would you nonetheless, in that
12 instance, describe the payment for the business as
13 consideration for the transfer of the business under
14 an installment sale contract?

15 A. Part of it, I probably would. I think my
16 tax accountant would be concerned with what part of
17 the business was consideration for what I conveyed
18 and what part might be on my W-2 as compensation.

19 Q. So it's a tax accounting distinction that
20 you intended to draw between the words?

21 A. I'm just trying to illustrate the
22 distinction that we keep coming back to here.

23 Q. Let me ask you a few questions about the
24 use of the PNB name or the US West name. Exhibit
25 608, which is your surrebuttal, page 26, you state

00681

1 that you are not aware of any disallowance of
2 salaries, legal fees, et cetera, incurred in
3 connection with the creation of the US West name. Is
4 that a fair summation of your testimony?

5 A. I think it's in there, but I haven't found
6 it yet. What line?

7 Q. It's the last two lines on the page,
8 continuing on to the top of page 27.

9 A. Yes, I see that.

10 Q. Are you aware of whether or not any such
11 costs were ever affirmatively allowed or included in
12 rates in the state of Washington?

13 A. I have to say I'm not aware of an
14 affirmative decision to include or exclude costs of
15 that nature. Part of my pause is because, as you
16 know, the rate-making process is one of looking
17 periodically at a test year and allowing specific
18 costs incurred in that test year, and it makes it
19 difficult to draw conclusions with respect to
20 expenses incurred between test years.

21 Q. To the extent that costs were incurred in
22 connection with the creation of the US West, Inc.
23 name at divestiture, would those costs have been
24 incurred by PNB, the operating company, or by US
25 West, Inc.?

00682

1 A. It could be either. I don't know if, in
2 that era, parent company pushed-down accounting was
3 being practiced yet. The accounting that occurs
4 presently where many, in fact, most of parent company
5 costs are allocable to the operating subs, including
6 PNB.

7 Q. On page 27 of your surrebuttal, just really
8 following that answer through to the end, lines one
9 through five of page 27, you discuss the public
10 awareness of the US West name, and you state that
11 public awareness is more important than creation
12 costs and that public awareness is primarily
13 generated from operating the dominant local exchange
14 telephone business. Do you see that testimony?

15 A. Yes, and promoting its products across 14
16 states.

17 Q. What basis do you have, Mr. Brosch, for --
18 well, let me ask it this way. Is it your contention
19 that public awareness of the US West name during the
20 1984, '85 and '86 time frame was generated from
21 operating the dominant local exchange business in the
22 PNB serving territory?

23 A. In that time frame, I expect that the
24 operation of the local exchange business contributed
25 much less to the awareness of the US West name, if,

00683

1 in fact, it contributed anything at all. I don't
2 have specific knowledge of whether there was any
3 pairing of the stylized US West name with the PNB
4 name shortly after divestiture or not.

5 Q. And if there were not any such pairing
6 during those initial years, is it your testimony that
7 there would be any awareness of the US West name
8 generated from operating the PNB local exchange
9 business?

10 A. If there was absolutely no referral to the
11 US West name in the operation of the local exchange
12 business, I would accept your premise that there's no
13 contribution there, but as I said before, I don't
14 know whether that's the case or not.

15 Q. In Washington, the local exchange telephone
16 business in 1984, 1985, and 1986 was operated under
17 the PNB name; isn't that correct?

18 A. It's my understanding that it was, yes. I
19 don't know whether there was any, as I said earlier,
20 pairing or reference to US West by operating
21 personnel, talking to customers, or names on trucks
22 or anything of that nature in that time frame.

23 Q. Are you personally aware of any use in the
24 1984 through 1986 time frame of the use of the US
25 West name in connection with the local exchange

00684

1 business? Are you personally aware of any use?

2 A. I don't recall any personal awareness.

3 Q. Are you aware of whether or not US West
4 Direct has ever used the designation official or
5 exclusive in connection with its publication of
6 directories?

7 A. I don't understand your question. Did you
8 say did they use it?

9 Q. Yes. Are you aware of whether or not US
10 West Direct ever used the designation official or
11 exclusive in connection with its promotion of the US
12 West Direct Yellow Pages product? Maybe that's a
13 better question.

14 A. I don't think I could know that one way or
15 the other. You're talking about a lot of customer
16 contacts, distant history with respect to promotional
17 activities.

18 Q. Is there a single instance that you're
19 aware of with a customer contact or the use of the
20 term exclusive or official on a directory cover or
21 any other manner?

22 A. Well, the covers certainly link the
23 telephone company to PNB.

24 MS. ANDERL: Your Honor, I would ask that
25 the witness be instructed to answer the yes or no

00685

1 question.

2 JUDGE WALLIS: Yes, it would expedite
3 matters, Mr. Brosch, if you did listen carefully to
4 the question, and if it calls for a yes or no answer,
5 answer yes or no.

6 THE WITNESS: Beyond the covers that we
7 spoke of earlier, I'm not aware of a specific
8 linkage.

9 Q. Do any of the covers contain the term
10 "official?"

11 A. Not the term, no. If you mean a literal
12 quote of the word official, no, I'm not aware of any.

13 Q. What about the word exclusive?

14 A. I'm not aware of any use of that, beyond
15 the publishing agreement itself. That wasn't in
16 connection with promotion of products, I suppose.

17 Q. Isn't it true -- I'm going to change
18 subjects now, just so you don't expect a lot more
19 questions about the use of the PNB name or the
20 directory covers. Isn't it true that when the
21 Commission imputes revenues, it treats US West
22 Communications or PNB as if it actually received
23 those revenues?

24 A. I don't think so. I think it's setting the
25 customers' rates without regard to whether PNB

00686

1 actually receives the revenues or not. I don't know
2 what you mean by treats. Maybe if you'd help me with
3 that.

4 Q. In a rate case setting, doesn't the
5 Commission, when it calculates a revenue requirement
6 and sets rates to achieve that revenue requirement,
7 treat US West as if it, in fact, actually received
8 the imputed revenues from US West Direct?

9 A. I don't think so. I don't think the
10 Commission has ever conditioned its imputation on a
11 receipt of revenues from US West Direct.

12 Q. Mr. Brosch, do you understand the concept
13 of treating something as if something happened?

14 A. Well, apparently not the same way you do.
15 I'm sorry.

16 Q. Was it your testimony that if a true sale
17 had occurred in 1984, that no imputation would be
18 necessary?

19 A. Yes.

20 Q. Let me ask you, with regard to imputation,
21 if you agree or disagree with the following
22 statement: The principal basis for imputation is
23 that US West transferred to an affiliated corporation
24 a valuable asset without receiving fair compensation.
25 Do you agree or disagree with that?

00687

1 A. I agree in part. The other basis is that
2 the Company continues to transfer valuable assets to
3 US West Direct without receiving adequate
4 compensation.

5 Q. So you don't think that that is the
6 principal basis for imputation?

7 A. I think that's part of it, but I don't
8 think that's all of it.

9 Q. You don't think that's all of it?

10 A. No, I don't.

11 Q. With regard to that statement, that the
12 principal basis for the imputation is that US West
13 transferred to an affiliated corporation a valuable
14 asset without receiving fair compensation, would you
15 agree with the following statement, that the
16 imputation serves to provide that compensation?

17 A. I agree that imputation serves to provide
18 additional compensation for both concerns that I
19 referenced before the inadequacy of consideration at
20 the time of the original transfer and the ongoing
21 inadequacy with respect to the compensation under the
22 publishing agreement.

23 Q. Do you believe that imputation -- strike
24 that. Do you agree that imputation served or has
25 served to compensate ratepayers for the going concern

00688

1 value of the business?

2 A. I believe that imputation has compensated
3 ratepayers for the going concern value within a
4 specific test period, but not a liquidating
5 compensation, as if the entirety of that value was to
6 be conveyed at one time.

7 Q. Mr. Brosch, isn't it true that you've
8 testified in this docket that the going concern value
9 of the business was fully captured through imputation
10 rents? And I will tell you that that is on -- it's
11 not a complete sentence. You can feel free to put it
12 in context, if you wish. That's on page 33 of your
13 surrebuttal. But what I want to ask you, once you've
14 gotten there, is whether you agree that the going
15 concern value of the business was fully captured
16 through imputation rents?

17 A. What line are you on, please?

18 Q. I'm sorry. Eight.

19 A. Yes, as it says there, on a periodic basis
20 through imputation rents, it's captured.

21 Q. What do you mean, fully captured?

22 MR. FFITCH: Excuse me, Your Honor. Just
23 to correct the record, the reference, I believe, is
24 to line nine.

25 MS. ANDERL: The sentence starts on line

00689

1 eight, but you are correct.

2 JUDGE WALLIS: So noted.

3 THE WITNESS: Sorry, your question -- fully
4 captured?

5 Q. Yes, what does that mean?

6 A. That means, within a particular test year,
7 the way imputation is calculated, it captures the
8 excess return and revenues that were moved to the
9 directory publishing affiliate's books under the
10 publishing agreement and transfers we've been
11 describing.

12 Q. What is the going concern value of the
13 business?

14 A. In any given period, it is the value thrown
15 off as represented by the income stream of the
16 business.

17 Q. What does that mean?

18 A. That means what the business returns to the
19 owners of the business in that period.

20 Q. How can that be quantified? Is that
21 quantified on a lump sum value basis or an annual
22 basis?

23 A. It's quantified on an annual basis in the
24 imputation process.

25 Q. So a going concern value for a business is

00690

1 an annual figure?

2 A. In the context of imputation, we look at
3 what the going concern --

4 Q. Mine was a more general question. I'm
5 sorry.

6 A. Well, I only know how to respond in the
7 context of my testimony you've pointed me to here.

8 Q. So you don't have a view as to what that
9 going concern value of a business would be outside of
10 the context of directory business and imputation?

11 A. Well, beyond my testimony here, and
12 imputation, in particular, the going concern value of
13 the business could be the entirety, the fair market
14 value of the business, if that's what you're after.
15 It could be a true sale to a disinterested third
16 party at fair market value, like we spoke of before.

17 Q. Back on page 16 of your surrebuttal, on
18 line six, you use the phrase "the going concern value
19 of the directory business." What do you mean by
20 going concern value of the directory business there?

21 A. Well, I'm talking about consideration for
22 the transfer of employees back in 1983.

23 Q. No, no, no, I'm sorry, Mr. Brosch. Let me
24 focus you on -- I understand that your answer there
25 is that no consideration was paid for the transfer of

00691

1 the employees, but then you have a comma, and you
2 indicate, in addition to the transfer of the
3 employees, the going concern value of the directory
4 business. Is that separate from the employees?

5 A. Well, it's related to the employees. I'm
6 talking about the fact that employees were
7 transferred and that the business has a going concern
8 value for which there was no consideration received
9 beyond the consideration of the fractional share of
10 the Landmark stock that we spoke of earlier.

11 Q. Do you know what the going concern value of
12 the directory business, as of January 1, 1984, was?

13 A. I have not calculated that number.

14 Q. Could you?

15 A. If assigned to and set about the task, yes,
16 I could produce an estimate of that value, but I
17 don't think that's a meaningful value.

18 Q. How would you calculate it?

19 A. If we're talking about a going concern
20 value that would be sufficient to represent the full
21 fair market value of the business at that point in
22 time, I would go about discounted cash flow analyses
23 of projected income and cash flow streams and a
24 comparison to any comparable companies or
25 transactions, if there were any available at that

00692

1 point in time. I would look for other evidence of
2 value, if there were comparable transactions where
3 affiliated publishers of incumbent local exchange
4 carriers had been transferred.

5 Q. Mr. Brosch, I'm going to ask you to turn
6 back to Mr. Inouye's Exhibit CTI-1, which is Exhibit
7 103.

8 A. I think I have it. What page are you on?

9 Q. I'm on page two.

10 MR. FFITCH: Just remind me what that is,
11 Counsel.

12 MS. ANDERL: The excerpts.

13 Q. On the very bottom of that page two, do you
14 see the statement that begins, "If US West believes
15 that the imputation has been sufficient --"

16 A. Yes, I do.

17 Q. -- "it should petition the WUTC to perform
18 a valuation of the asset that was transferred (the
19 publishing right) and the value that has been
20 received from imputation to determine whether
21 imputation should continue. US West has refused this
22 invitation."

23 A. I see that language.

24 Q. Do you agree that if US West believes the
25 value of the imputation has been sufficient, it

00693

1 should petition the Commission to perform a valuation
2 of the asset that was transferred and the value that
3 has been received from imputation to determine
4 whether imputation should continue?

5 A. I believe that my recommendations are
6 stated in my testimony as to what the Company should
7 demonstrate in terms of a showing to cease
8 imputation. And those recommendations are not
9 identical to what you read here.

10 Q. So do you disagree with this statement?

11 A. I would leave it to my clients to state
12 their position with respect to what this statement
13 means. I'm not the author of it. My recommendations
14 are stated in my testimony.

15 Q. This is not your recommendation; is that
16 right?

17 A. That's correct. My recommendations are
18 stated in my testimony.

19 Q. Do you disagree with this recommendation?

20 MR. FFITCH: Well, that's been asked and
21 answered, Your Honor.

22 JUDGE WALLIS: I believe that's true.

23 MS. ANDERL: I did not mean to be
24 duplicative. May the witness answer it again, so
25 that I know?

00694

1 THE WITNESS: I believe I said that this --
2 MR. FFITCH: Your Honor, I believe we've
3 made an objection and it was upheld, so the witness
4 is not required to answer again.

5 MS. ANDERL: Your Honor, may I then ask the
6 reporter to find the question that Counsel contends
7 has already been asked and answered?

8 JUDGE WALLIS: Why don't we short-circuit
9 this and just ask the witness for a yes or no answer
10 to the question.

11 Q. I think the question was do you disagree
12 with this statement?

13 A. I disagree with this statement. It's not
14 my recommendation.

15 Q. Let me just ask you a few questions about
16 business valuation analyses, and relating generally
17 to some of the testimony of Mr. Golden and some of
18 the testimony that you've given in response. I don't
19 believe I have a specific reference for you with this
20 question, but let me see if you can answer it. The
21 question pertains to where one finds an equity ratio
22 in driving the weighted average cost of capital for
23 business valuation purposes. Do you have that in
24 mind?

25 A. I understand the subject matter. Is there

00695

1 a question?

2 Q. Not yet. I wanted to get us on the same
3 track.

4 A. All right.

5 Q. Do you believe that book value or fair
6 market value of equity is the appropriate basis?

7 A. For determining weighted average cost of
8 capital and the equity ratio to use?

9 Q. Yes.

10 A. You can use either one.

11 Q. Do you have an opinion on which is
12 appropriate for business valuation purposes?

13 A. I think the important thing is that the
14 capital ratios be representative of what one thinks
15 the hypothetical buyer's cost of capital is. I made
16 reference to book value because that's the convention
17 most often referred to and used by regulators. I
18 understand that some financial analysts use market
19 values.

20 Q. Do you know what the convention most often
21 used by or referred to by business valuation experts
22 is?

23 A. I've not conducted any survey or research
24 to determine one way or the other.

25 Q. With regard to growth rates, do you

00696

1 understand the distinction between a long-term growth
2 rate and a short-term growth rate?

3 A. I think so. One's longer than the other.

4 Q. How long is a short-term rate?

5 A. It's a relative notion. I don't know how
6 to answer your question. Three years is shorter than
7 four years.

8 Q. What does a long-term, i.e., into
9 perpetuity growth rate represent?

10 A. Well, in the context of a valuation
11 calculation, it represents the growth anticipated
12 beyond the explicit forecast period, whatever that
13 period is, into the indefinite future.

14 Q. And the explicit forecast period then
15 contains the short-term?

16 A. The explicit forecast period often contains
17 specific anticipated values, rather than a growth
18 rate per se. I'm a little confused by your question.

19 Q. But can you calculate growth rates from the
20 specific anticipated values?

21 A. Yes, you could derive an average annual
22 growth rate from specific annual values over a period
23 of time, if you chose to.

24 Q. And when you're selecting a terminal year
25 growth factor, do you use a long-term growth rate or

00697

1 a short-term growth rate assumption?

2 A. It is more of a long-term convention, in
3 that it's applied to a period beyond the near term
4 explicit forecast period.

5 Q. Prior to the filing of your testimony, did
6 you do any independent research as to what an
7 appropriate terminal year rate should be for a 1983
8 business valuation study for the Yellow Pages
9 publishing business?

10 A. I'm not completely clear on your use of the
11 term independent. I certainly reviewed the actual
12 performance of the directory company that we had the
13 benefit of because of the retrospective nature of
14 this valuation and observed that the growth was what
15 it was in those periods described in my testimony. I
16 didn't do that with anyone else's help. Is that what
17 you mean by independent?

18 Q. Did you conduct any study or analysis,
19 formal study or analysis of what a 1993 vintage
20 terminal year rate should be? Eighty-three, I'm
21 sorry.

22 A. What I'm describing is an analysis that's
23 described in my direct testimony where I arrive at an
24 observation that, given what we know today, a growth
25 rate higher than those recommended by Mr. Golden as

00698

1 of 1984 would be more reasonable.

2 Q. And you relied on the information provided
3 to you by Mr. Golden and US West in reaching that
4 conclusion; is that right?

5 A. I believe so, yes.

6 Q. And did you do any research outside of the
7 information that US West and Mr. Golden provided to
8 you in arriving at your conclusions?

9 A. Yes.

10 Q. Did you record that research in your work
11 papers?

12 A. No.

13 Q. Why not?

14 A. Because it consisted of reviewing growth
15 rates used in other valuation reports and other
16 projects and in the -- any other projects I'm
17 involved with of a merger and acquisition nature. It
18 also involved observation of the Company's own SEC 8K
19 disclosures with respect to the US West, Inc.
20 valuation reports that were received in 1997. I
21 didn't see any need to create work papers to document
22 that.

23 Q. Well, with regard to the first reason that
24 you offered, which is it was information that you --
25 as I understood it, you described that the

00699

1 information is information related to other
2 consulting work that you're doing?

3 A. That's correct.

4 Q. Is that information proprietary to those
5 clients?

6 A. It would be, yes.

7 Q. Is that why you didn't record it in a work
8 paper?

9 A. Well, I assume I would be concerned with
10 that had I written it down and disclosed it
11 improperly. But the real reason is it consisted of
12 observing certain information, making mental note of
13 it, and then moving on, rather than trying to create
14 work papers and documentation. You'll recall that
15 I'm not sponsoring a specific valuation estimate as
16 of 1984 that needed any documentation.

17 Q. On pages 50 and 51 -- I'm sorry, Exhibit
18 Number 601, your direct testimony, pages 50 and 51.

19 A. I'm there.

20 Q. I guess I should be, as well. I apologize.
21 The question is have you conducted any study or
22 analysis of what the value of the Dex ventures would
23 be without the inclusion of the interactive
24 information services?

25 A. You said Dex ventures. I'm not clear on

00700

1 what you mean.

2 Q. Well --

3 A. Oh, as I use it on 23?

4 Q. Yes, exactly.

5 A. Let me read it just a moment.

6 Q. For the record, we are discussing the
7 answer that starts on line 16, page 50.

8 A. And your question is what would it be?

9 Q. Have you conducted any study or analysis of
10 what the value of the Dex ventures would be without
11 the inclusion of the interactive information
12 services?

13 A. I think the answer is no. I'm trying to
14 recall what I was told about the projections the
15 Company provided that I relied upon in Exhibit MLB-5,
16 and I don't recall inclusion versus exclusion without
17 referring to some work papers.

18 Q. Isn't it correct that as of the valuation
19 date for the \$4.75 billion valuation, Dex did not
20 have any international investments?

21 A. As of what valuation date? I'm sorry.

22 Q. The date of the fairness opinion, fair
23 value of the business assessed to be 4.75, as of the
24 date those fairness opinions were rendered?

25 A. I'm not certain.

00701

1 Q. What international investments were you
2 referring to at line 22 of your answer there?

3 A. Let me see if I can find some
4 documentation.

5 MR. FFITCH: Would you remind me what page
6 we're on, Counsel?

7 MS. ANDERL: Page 50.

8 MR. FFITCH: Of the?

9 MS. ANDERL: Direct.

10 MR. FFITCH: Direct.

11 JUDGE WALLIS: Let's be off the record for
12 just a moment, please.

13 (Discussion off the record.)

14 JUDGE WALLIS: Let's be back on the record,
15 please. Ms. Anderl, are you ready to proceed?

16 MS. ANDERL: Yes, I am. Thank you, Your
17 Honor. There was a question pending when you took
18 the break, and the witness has indicated to me he is
19 ready with an answer.

20 JUDGE WALLIS: Mr. Brosch.

21 CHAIRWOMAN SHOWALTER: Can we be reminded
22 of what the question is?

23 MR. FFITCH: It's not important.

24 MS. ANDERL: It was relative to what
25 international investments Mr. Brosch understood Dex

00702

1 to have at the time of the fairness opinion relative
2 to the \$4.75 billion valuation.

3 THE WITNESS: With that buildup, I think
4 the answer will be disappointing. All I recall is a
5 footnote in the materials made available for my
6 review in Kansas City, but I haven't been able to
7 find any notes that I may have made at that time.

8 Q. All right. Then I think we can change
9 subjects. And let's talk a bit about the assets that
10 were transferred and those which you may or may not
11 contend were not transferred. You just indicated a
12 little while ago, Mr. Brosch, in response to a
13 question of mine, that US West continues to transfer
14 to US West Direct assets without adequate
15 compensation. Is that a fair --

16 A. Yes.

17 Q. -- summation of what you said?

18 A. Yes, with reference to the publishing
19 agreements that remain in force.

20 Q. What assets do you refer to there?

21 A. The right to publish the official
22 directory, the exclusive right to be that publisher
23 and affiliate those books with the local exchange
24 telephone company.

25 Q. Have you reviewed any of those -- have you

00703

1 reviewed the currently-effective publishing
2 agreement?

3 A. I have.

4 Q. Is that a part of the record in this
5 docket, to your knowledge?

6 A. I'm not sure if it is or not. I've seen it
7 previously and have it in my files in the pending
8 Arizona case.

9 Q. And are there any other assets that you
10 contend US West continues to transfer to US West
11 Direct without adequate compensation?

12 A. Not that I would call assets, no. There
13 are continuing transfers of services, and I believe
14 those transfers are in accordance with the FCC rules
15 for intercompany transfers. The end result of all of
16 that in observed excess earnings and revenues remains
17 the subject of imputation.

18 Q. And to the extent that assets -- that you
19 contend assets are continuing to be transferred to US
20 West Direct without adequate compensation, is it your
21 contention that those assets are transferred through
22 the currently-effective publishing agreement?

23 A. Yes.

24 Q. Have you performed a valuation of those
25 assets?

00704

1 A. Not of the assets. I believe that the
2 value of those assets is quantified periodically when
3 the imputation calculations are made in terms of the
4 return they produce in a particular test year.

5 Q. So is it your testimony that all of the
6 imputation in any given year is attributable to
7 either the right to be the official directory
8 publisher or the exclusive right to be the official
9 directory publisher?

10 A. I don't think I would use the word all, but
11 certainly those rights convey significant value that
12 continues to be transferred that contributes to the
13 amount of the imputations that are calculated,
14 recognizing that imputation is a bottom line driven
15 amount with reference to the US West Direct income
16 statements.

17 Q. Mr. Brosch, do you recall that I asked you
18 in your deposition -- and we're, again, on Exhibit
19 610, page 107 in this instance. Let me get the
20 question precisely, so that we're not dealing with
21 paraphrases. Line four, where I say --

22 A. Excuse me. I just found the exhibit. The
23 page is what?

24 Q. Sorry, 107.

25 A. All right.

00705

1 Q. We're talking about the exclusive right to
2 publish there. And the question at line four says,
3 "Do you know that the increase in the value of the
4 business is either caused by or attributed to the
5 exclusive right?" And your answer there is, "It is
6 my opinion that it is, but I have no empirical study
7 or data to support that opinion." Is that correct?

8 A. Yes, that's what it says.

9 Q. Is that still true?

10 A. Yes, it is.

11 Q. Mr. Brosch, is it correct that you have not
12 quantified the value of the intangible assets that
13 you've identified as of 1984?

14 A. I have not prepared a valuation of those
15 assets, that's correct.

16 Q. In your surrebuttal, Exhibit 608, page
17 eight, line 24 --

18 A. I'm there.

19 Q. You use the phrase "permanent designation
20 as official publisher." What do you mean when you
21 say permanent designation as official publisher?

22 A. A designation of official publisher that is
23 not of limited term, such as is contained in the
24 publishing agreements.

25 Q. What does the official publisher mean?

00706

1 A. In essence, it means that the local
2 exchange company -- in this instance, US West
3 Communications -- is not going to publish a different
4 directory, but is instead going to rely exclusively
5 upon the contracted affiliate to produce directories
6 on its behalf. It's essentially a noncompete
7 agreement.

8 Q. Do you have any independent knowledge of or
9 have you been advised by counsel as to the
10 enforceability of a permanent noncompete agreement?

11 A. I have not sought or received any advice
12 such as that.

13 Q. Do you have any understanding?

14 A. No.

15 Q. Independently of advice given or received?

16 A. No, I don't.

17 Q. Okay. I'd like to walk through now with
18 you the assets, the intangible assets that you claim
19 PNB retained. Are you with me on that?

20 A. Do you have a reference to the claim you're
21 talking about?

22 Q. Yeah, I'm still on Exhibit 608, which is
23 your surrebuttal, page 15.

24 A. All right. I'm there.

25 Q. And lines seven and eight in the question,

00707

1 it says, "Do you continue to believe that there was
2 only a partial transfer of business in 1984, and that
3 PNB retained some of the intangible assets that
4 contribute to the value of the business?"

5 A. Yes, I see that.

6 Q. I'd like to walk through and get a list
7 from you of the intangible assets that you believe
8 PNB retained.

9 MR. FFITCH: Your Honor, I don't know if
10 this is an objection.

11 MS. ANDERL: It wasn't a question yet.
12 Okay.

13 MR. FFITCH: Okay, go ahead. But it
14 sounded like a question, so I guess I'll just note
15 for the record that Counsel, I believe, engaged in
16 this exercise in the deposition, which is an exhibit
17 in this case, so if we're going to have the same list
18 of questions here that were asked of the witness in
19 the deposition, that's going to take quite a bit of
20 time. And perhaps we could just -- he could be
21 directed to the portion of his deposition where
22 that's discussed and see if the answers are -- if he
23 wants to, you know, modify any of those or adopt
24 those answers.

25 JUDGE WALLIS: Thank you, Mr. ffitch.

00708

1 MS. ANDERL: Your Honor.

2 MR. FFITCH: Maybe I'm misunderstanding the
3 direction of the examination, but --

4 MS. ANDERL: I was not aware that admission
5 of the deposition precluded me from asking questions
6 to see if the witness' answers are still the same.

7 MR. FFITCH: You could find that out with
8 one question, perhaps, and a reference to the
9 deposition, rather than repetitious questioning.

10 MS. ANDERL: Well, Your Honor, Mr. ffitich
11 is not conducting the cross; I am. If Your Honor
12 rules that my questions are not appropriate,
13 obviously I will live with that, but I believe that
14 the approach I'm taking is appropriate.

15 JUDGE WALLIS: The approach you're taking
16 is certainly lawful and appropriate. It would offer
17 some advantages to shortcut the issue and give you
18 the opportunity to get all of the evidence that you
19 wish in the hearing if you were to proceed in the
20 manner that Mr. ffitich has suggested.

21 MS. ANDERL: It's not my intent to take
22 longer than need be.

23 Q. Mr. Brosch, do you agree that it had been
24 your testimony -- well, strike that. Let's start
25 over.

00709

1 Is it your testimony that PNB retained the
2 PNB name?

3 A. Yes.

4 Q. In 1984?

5 A. It is, yes.

6 Q. And its logos?

7 A. Yes.

8 Q. Its trademarks?

9 A. Correct.

10 Q. As well as the ability to designate an
11 official publisher or exclusive publisher?

12 A. Yes.

13 Q. Are there any other intangible assets that
14 I have not identified in that list that you contend
15 PNB retained in the 1984 transfer?

16 A. There was reference in earlier testimony to
17 a dependence on the billing system of the telephone
18 company, at least in the early years, and I know that
19 the directory affiliate purchased billing services,
20 because of that dependence and still purchases
21 certain billing services from the telephone company.
22 So that critical system would appear to be an asset.
23 It wasn't transferred.

24 Q. Is that a necessary asset of the publishing
25 business?

00710

1 A. Well, apparently so. The use of it was
2 contracted for.

3 Q. That is my question for you. Is the asset
4 itself necessary or is it simply necessary for the
5 publishing business to obtain those services
6 somewhere?

7 A. I suppose, fundamentally, that's a make or
8 buy kind of issue. It's conceivable that the
9 directory publishing business would elect to either
10 buy the system for its own internal use or buy the
11 services from a third party vendor. In this
12 instance, if I understood the testimony correctly,
13 there was an established billing system within the
14 telephone company that was recognized to be an
15 important resource and asset that the directory
16 publishing affiliate desired to use that was not
17 transferred.

18 Q. Right, and my question for you is was the
19 billing system necessary to be transferred to the
20 directory publishing business as a directory
21 publishing asset or was it only necessary for the
22 directory publishing business to obtain billing
23 services somehow in order for it to be in the
24 directory publishing business?

25 A. It's conceivable that services might have

00711

1 been procured from some third party vendor.

2 Q. Let's assume for a moment that the
3 directory business existed in 1984 without the
4 intangible assets that you've just identified. Can
5 you assume that hypothetical with me?

6 A. I think so.

7 Q. And that it was furthermore obtaining
8 billing services from a third party?

9 A. All right.

10 Q. Under that circumstance, would US West
11 Direct still have had employees in its publishing
12 operation?

13 A. If your assumption is the employees were
14 still transferred, yes.

15 Q. Yes, everything else being the same?

16 A. Yes.

17 Q. Could those employees still have made
18 contacts with advertisers?

19 A. I would think so, yes.

20 Q. Do you have any reason to believe that US
21 West Direct could not have obtained listings from PNB
22 as other publishers did, even absent -- well, strike
23 those last words -- as other publishers did?

24 A. I expect that, on some terms, it would be
25 possible to receive listing information.

00712

1 Q. Could Direct still have entered into
2 contracts with paper suppliers and printers?

3 A. I would think so, yes.

4 Q. Absent the intangible assets that you've
5 identified, including PNB name, logos, trademarks,
6 and the official or exclusive publisher designation,
7 what aspect of the directory publishing operation
8 would Direct not have been able to perform?

9 A. Publishing the official directories of the
10 telephone company.

11 Q. Would Direct have been able to publish
12 directories?

13 A. Consistent with all of your stated
14 assumptions, I think so, yes.

15 Q. Would Direct have been able to publish a
16 Yellow Pages directory with classified advertising in
17 it?

18 A. Same answer, yes.

19 Q. Would Direct have been able to obtain
20 subscriber lists and combine a White Pages listing
21 with its Yellow Pages listings?

22 A. On some terms, yes, I think so.

23 Q. Do you contend, Mr. Brosch, that
24 compensation was due to PNB for the transfer of
25 employees to US West Direct in the 1983-1984 time

00713

1 frame?

2 A. It would have been equitable for some
3 compensation to have been granted, yes.

4 Q. Is it your contention that US West was
5 required to seek approval from the Commission or PNB
6 was required to seek approval from the Commission for
7 the transfer of those employees?

8 A. I don't know.

9 Q. You're not contending that PNB was so
10 required, are you?

11 A. I am not contending that.

12 Q. Are you contending that Mr. Golden's
13 valuation study fails to take into account the value
14 of the employees to the business when he performed
15 his business enterprise valuation?

16 A. No.

17 Q. On page 15 of your surrebuttal, I think
18 that's probably where we are, on Exhibit 608?

19 A. I have that.

20 Q. You state that if a full and permanent
21 transfer had occurred, one would expect to see an
22 agreement with longer term rights and obligations for
23 these intangible assets. Do you see that?

24 A. I do.

25 Q. Are we referring to the same intangible

00714

1 assets there as I've just had you identify a little
2 bit earlier in our conversation, the name, the logos,
3 et cetera?

4 A. Yes, the ones in the same answer there in
5 the sentence above that statement.

6 Q. How much longer of a term would one have
7 expected to see?

8 A. A long enough term that there was no
9 foreseeable scenario under which the regulated
10 telephone company could effectively grant official
11 publisher status to some other publisher and have a
12 number of years in mind. Certainly longer than the
13 initial three-year term.

14 Q. Well, what would have to take place for the
15 telephone company to be effectively precluded from
16 granting official publisher status to another
17 publisher?

18 A. One thing that might take place is a
19 commitment within the agreement that the telephone
20 company would commit to not grant a license to use
21 its names, marks, and that designation to any other
22 publisher indefinitely into the future.

23 Q. And make that same commitment as to its own
24 operations?

25 A. Excuse me?

00715

1 Q. And would you also expect it to make that
2 same commitment as to itself? In other words, agree
3 to not compete indefinitely into the future?

4 A. I don't understand your question.

5 MS. ANDERL: Could you read the witness's
6 answer back?

7 (Record read back.)

8 Q. In your answer, you stated any other
9 publisher. Would you include the telephone company?

10 A. As a potential other publisher?

11 Q. Yes.

12 A. Yes, I would, at least in the context of
13 publishing White and Yellow Pages.

14 Q. Is there anything else that one would have
15 expected to see in accordance with the terms of your
16 answer there, other than a longer term rights and
17 obligations for the intangible assets?

18 A. Possibly the ones that I mentioned here are
19 the most obvious ones and the ones that refer to the
20 publishing agreement that actually existed. I don't
21 have any others in mind as I sit here.

22 Q. With regard to the length of the rights and
23 obligations for these intangible assets, do you know
24 what Mr. Golden assumed in his valuation analysis?

25 A. The length of what, I'm sorry?

00716

1 Q. The rights and obligations regarding
2 intangible assets?

3 A. My understanding of Mr. Golden's analysis
4 is that all of the benefits and rights to use
5 conveyed by the publishing agreements would, in fact,
6 continue in force for the benefit of the directory
7 publisher indefinitely into the future.

8 Q. So that --

9 A. Without the payment of any publishing fees.

10 Q. Thank you. That valuation assumption, that
11 is consistent with what you've testified one would
12 have expected to see in a full and permanent
13 transfer?

14 A. The valuation assumption is consistent; the
15 publishing agreement that actually exists is not
16 consistent.

17 Q. So do I understand your testimony
18 correctly, Mr. Brosch, that the intangible assets did
19 not need to be transferred per se; only licensed for
20 a longer period of time than the three years of the
21 initial publishing agreement?

22 A. They effectively need to be permanently
23 transferred. That could be effected by an indefinite
24 future right to use or a conveyance, if it's possible
25 to do that, of the actual permanent right to use.

00717

1 Q. Do you know if it is possible to do that?

2 A. I have assumed that it is. You asked
3 earlier about other intangibles. There certainly is
4 an ongoing exclusive referral process taking place
5 between the telephone company and US West Direct, and
6 there is a billing and collection arrangement that is
7 taking place. And I would think that the --

8 Q. Let me stop you for a moment. Well, no,
9 I'm sorry, I don't want to interrupt your answer. Go
10 ahead.

11 A. I was just going to complete the thought,
12 that I think that a permanent entitlement to those
13 linkages to the telephone company would also be a
14 strong indication that a full and permanent transfer
15 and true sale had occurred, but those things did not
16 exist either.

17 Q. Have you read the testimony in this docket
18 of Max Johnson?

19 A. Yes, I have.

20 Q. Isn't it true that his testimony indicates
21 that US West Direct was developing its own brand
22 identity during the time of the initial publishing
23 agreement?

24 A. I believe he said that, yes.

25 Q. Is it your testimony, Mr. Brosch, that the

00718

1 only way one can transfer a business is to grant a
2 permanent noncompete agreement to the purchaser?

3 A. I think that the noncompete agreement in
4 this transaction needs to be permanent to effect a
5 full reflection of the value of the business in the
6 way Mr. Golden has placed the valuation on it. His
7 numbers implicitly assume that there will be no
8 reentry by the telephone company and that the
9 affiliate publisher will continue to have the
10 exclusive right to publish in perpetuity without
11 competitive reentry by the Telco.

12 Q. Mr. Brosch, I guess my question was is it
13 your testimony that the only way one can transfer a
14 business is to grant a permanent noncompete agreement
15 to the purchaser?

16 A. No, but --

17 Q. Thank you.

18 A. The valuation that was done here implicitly
19 assumes that precisely that occurred. Mr. Golden's
20 valuation.

21 Q. Is Mr. Golden's valuation the only way --
22 is the use of the assumptions in Mr. Golden's
23 valuation analysis the only way one could have
24 permanently transferred this business?

25 A. No, my point is that the business, as

00719

1 valued, implicitly assumes that permanent right to
2 serve as the exclusive publisher. If that right is
3 not permanently transferred, we're not talking about
4 the same business anymore.

5 Q. If the right is not permanently transferred
6 or is transferred only for a short period of time,
7 what does that do to the value of the business that
8 is transferred, all other things being equal?

9 A. I expect it would reduce it considerably.

10 Q. You list six items in your testimony which
11 you claim are key determinants of business value.

12 A. Where are you at?

13 Q. I'm referencing your Exhibit 608, page 24.

14 A. I'm there.

15 Q. You state that the business value cannot be
16 determined without correct assumptions regarding
17 these six items. Is that a fair characterization of
18 your testimony?

19 A. Yes.

20 Q. What assumption would be necessary --

21 A. For this business.

22 Q. Yes, I understand that. What assumption
23 would be necessary in order to determine a fair
24 market value for the business as of 1984, with regard
25 to the ongoing obligation to pay publishing fees?

00720

1 What's the appropriate assumption?

2 A. The appropriate assumption's not defined at
3 that date. What we know at that date is that we have
4 a three-year agreement with defined publishing fees,
5 and we have considerable uncertainty with respect to
6 whether those fees would persist or not beyond the
7 three-year term.

8 Q. Well, in order to determine a fair market
9 value for the business as of 1984, it's your
10 testimony that you don't know what the correct
11 assumption is with regard to the ongoing obligation
12 to pay publishing fees?

13 A. It's stronger than that. I don't think
14 anyone portends to know what the direct assumption
15 was. Mr. Golden made an assumption that there would
16 be no publishing fees impacting the value of the
17 business, which clearly is wrong. There is a Company
18 response indicating that essentially the Company
19 didn't know one way or the other whether there would
20 be publishing fees in 1983, beyond the first
21 three-year term of the agreement.

22 Q. Well, Mr. Brosch, do you agree or disagree
23 that when one is doing a business valuation, one
24 occasionally has to make assumptions about things
25 that one does not know or cannot ascertain with

00721

1 certainty?

2 A. Yes, and this is a massive assumption.

3 Q. What is the correct assumption for valuing
4 the business with regard to your item number two, the
5 right to act as the official US West directory
6 publisher?

7 A. The direct assumption in 1984?

8 Q. Yes, in order to determine the fair market
9 value for the business as of that date?

10 A. Well, I don't think that's determinable
11 from the publishing agreement that existed at that
12 time, so I don't know. I don't think anyone knew.

13 Q. Let's not look at the publishing agreement
14 that was in existence at that time. Let's look at
15 the business as it existed at that time, and if a
16 third party were to be buying it and a fair market
17 value had to be determined, what would be the
18 appropriate assumption about your item number two?

19 A. I think a third party buyer would demand to
20 know what the appropriate assumption is.

21 Q. Is your answer that you don't know?

22 A. My answer is that an informed buyer would
23 definitely want to know whether they would continue
24 to have the right to serve as an exclusive publisher,
25 and that would directly impact the value they would

00722

1 ascribe to the business, just like the informed buyer
2 would demand to know whether they had an obligation
3 beyond the first three years to pay millions of
4 dollars in publishing fees to the affiliate telephone
5 company, but that couldn't be determined at that
6 point in time.

7 Q. And to the extent that there's an
8 obligation to pay publishing fees, the value of the
9 business is lower; is that correct?

10 A. Absolutely. That's my point.

11 Q. And as to item number two, the longer one
12 has the right, in your view, to act as the official
13 US West directory publisher, would that translate to
14 a higher value for the business?

15 A. I would think so, yes.

16 Q. You talk, in item number three, about the
17 right to receive business referrals?

18 A. Yes.

19 Q. What do you mean when you say business
20 referrals there?

21 A. In the early years, it's my understanding
22 that the Direct company, as an affiliate, had the
23 right to query automated systems of US West
24 Communications, then PNB, to learn about the status
25 of service orders. In more recent periods, in fact,

00723

1 commencing in 1998 sometime, an agreement was put in
2 place by which customers inquiring of telephone
3 company employees expressing an interest in directory
4 advertising were referred to US West Direct.

5 Q. What --

6 A. For a fee.

7 Q. What's the basis for your understanding
8 about the business referrals you discussed first in
9 your answer, the suggestion that you make that US
10 West Direct employees have the right to query PNB?

11 A. Some of the documents that have been
12 produced in discovery.

13 Q. Can you point me to any one?

14 A. I'm not sure if I can or not. I'll try to.
15 I'm referring to the publishing agreement, which is
16 probably Exhibit 602. Yes. At page six, paragraph
17 4.07, "The telephone company shall provide access for
18 inquiry only to the following systems: Customer
19 Records Information Systems (CRIS) and Customer Order
20 and Display (CORD) for the pending order file.
21 Inquiry and limited updating capability of some
22 indicators will be available in DIR/ECT Listing and
23 Database Maintenance (LDBM). These access facilities
24 will be provided using telephone company standard
25 data communications facility, e.g. BANCS. Such

00724

1 access will be provided at the discretion of the
2 telephone company where facilities and computer
3 capacity are available and where such use would not
4 be detrimental to the telephone company's primary
5 users. Such access to systems will only be available
6 as long as they are required by telephone company's
7 primary users." Then it goes on to respond to the
8 inquiry to foreign directory database.

9 Q. Is that representative of what you believe
10 is the, quote, right to receive business referrals?

11 A. No.

12 Q. All right.

13 A. I meant to distinguish in my earlier answer
14 that the automated inquiry into telephone company
15 systems was provided for in the initial publishing
16 agreement. The current referral situation was
17 explained in response to a data request that, for a
18 fee, the hot referrals are made to the benefit of US
19 West Direct.

20 Q. Do you have an understanding of what this
21 provision 4.07 was in the publishing agreement for?

22 A. Oh, I know what the CRIS system is and I
23 know that there is a provision there to make
24 automated data inquiries into that system.

25 Q. Isn't it correct that the access for

00725

1 inquiry only was for purposes of verifying the
2 accuracy of the White Pages Listings?

3 A. It could be used for that purpose.

4 Q. And you don't contend that the rights in
5 4.07 of the publishing agreement are the same as the
6 right to receive business referrals; is that correct?

7 A. No, I don't.

8 Q. What is the appropriate assumption to
9 determine a fair market value for the business as of
10 1984 about the right to receive business referrals?

11 A. As of 1984?

12 Q. Yes.

13 A. I think paragraph 3.07 provides for the
14 telephone company's agreement to furnish for the use
15 of US West Direct such information as is necessary
16 regarding subscribers, operating practices, access
17 lines, fluctuation of telephone movement and any
18 other related information for US West Direct to
19 perform its obligations to publish and sell directory
20 advertising.

21 It sounds to me like they had an
22 opportunity here to learn about subscriber movements,
23 fluctuation in telephone movement and other customer
24 information that the telephone company possessed.

25 Q. Is that what you mean when you say business

00726

1 referrals, then?

2 A. Well, this is the right to receive
3 information. Whether it is a referral per se or not,
4 I don't know.

5 Q. Do you recall Mr. Johnson's testimony that,
6 in the 1984 time frame and during the term of the
7 initial publishing agreement, US West Direct did not
8 receive business referrals from PNB?

9 A. I don't recall that. Was that in his
10 prefiled testimony?

11 Q. You don't recall him saying that on the
12 stand?

13 A. No, I didn't.

14 Q. And you don't recall reading it in his
15 testimony?

16 A. No, I don't recall reading it in his
17 testimony.

18 Q. What was the appropriate assumption, as of
19 1984, with regard to the exclusive right to receive
20 billing and collection services from USWC, your item
21 number four?

22 A. The only verifiable assumption would be
23 that the Company has that right pursuant to the
24 agreement that exists at that time.

25 Q. And why do you believe that it was an

00727

1 exclusive right?

2 A. To my knowledge, no other directory
3 publishers have purchased billing and collection
4 service from US West Communications or PNB.

5 Q. Does that make an exclusive right if other
6 directory publishers have not purchased it?

7 A. It has the effect of being exclusive right.

8 Q. Does it mean it is exclusive?

9 A. If I recall correctly, the telephone
10 company committed to make available billing and
11 collection services to other publishers if those
12 publishers agreed to reimburse the Company for the
13 costs of system modifications to enable that service
14 to be provided. To date, as I said, I don't think
15 any competing directory publishers have taken
16 advantage of that.

17 It occurs to me that there may be both
18 competitive and cost disincentives to competing
19 publishers to reveal their customers and what they
20 spend on advertising and then pay the telephone
21 company to modify its systems to bill for that
22 advertising.

23 Q. Is there anything in the publishing
24 agreement that says that US West Direct's right to
25 receive billing and collection from PNB is exclusive?

00728

1 A. Do you have the reference to the billing
2 and collection?

3 Q. I'm sorry, I don't. I was just asking you
4 if there was anything that you recall defined an
5 exclusive right?

6 A. Not that I recall. It's in the record. Do
7 you want me to search it?

8 Q. If you don't recall, that's not necessary,
9 no. Do you know what Mr. Golden's assumption was in
10 his business valuation with regard to billing and
11 collection?

12 A. I believe the embedded assumption was that
13 the directory publishing business would continue to
14 use billing and collection services of the telephone
15 company in the same manner projected by management in
16 1984, and in the actual case, as actually used by the
17 business, for a longer period of time.

18 Q. Do you know if that valuation assumption
19 makes the value higher or lower than it otherwise
20 would be if billing and collections were not assumed
21 received from PNB?

22 A. I believe that the value is higher as a
23 result of the availability of billing and collection
24 services, assumed to persist in perpetuity in Mr.
25 Golden's analysis.

00729

1 Q. Your item number five, you state "the
2 exclusive right to use the PNB and US West name."
3 Where in the publishing agreement is there an
4 exclusive right granted to use the US West name?

5 A. There's not.

6 Q. What assumption do you contend would have
7 been appropriate with regard to your item number five
8 to perform a proper business valuation as of 1984?

9 A. It goes back to the earlier item. I think
10 all that's verifiable is the grant of the right to
11 use that name for the initial three-year publishing
12 agreement term with respect to PNB. I don't know
13 what would be appropriate with respect to US West.

14 Q. What's the assumption that Mr. Golden made?

15 A. It's the same as with respect to the other
16 items, that the actual use, either projected or
17 reflected and recorded Yellow Pages or directory
18 financial results, is appropriate.

19 Q. I'm sorry, I don't think I understood your
20 answer. Could you repeat it?

21 A. Mr. Golden assumed that full and continuous
22 access to that benefit would persist.

23 Q. And would his assumption produce a business
24 value that is higher or lower than the value that
25 would be produced if a three-year assumption were

00730

1 employed?

2 A. Higher.

3 Q. With regard to your item number six, the
4 ongoing obligation to publish alphabetical White
5 Pages directories, can you state what you believe to
6 be the proper assumption with regard to that item,
7 4/8/1984 business valuation?

8 A. Yes, that for a period of three years, it
9 was certain that the directory publisher would have
10 the obligation to publish White Pages on behalf of
11 PNB.

12 Q. Do you know what Mr. Golden's assumption
13 was?

14 A. I believe he assumed that that obligation
15 and the costs associated with publishing the White
16 Pages would persist indefinitely into the future.

17 Q. Do you know whether his assumption -- how
18 those assumptions affect the business value?

19 A. No.

20 Q. All other things being equal?

21 A. I do not.

22 Q. We're getting really close. On page 32 of
23 your surrebuttal, line 13.

24 A. I'm there.

25 Q. You state -- well, line 12, "It simply

00731

1 makes no sense for PNB to be granting a right to use
2 certain assets if those assets had, as Mr. Inouye
3 claims, been transferred to USWD." Do you see that?

4 A. I see that. I think you left out the word
5 "already," but I see it, yes.

6 Q. I'm sorry, you're right, I did. Already
7 been transferred to USWD. What assets are you
8 referring to there?

9 A. The ones we've been talking about. The
10 assets provided for in the publishing agreement.

11 Q. Can you point me to where in his testimony
12 Mr. Inouye makes the claim that those assets were
13 transferred?

14 A. Well, he claims throughout his testimony
15 that the entirety of every asset required to operate
16 the directory business was fully and permanently
17 transferred in 1984. There are references to that
18 testimony throughout my surrebuttal.

19 Q. Mr. Brosch, let me direct your attention to
20 Mr. Inouye's -- oh, the perils of having three
21 testimonies filed. I believe it is his rebuttal
22 testimony, but let me verify before I chase people
23 after it.

24 Exhibit 102-T, Mr. Inouye's rebuttal, page
25 eight, footnote eight.

00732

1 A. I see that.

2 Q. What does that footnote say?

3 A. It says, "Use of PNB's name, marks and
4 logos was licensed. They are not directory assets."

5 Q. Does that cause you to change your
6 testimony that Mr. Inouye claims that these assets
7 were transferred?

8 A. I would restrict my testimony here to the
9 assets other than the specific name, marks, and logos
10 and consider it the right to publish the official
11 book. I acknowledge your point.

12 Q. If, in 1987, at the termination of the
13 initial three-year term of the publishing agreement,
14 PNB had designated a different company, other than US
15 West Direct, as its official publisher, how would
16 that have changed the publishing business of US West
17 Direct?

18 A. Well, there are different scenarios we can
19 talk about. If your hypothetical occurred with the
20 support of the common parent company, one might
21 expect that we simply transfer back people and
22 relationships and other elements of going concern and
23 do business like we had prior to 1984.

24 Q. But assume, for purposes of your answer, if
25 you would, that the only change to events as they did

00733

1 occur in 1987 is as I've described for you, that PNB
2 simply designated a different company, other than US
3 West Direct, as its official publisher.

4 A. There are still alternative scenarios. One
5 would be that PNB or US West Communications could
6 contract with some other established directory
7 publisher and endeavor to endow that publisher with
8 the rights to link its product to the regulated
9 telephone company, designate it as the official book,
10 contact and canvas potential advertisers and rebuild
11 the business. There are probably other scenarios one
12 could imagine.

13 Q. Isn't it correct that if the only change
14 had been that a different publisher was designated as
15 the official publisher, that US West Direct, with its
16 employees, customer lists, paper and printing
17 contracts, et cetera, could have continued to publish
18 a Yellow Pages book of classified advertising?

19 A. I expect they could have continued to
20 physically publish and distribute a book, yes, but
21 they would lose the valuable benefits of affiliation
22 with the phone company.

23 Q. Those are the intangible assets you've
24 described?

25 A. Well, yes, they are.

00734

1 Q. Okay. It's correct, isn't it, that US West
2 Communications, and PNB in the past, sell their
3 subscriber listings to all publishers who are willing
4 to pay?

5 A. I believe so, yes. Certainly as of the
6 implementation of what was referred to as the open
7 directory architecture, where the publisher lists
8 were broken out separately from the fees, in about
9 1987, I think.

10 Q. Have you ever done any analysis or study of
11 whether the compensation that PNB received for its
12 subscriber listings is fair?

13 A. Which compensation, when?

14 Q. When it sold its subscriber listings to
15 publishers?

16 A. I don't recall conducting an analysis of
17 that for US West.

18 Q. Do you recall whether or not you have ever
19 contended in any proceeding that the compensation PNB
20 received from other publishers, other than US West
21 Direct, for its subscriber listings was not fair?

22 A. I don't believe I've ever alleged that, no.

23 Q. Isn't it correct that, even after the
24 termination of the publishing fees between PNB and US
25 West Direct, PNB continued to receive compensation

00735

1 from US West Direct for subscriber listings?

2 A. Yes.

3 Q. Is there anything that you can identify
4 about Mr. Golden's assumptions in his 1984 valuation
5 analysis that is inconsistent with what would have
6 taken place, in your view, in a true sale?

7 A. The answer is it depends. Mr. Golden's
8 analysis presumes that the transaction occurs with
9 the benefit in perpetuity of all of these
10 relationships to the telephone company. A true sale
11 might have been structured to perpetuate a publishing
12 fee arrangement, one perhaps comparable to that which
13 GTE directories maintains today, that shares Yellow
14 Page revenues with the telephone company party to the
15 publishing agreement.

16 Q. Mr. Brosch, I think what I asked you -- I
17 was not asking you whether there are other
18 arrangements that could also be consistent with a
19 true sale; I was asking you if there's anything about
20 Mr. Golden's assumptions that was inconsistent with
21 what would have taken place, in your view, in a true
22 sale?

23 A. And my answer was, I'm not trying to be
24 difficult, a true sale of what is the key question?
25 If you're selling a business in a true sale that has

00736

1 a perpetual grant of all of these intangible benefits
2 of being linked to the telephone company, that's one
3 scenario, one he studied. A true sale could easily
4 be very different from that, one that perpetuated a
5 form of continued compensation to the regulated
6 telephone company.

7 Q. So is it your testimony that while there
8 may be more than one type of transaction which could
9 constitute a true sale, there's nothing in Mr.
10 Golden's assumptions that's inconsistent with a type
11 of true sale?

12 A. A type of true sale was evaluated by Mr.
13 Golden, one that's inconsistent with the actual
14 agreements that existed at that date.

15 Q. Is it your understanding that US West
16 Communications has retained listings as a separate
17 line of business and that it, even to date, receives
18 revenues from licensing or selling those listings to
19 other publishers?

20 A. I think I said yes before.

21 Q. I wasn't sure. Let me just clarify your
22 testimony, and I believe this may be my last
23 question. Is it your testimony that imputation is
24 rent for US West Direct's use of assets that were not
25 transferred in 1984, or is it rent for the regulatory

00737

1 asset that you previously described?

2 A. Both.

3 Q. Do you say that anywhere in your testimony?

4 A. You promised that was the last question.

5 Q. No, I said it might be.

6 A. I don't know if I do or not.

7 Q. Can you apportion the imputation to rent

8 for the use of assets and rent for the regulatory

9 asset?

10 A. I don't think so. I mentioned before the

11 imputation calculation is a bottom line driven

12 calculation and looks at the overall performance of

13 US West Direct's core printed directory product in a

14 given test year.

15 Q. Well, and here that just kind of brings to

16 mind one question I did forget to ask you, and this

17 may, in fact, be my last one. Promises, promises.

18 Talking about the amount of imputation, I want to --

19 I'll go ahead and get you a page and line reference.

20 Page 29 of your surrebuttal, Exhibit 608, page 29,

21 lines one through three.

22 A. All right.

23 Q. Have you done any study or analysis as to

24 what amount of US West Direct revenues would have

25 been available for imputation if the costs related to

00738

1 maintaining and creating new customer relationships
2 had not been incurred?

3 A. No, there's no need to do that analysis.
4 As I said, the imputation is a bottom line concept
5 that encompasses all of the incurred expenses and all
6 of the realized revenues of the Direct business.

7 Q. You state that the costs of maintaining and
8 creating new customer relationships -- and I believe
9 this is elsewhere in your testimony. I'm sure I can
10 find it for you. But do you agree that the costs of
11 maintaining and creating new customer relationships
12 were costs that were incurred to accrue and grow the
13 business?

14 A. I'm sure that was the intent, but I think
15 there's been some misconstruing of this testimony. I
16 believe that Mr. Johnson may have concluded that I
17 thought those costs and activities were ineffective.
18 In reality, what I intended to say here is I'm not
19 quarreling with the expenditures, but merely
20 observing that all the costs related to the
21 expenditures have been fully captured by imputation.

22 Q. So Is it your testimony that revenues
23 available for imputation would have been the same
24 even if costs had not been incurred to grow the
25 business?

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1 A. Not at all.

2 MS. ANDERL: Thank you for that
3 clarification. If I may have a moment? That
4 concludes my cross. Thank you.

5 JUDGE WALLIS: Let's be off the record for
6 a scheduling discussion.

7 (Discussion off the record.)

8 JUDGE WALLIS: Back on the record here. I
9 want to verify that other parties have no questions
10 for this witness. That is indicated to be true. So
11 let's move to the bench for questions.

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

13 BY CHAIRWOMAN SHOWALTER:

14 Q. Mr. Brosch, I have a couple of questions,
15 and I want to lay out two scenarios.

16 A. All right.

17 Q. Neither of which is identical to this case,
18 but I'm trying to isolate factors in the case.

19 A. Sure.

20 Q. Take the scenario where, in 1984, the
21 Company came in with an application explicitly to
22 transfer the whole directory business, that that was
23 clear that that was what they wanted to do, and that
24 the Commission -- oh, and that the consideration for
25 that transfer was a dollar. And the Commission

00740

1 approves the transfer of the business, the transfer
2 of the ownership of the business, if we want to be
3 very explicit about it --

4 A. All right.

5 Q. -- but says, We approve the transfer, but
6 we don't think a dollar is enough.

7 A. Yes.

8 Q. And we don't know today what is enough, but
9 in the meantime, we're going to impute revenue, and
10 they do.

11 A. The regulator imputes revenue?

12 Q. Right.

13 A. As if the business was never transferred?

14 Q. They impute revenue.

15 A. Okay.

16 Q. As if it was never sold.

17 A. Okay.

18 Q. And now it's 15 years later, and the
19 Company comes back and says, We think there's been
20 enough revenue imputed here and we want the
21 imputation to end. In that scenario, where there's
22 been a clear request and approval for transfer of the
23 whole business, do you think that 1984 is the
24 appropriate date to value or do you think that 1999
25 is the appropriate date?

00741

1 A. Let me answer it this way. If the
2 imputation was in a form comparable to the kind of
3 imputation that has been practiced for US West Direct
4 since 1984, then the valuation should be a current
5 valuation, because that imputation methodology that's
6 been used for US West Direct and might apply to this
7 hypothetical is one in which all the costs and risks
8 associated with operating that business are borne by
9 ratepayers ultimately.

10 It's, as I said earlier, a bottom line
11 driven calculation. So that if the business declined
12 during that period of imputation, ratepayers would
13 participate in that decline. If the business
14 appreciated in value and that appreciation was
15 attributable to costs that were captured in the
16 imputation process, ratepayers bore that cost and
17 should participate in the appreciation of the asset.

18 Q. So that, in your mind, no matter how
19 express the transfer of the whole business or the
20 ownership of the business was, and the Commission
21 approving that, what's important to you is the risk
22 follows -- excuse me, I'm forgetting the phrase at
23 this late hour.

24 A. Return follows risk.

25 Q. Return follows risk. And then, as far as a

00742

1 regulatory asset is concerned, you're saying that
2 that regulatory asset, meaning what, the asset that
3 is --

4 A. Continued regulatory claim on that asset.

5 Q. Despite the ownership of the --

6 A. Precisely.

7 Q. -- actual business continues, and
8 therefore, you use a current value?

9 A. Yes, and I took it from your stated
10 assumptions that, for some reason, it was deemed
11 appropriate, in spite of the change of ownership, for
12 imputation to be imposed in all those years. I know
13 the reasons, I think, why that was the case with
14 respect to US West Direct. I simply took it as a
15 given that there was such a regulatory claim under
16 your hypothetical in the way I answered.

17 Q. Okay. And then I maybe don't need to draw
18 the second scenario. The second scenario would be
19 the Company comes in and says, We want to transfer a
20 few pieces of furniture and a building and we're
21 going to transfer our employees over there, but we're
22 expressly saying we're keeping the business, but we
23 want to contract the business out to this new entity
24 for a dollar.

25 A. Okay.

00743

1 Q. Everything for a dollar. And the
2 Commission says, We approve the transfer of the
3 furniture, we approve the contract, but we don't
4 think a dollar is enough, and therefore, we impute.
5 And in that scenario, there's been no transfer of the
6 business by definition of the scenario?

7 A. I think that's right, and I think you might
8 be concerned with the reasonableness of the
9 consideration for what was transferred in your
10 hypothetical. I took that to be a dollar.

11 Q. Really, I think I was trying to test
12 whether you see a difference in the two scenarios,
13 and I think you're saying you don't?

14 A. I'm not sure what I'm saying.

15 Q. Okay.

16 A. The first scenario is one that I thought
17 was analogous to what we're dealing with here, a
18 situation where there's a transfer of certain
19 physical assets and some people that was reviewed by
20 the Commission, the Commission said, with respect to
21 the asset, transfer of the cash and the physical
22 assets, that doesn't bother us, but the rest of the
23 deal is this publishing agreement that we have
24 remaining concerns with. So we're going to not
25 reject the publishing agreements; instead, we're

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1 going to reserve the right to fashion a remedy when
2 we need to in a future rate case.

3 And that remedy ultimately became
4 imputation. And through that imputation process,
5 ratepayers were treated to an amount that was driven
6 by the bottom line of the performance of that
7 business, and because of that calculation, the
8 mechanics of that calculation of imputation,
9 ratepayers remained at risk. The Commission
10 continued to recognize a regulatory claim, a
11 regulatory asset, as we discussed earlier, because it
12 didn't fully accept all that happened in 1984, but
13 needed to preserve a remedy for rate-making purposes.

14 Q. And is there a scenario that -- other than
15 a sale and valuation of a business in 1984, is there
16 a scenario of a transfer that occurs in '84, where
17 the valuation should occur based on '84?

18 A. There could be.

19 Q. Can you give me an example of what that
20 would be?

21 A. Yes, a transfer of assets to -- sort of
22 going from your second scenario there, could be
23 brought to closure by regulatory review at the time
24 of the transfer by an observance that the book value
25 of those assets was X, and the fair market value was

00745

1 Y, and that difference applies a gain or a loss. For
2 rate-making purposes, we're going to either impose or
3 not impose that gain or loss on ratepayers.

4 Q. And would that --

5 A. You'd be done.

6 Q. Would that be called imputation or not?

7 A. I wouldn't call it imputation, because it's
8 sort of a once and for all passing of judgment on the
9 consideration for the transfer.

10 Q. So then, to calculate in '84 a hypothetical
11 gain and then award it to the ratepayers in some way
12 would not be done through imputation?

13 A. No, I don't think it would. I think the
14 Commission actually talked about the three forms of
15 remedy in that U-86-156 order at page 12. The
16 options included treating it as a sale of a capital
17 asset, which would give rise to some valuation
18 exercise at a point in time and some prescribed
19 treatment of the gain or loss, or a rejection of the
20 transfer and some action to compel the transfer being
21 undone, which clearly didn't happen, or the option
22 that was invoked by the Commission, which was to
23 remedy the problem with the publishing agreements
24 that existed since that date.

25 Q. And is your reasoning as to why there was

00746

1 not a full and complete transfer of ownership in '84
2 based not on the fact of imputation, but on what did
3 transpire in '84? In other words, are you looking at
4 the transfer agreement of the assets and then you
5 look at the performance agreements and it -- based on
6 that, you're deciding what was and wasn't transferred
7 at that time?

8 A. Let me answer you this way. It's actually
9 based on a lot of things. It's based on the fact
10 that there wasn't a true sale and PNB was not paid
11 for the fair market value of the business in 1983 or
12 '84, so the Commission never saw that gain or loss,
13 presumably that large gain, that it might have dealt
14 with the finality at that time.

15 The reality of the terms and conditions in
16 the publishing agreement are a clear indication that
17 there was no permanent transfer of the business at
18 that point in time. The fact that this Commission
19 retained jurisdiction to me indicates that there was
20 no final sale transaction that brought closure to the
21 transfer of the directory publishing business. There
22 are a lot of considerations that I tried to touch on
23 in my testimony that lead me to the conclusion that
24 we didn't adopt that sale of the capital asset
25 remedy. Instead, we've been imputing to remedy

00747

1 imprudent and improper publishing agreements all of
2 these years, and if today we want to shift to a
3 different form of remedy, the right way to do that is
4 to value the business today and give customers a
5 liquidating payment in lieu of continued imputation
6 out into the indefinite future.

7 CHAIRWOMAN SHOWALTER: I don't have any
8 more questions.

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

10 BY COMMISSIONER HEMSTAD:

11 Q. I have one actual inquiry that a Company
12 witness can answer this, but perhaps you know. After
13 the termination of the publishing agreements, there
14 was no further activity after 1988, there were no
15 other documents spelling out the duties and
16 obligations on an ongoing basis between US West
17 Direct and US West Communications?

18 A. No, sir, that's not correct. There has
19 been a series of publishing agreements and there is
20 one in place today --

21 Q. All right, so --

22 A. -- that documents that.

23 Q. All right. So they were brought forward
24 over the years, but without the dollar amounts that
25 occurred in the early --

00748

1 A. Precisely, yes. The first three-year
2 agreement specified dollar amounts, the two one-year
3 -- the two-year extension of that specified further
4 dollar amounts, and then the letter attached to my
5 surrebuttal testimony is the document that eliminated
6 the publishing fee on a going forward basis.

7 Q. Are those going forward publishing
8 agreements in the record?

9 A. I was asked that before, and I'm really not
10 certain. I think -- I'm told no.

11 COMMISSIONER HEMSTAD: No further
12 questions.

13 JUDGE WALLIS: Mr. ffitch.

14 MR. FFITCH: Thank you, Your Honor.

15 R E D I R E C T E X A M I N A T I O N
16 BY MR. FFITCH:

17 Q. Mr. Brosch, if I could ask you to turn to
18 the exhibit that is 103-A, I believe. This is the
19 list, it's CTI-1, it's attached to your rebuttal. I
20 think it's -- it's Carl Inouye's rebuttal testimony,
21 Exhibit CTI-1, 103-A.

22 A. I think I'm there.

23 Q. And this is page two of the excerpt at the
24 bottom of the page. You were asked about that
25 statement on your cross-examination, and I believe

00749

1 you testified that you said you disagreed with that
2 statement. Was that your testimony?

3 A. Yes, it was.

4 Q. And I just wanted to ask if you could
5 explain what you meant when you said that you
6 disagreed with that statement?

7 A. Yes, I would explain it this way. I was
8 asked for my agreement or disagreement in yes or no
9 fashion. My disagreement was premised on an
10 understanding that what those words mean should be
11 assumed to be consistent with the Company's
12 interpretation and application of that process that's
13 described. And I view the Company's interpretation
14 and application to be disagreeable, as explained
15 throughout my testimony.

16 My testimony explains what should be done
17 prior to cessation of imputation, and if the
18 Company's application and interpretation is judged to
19 be correct with respect to this statement, then I
20 disagree with it.

21 Q. While we are on this Exhibit 103-A, I'd
22 like you to look at page six. And you were also
23 asked about an excerpt on that page. I believe it
24 was a reference to the third -- the third reference
25 or quotation listed under Rate Case Direct Testimony

00750

1 of Mr. Brosch, page 19; is that correct?

2 A. Yes, I believe I was asked about this one.

3 Q. And did the transfer referenced there --
4 excuse me, how did the transfer referenced there
5 occur?

6 A. The transfer occurred both through the
7 transfer of the specific identified cash and physical
8 assets and through the implementation of the
9 publishing agreement that's referenced there.

10 Q. You stated that what was sold, as you used
11 the term in 1983, was the physical assets listed in
12 the Company's application in FR-83-159?

13 A. Yes.

14 Q. Did those physical assets constitute the
15 entirety of the directory publishing business?

16 A. No, they did not.

17 Q. Were more things required to conduct the
18 directory publishing business? For example, the
19 intangible assets you've referred to?

20 A. I believe so. Certainly the business that
21 we've been talking about required those other things.

22 Q. Was the publishing agreement necessary for
23 US West Direct to be able to conduct the business of
24 publishing the directories PNB used to publish with
25 all of the advantages that PNB had?

00751

1 A. Yes.

2 Q. Were all rights, title and interest to the
3 certain intangible assets referred to in the
4 publishing agreements permanently and completely
5 transferred to US West in those publishing
6 agreements?

7 A. No.

8 MS. ANDERL: Objection.

9 Q. If I were to use the term sale to mean the
10 transfer --

11 MS. ANDERL: Your Honor.

12 JUDGE WALLIS: Ms. Anderl.

13 MS. ANDERL: I did have an objection
14 pending. The witness answered it so quickly that I
15 did not -- I was unable to get an objection prior to
16 the answer. I don't know if I lost my chance or not.

17 JUDGE WALLIS: What is your objection?

18 MS. ANDERL: I believe that Mr. ffitch's
19 question, although it was read very, very quickly,
20 and I'm not sure if he was quoting from the
21 publishing agreement or not, absolutely called for a
22 legal conclusion as to right, title and interest.

23 JUDGE WALLIS: Could Mr. ffitch repeat his
24 question?

25 MS. ANDERL: I don't recall ever asking

00752

1 this witness with regard to whether title was
2 transferred, and certainly given that he has objected
3 to having his witness render a legal conclusion, I
4 believe it's entirely inappropriate for him to ask
5 directly for the witness, on redirect, to do so.

6 JUDGE WALLIS: Mr. ffitch, what was your
7 question?

8 MR. FFITCH: I'd be happy to read it more
9 slowly and perhaps revise it to try to accommodate
10 Counsel's concern it not ask for a legal conclusion.
11 Do you want me to read the original question?

12 JUDGE WALLIS: If you're withdrawing the
13 question, please do so and proceed.

14 Q. I'll try to rephrase it, so I'm not asking
15 for a legal conclusion. Were all of the ownership
16 rights, as you would understand them as a
17 non-attorney, to the intangible assets referred to in
18 the publishing agreements permanently and completely
19 transferred to US West Direct in those publishing
20 agreements?

21 A. No.

22 Q. If I were to use the term "sale" to mean
23 the transfer of all the ownership rights, including
24 the right to use in perpetuity those intangible
25 assets, were the intangible assets or rights

00753

1 themselves sold to US West Direct in the publishing
2 agreements?

3 A. I'm sorry, I lost the middle of that
4 question. Could I have it again?

5 Q. Sure. If I were to use the term "sale" to
6 mean the transfer of all the ownership rights,
7 including the right to use in perpetuity those
8 intangible assets, were the intangible assets or
9 rights sold to US West Direct in the publishing
10 agreement, or by virtue of the publishing agreements?

11 A. No, they were not.

12 Q. Then what were the terms of the publishing
13 agreements you're talking about here?

14 A. The initial term was three years for the
15 one that's attached to my testimony.

16 Q. In your opinion, is an agreement limited to
17 a three-year term typically used to effect a complete
18 sale?

19 A. I would think not.

20 MS. ANDERL: Objection, Your Honor, I don't
21 believe that there's any foundation to ask this
22 witness that. He's already indicated that he's not
23 been ever retained in his professional capacity to
24 advise buyers or sellers in sales or transfers of
25 businesses. I don't believe he can testify as to

00754

1 what's typically done.

2 MR. FFITCH: I'll withdraw the question,

3 Your Honor.

4 Q. Do you understand, Mr. Brosch, that
5 advertisers or users of the Yellow Pages believe that
6 there is an official directory of the White and
7 Yellow Pages that is associated with the local phone
8 company?

9 MS. ANDERL: Objection, Your Honor.
10 Foundation. I don't believe that this witness has
11 established that he knows what advertisers or users
12 believe, nor did I inquire into such on cross.

13 MR. FFITCH: I believe there was a line of
14 questioning about the official Yellow Pages, White
15 and Yellow Pages, Your Honor.

16 MS. ANDERL: The only questions concerned
17 whether or not US West Direct used that designation
18 in its publication of the directories or its contact
19 with advertisers.

20 JUDGE WALLIS: I'm going to sustain that
21 objection.

22 MR. FFITCH: Thank you, Your Honor. I'll
23 see if I can rephrase it, and maybe just move on.

24 Q. Do people keep and use more than one
25 directory, one telephone directory?

00755

1 MS. ANDERL: Objection, Your Honor. I
2 would again ask for foundation, and it's beyond the
3 scope of cross.

4 MR. FFITCH: Well, in the interest of
5 proceeding, Your Honor, I'll just withdraw this
6 question, also, and move on to my next one.

7 Q. Do you have any basis to believe, Mr.
8 Brosch, whether the directories associated with the
9 local telephone company have advantages over other
10 directories provided in the same market?

11 A. My experience in testimony is that there
12 are considerable advantages to being affiliated with
13 the local exchange carrier in a given market.

14 Q. Now, you were asked by Ms. Anderl about the
15 association of US West's name with the local
16 telephone service, were you not?

17 A. I believe so.

18 Q. And I'd like you to take a look at Exhibit
19 302-A, which I will hand to you. You probably don't
20 have it. That's Exhibit MGJ-1 to the rebuttal
21 testimony of Max Johnson. I don't know if you have
22 that there. It's the directory numbers exhibit.

23 A. I do, yes, MGJ-1?

24 Q. Again, it's 302-A --

25 A. I'm there.

00756

1 Q. -- on our listing in this hearing. I'll
2 just wait for everyone to find it. I believe you
3 were asked about a time period -- my notes say 1984
4 to 1986 -- with regard to the association of US West
5 with local telephone service, were you not?

6 A. That sounds familiar.

7 Q. And I'd just like you to turn to the 1984,
8 June 1984 cover showing that exhibit, and then
9 continue on, looking at the covers through 1986, and
10 indicate whether those contain US West -- the words
11 US West on them?

12 A. Yes, they do.

13 Q. And they also contain the name of the local
14 exchange company at that time, Pacific Northwest
15 Bell, do they not?

16 A. Yes.

17 Q. So in your opinion, do these create an
18 association of the US West name with local telephone
19 service?

20 MS. ANDERL: Objection, Your Honor. I
21 believe that the witness who sponsored this exhibit
22 and repeatedly clarified that the US West cannot be
23 used by itself as it appears on those directory
24 covers, but must be associated with the US West --
25 with the name Direct, and that the entire phrase must

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1 appropriately be used, because that is the
2 trademarked name of the publishing company.
3 Therefore, I think Mr. ffitich's question
4 mischaracterizes the evidence.

5 MR. FFITCH: Your Honor, I think that US
6 West is certainly free to rely on Mr. Johnson's
7 testimony to that effect, to take a different
8 position with regard to the implications of these
9 covers, but I believe that doesn't make this an
10 objectionable question.

11 Mr. Brosch can answer what his opinion is
12 about the effect of associating these names on the
13 cover of the book.

14 JUDGE WALLIS: The witness may respond.

15 THE WITNESS: I believe these covers are
16 examples of the product produced by US West Direct,
17 and they contain both the name of US West Direct and
18 Pacific Northwest Bell in a way that makes clear to
19 users and advertisers that the companies are linked
20 or affiliated.

21 Q. Has the 1983 transfer of the PNB directory
22 publishing activity been treated as a sale by the
23 Commission?

24 A. No.

25 Q. As I understand it, it's your testimony

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1 that imputation has reflected the value of the
2 business on a periodic basis. That is, only during
3 the applicable test period; is that correct?

4 A. It is, yes.

5 Q. With that understanding, would the
6 imputation made in the past completely offset the
7 value of the directory publishing business if it
8 will continue as a profitable venture in the future?

9 MS. ANDERL: Objection, Your Honor. I
10 believe the question is vague. I don't understand
11 it. If I could -- well, that's my objection.

12 MR. FFITCH: Would you like me to restate
13 it, first of all, to see if you understand it without
14 -- I don't agree that it's vague.

15 JUDGE WALLIS: Well, Mr. ffitch, I will
16 note that the hour is getting late and we are all
17 stressed and anxious to conclude. Why don't we start
18 by asking you to restate the question as you
19 initially phrased it.

20 MR. FFITCH: And I will read it more
21 slowly. I may be reading quickly here. I apologize
22 if that's the case.

23 Q. It is your testimony that imputation --
24 excuse me. I've read that part. That's the
25 preamble. The question is, with that understanding

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1 -- perhaps I should read the whole thing here. Just
2 leave people in a bit more confusion.

3 It is your testimony that imputation has
4 reflected the value of the business on a periodic
5 basis, that is, only during the applicable test
6 period?

7 A. Yes.

8 Q. With that understanding, would the
9 imputation made in the past completely offset the
10 value of the directory publishing business if it were
11 to continue as a profitable venture in the future?

12 MS. ANDERL: I will object to that
13 question.

14 JUDGE WALLIS: And what's the basis for the
15 objection?

16 MS. ANDERL: I don't believe that it is
17 within the scope of my cross-examination of this
18 witness, or, if it is, it is as to a subject which
19 Mr. Brosch has indicated he does not know, which is
20 what the value of the directory business is. And so,
21 therefore, I don't see how there's sufficient
22 foundation in this record for him to be able to
23 answer that question.

24 JUDGE WALLIS: Mr. ffitch?

25 MR. FFITCH: I believe the question is

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1 certainly within the scope of cross-examination. Mr.
2 Brosch was asked extensively about his theories of
3 imputation, and in general about how to value the
4 directory business. And he has expressed some
5 opinions on the value of the directory business. I
6 think it's a permissible question.

7 JUDGE WALLIS: I agree that it's
8 permissible, and the witness may respond.

9 THE WITNESS: I believe that the value of
10 the business has not been fully captured by the
11 imputation to date, as explained more fully in my
12 testimony.

13 MR. FFITCH: I don't think I have anything
14 else, Your Honor, if I may just confer with
15 co-sponsors of the witness to see if anybody has any
16 other questions they'd like asked? We have nothing
17 further on redirect.

18 MS. ANDERL: I'm sorry.

19 JUDGE WALLIS: Is there limited re-cross?

20 MS. ANDERL: I thought that there were
21 perhaps additional questions from the bench, and I
22 was kind of waiting for that. I don't think so, Your
23 Honor. Thank you.

24 JUDGE WALLIS: Very well. With that, the
25 witness will be excused and we'll be off the record

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1 for a scheduling discussion.

2 (Proceedings adjourned at 6:30 p.m.)

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