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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 ARONSON-CAMPBELL INDUSTRIAL)
 SUPPLY, INC.,) DOCKET NO. UT-030168
4)
 Complainant,) Volume I
5) Pages 1 to 44
 vs.)
6)
 MCI WORLDCOM COMMUNICATIONS,)
7 INC.,)
)
8 Respondent.)
)
9 _____)

10 A hearing in the above matter was held on
11 April 3, 2003, from 1:30 p.m to 2:45 p.m., at 1300 South
12 Evergreen Park Drive Southwest, Room 206, Olympia,
13 Washington, before Administrative Law Judge LAWRENCE
14 BERG.

15 The parties were present as follows:

16 THE COMMISSION, by SHANNON SMITH, Assistant
17 Attorney General, 1400 South Evergreen Park Drive
18 Southwest, Post Office Box 40128, Olympia, Washington
19 98504-0128, Telephone (360) 664-1192, Facsimile (360)
20 586-5522, E-Mail ssmith@wutc.wa.gov.

21 WORLDCOM, INC., via bridge line by MICHEL
22 SINGER NELSON, Attorney at Law, 707 - 17th Street, Suite
23 4200, Denver, Colorado 80202, Telephone (303) 390-6106,
24 Facsimile (303) 390-6333, E-Mail
25 michel.singer nelson@wcom.com.

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Joan E. Kinn, CCR, RPR
Court Reporter

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1 ARONSON-CAMPBELL INDUSTRIAL SUPPLY, INC., by
2 DAVID W. WILEY, Attorney at Law, Williams, Kastner &
3 Gibbs, PLLC, Two Union Square, 601 Union Street, Suite
4 4100, Seattle, Washington 98101-2380, Telephone (206)
5 233-2895, Facsimile (206) 628-6611, E-Mail
6 dwiley@wkg.com.

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

2 JUDGE BERG: This is a pre-hearing conference
3 before the Washington State Utilities and Transportation
4 Commission in the case captioned Aronson-Campbell
5 Industrial Supply, Inc., Complainant, versus MCI
6 WorldCom Communications, Inc., Respondent, Docket Number
7 UT-030168. This pre-hearing conference is being held in
8 the Commission's main hearing room at its headquarters
9 in Olympia, Washington. Today's date is April 3rd,
10 2003. This pre-hearing conference is being conducted
11 pursuant to notice that was duly and properly served on
12 all parties on March 20th, 2003. My name is Lawrence
13 Berg. I am the Administrative Law Judge assigned to
14 preside in this proceeding.

15 At this time, we will go ahead and take
16 appearances from parties. We will begin with parties
17 present in the hearing room starting with counsel for
18 Aronson-Campbell Industrial Supply, Inc., which we may
19 also refer to as Aronson or Aronson-Campbell. Then
20 we'll take appearance from Commission Staff. Then we'll
21 take appearance from MCI WorldCom Communications, Inc.,
22 which may be referred to as either MCI, MCI WorldCom, or
23 WorldCom. WorldCom's counsel appears via the
24 Commission's teleconference bridge.

25 A note to all counsel, when you do make your

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1 appearance, please state your name, your firm or
2 affiliation, spell your last name for the reporter, also
3 state your client, and then contact information, your
4 mailing address, telephone number, fax number, and
5 E-mail.

6 MR. WILEY: Thank you, Your Honor. David W.
7 Wiley, W-I-L-E-Y. I am with the law firm of Williams
8 Kastner & Gibbs. The street address is Two Union
9 Square, 601 Union Street, Suite 4100, Seattle,
10 Washington 98101-2380. Our fax number is (206)
11 628-6611. My direct phone line is (206) 233-2895. My
12 E-Mail address is dwiley@wkg.com. I am appearing today
13 on behalf of Complainant Aronson-Campbell Industrial
14 Supply, Inc. And also with me today is Mr. Bruce
15 Buckberger of Aronson-Campbell.

16 JUDGE BERG: Very good, welcome, sir.

17 MS. SMITH: Shannon Smith, Assistant Attorney
18 General representing Commission Staff, 1400 South
19 Evergreen Park Drive Southwest, P.O. Box 40128, the zip
20 code is 98504-0128. My telephone number is area code
21 (360) 664-1192, fax is area code (360) 586-5522, my
22 E-Mail address is ssmith@wutc.wa.gov.

23 JUDGE BERG: Ms. Singer Nelson.

24 MS. SINGER NELSON: Yes, Michel Singer
25 Nelson, Michel is M-I-C-H-E-L, Singer, S-I-N-G-E-R,

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1 Nelson, N-E-L-S-O-N, appearing on behalf of MCI
2 WorldCom. My address is 707 - 17th Street, Suite 4200,
3 Denver, Colorado 80202. My phone is (303) 390-6106, my
4 fax is (303) 390-6333, and my E-mail address is
5 michel.singer nelson@wcom.com.

6 JUDGE BERG: Thank you.

7 Is there any other party that wishes to state
8 an appearance at this time?

9 Let the record reflect that there was no
10 response.

11 Ms. Singer Nelson, your voice doesn't seem to
12 be what it usually is, so I'm going to just ask that you
13 make an attempt to speak up just a little bit louder.

14 MS. SINGER NELSON: Okay, I will, Judge.

15 JUDGE BERG: Thank you.

16 I have reviewed both the complaint with
17 Exhibit A and B and the answer filed by MCI WorldCom in
18 this case. My reading of the complaint highlights two
19 particular issues to be discussed.

20 One issue relates to the assignment of lines
21 belonging to Aronson-Campbell serviced by MCIW which
22 Aronson-Campbell seeks to transfer service to another
23 carrier, and the complaint makes reference to Electric
24 Lightwave. It appears at the time the complaint was
25 filed, MCI WorldCom had not agreed to release

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1 Aronson-Campbell's telephone numbers.

2 The second most obvious issue relates to a
3 sum of money relating to charges that putatively are due
4 under the term of the contract. Even though it appears
5 that this is a claim for payment that is being made by
6 MCI WorldCom to Aronson-Campbell, Aronson-Campbell
7 raises the issue in its complaint seeking resolution.

8 In the answer that was filed by WorldCom, my
9 understanding is that WorldCom at this time either
10 agrees or has agreed to release Aronson-Campbell's
11 telephone lines and acknowledges a dispute over charges
12 that are unpaid at this time.

13 Ms. Singer Nelson, could you share with me
14 the status of Aronson-Campbell's telephone lines?

15 MS. SINGER NELSON: Yes, Your Honor, and I
16 would ask that the customer, Aronson-Campbell, and his
17 attorney let me know too when they let you know how
18 that's going. But my understanding is we have agreed to
19 release the numbers. We have agreed to release the
20 numbers, but I don't know whether or not they have been
21 released. I know that there's a period of time that
22 that needs to happen over, so I'm not sure that they
23 have yet been transferred to ELI at this point, but we
24 have agreed to release the numbers.

25 JUDGE BERG: Mr. Wiley, do you have more

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1 information about that?

2 MR. WILEY: Yes, some, Your Honor. We have
3 as recently as either yesterday afternoon or this
4 morning attempted to verify the release of the numbers.
5 Ms. Singer Nelson is correct that we reached agreement
6 after the answer was filed or on or about the same time
7 the answer was filed wherein Ms. Singer Nelson indicated
8 her client's willingness to release the telephone
9 numbers. That apparently involves, and probably you and
10 the Assistant Attorney General know more than I do about
11 this process, but it involves a third party
12 administrator who must basically clear the release of
13 the lines. It also involves dealing with the incumbent
14 telephone provider, which in this case is Qwest I
15 understand.

16 As of today, the numbers have not been
17 released. We are not implying that that is because of
18 intransigence by MCIW, but we certainly are not in a
19 position to indicate that the numbers are now in ELI's
20 domain and can be used by us. And obviously until we
21 can verify that, we would not want to dismiss that
22 portion of the complaint. Ms. Singer Nelson and I have
23 discussed this process over the last two to three weeks,
24 and she understands that we're trying to verify it. But
25 as of today, we still can not verify. It's somewhat

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1 arcane, as I understand. I would think you could just,
2 you know, call somebody and say, do we have our numbers,
3 but apparently timing is everything, and we do not have
4 the numbers yet.

5 And I will ask Mr. Buckberger if there is
6 anything he wants to add that I am not familiar with as
7 far as the process since he made the call.

8 JUDGE BERG: Sure, I will hear from you,
9 Mr. Buckberger.

10 Let me make clear that this is not testimony.
11 This is only information for the sake of developing the
12 issues to be addressed during this proceeding.

13 MR. BUCKBERGER: Yeah, we were in this -- is
14 that on?

15 JUDGE BERG: It is, but you may need to move
16 a little closer, Mr. Buckberger.

17 MR. BUCKBERGER: All right.

18 JUDGE BERG: Thank you, sir.

19 MR. BUCKBERGER: We are in this period now as
20 I understand it of requesting the numbers, but until ELI
21 at that instance in time asks MCI to release, then we
22 really don't know we'll get them. And that's due for
23 April 16. As I understand, it's almost a software
24 electronic move that MCI has to release them at the
25 instant in time that ELI grabs them or we're out of dial

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1 tone. It goes off into a void. So we tried this
2 process about a year ago, and MCI refused to release
3 them at that instant in time. So we're trying again,
4 and until that instant that we get dial tone from the
5 other carrier, we won't know whether some technician
6 somewhere in the country has really physically released
7 the numbers.

8 JUDGE BERG: Just generally, is this what
9 gets referred to as a hot cut?

10 MR. BUCKBERGER: Yes.

11 JUDGE BERG: And so --

12 MR. BUCKBERGER: A porting of numbers they
13 call it or a hot cut, and so we won't know.

14 JUDGE BERG: But at this point in time, your
15 information is that April 16th is the target date?

16 MR. BUCKBERGER: That's the target date.

17 JUDGE BERG: All right.

18 MR. BUCKBERGER: As I understand, you never
19 know until -- that MCI will release the numbers until
20 they're instantly released. We have done this once
21 before, and the numbers weren't released, so we had to
22 back off to keep our dial tone.

23 JUDGE BERG: I will share with Mr. Wiley that
24 I have no information regarding a process that would
25 involve a third party administrator or otherwise involve

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1 the Commission in effecting that transition.

2 Ms. Smith, do you have any knowledge or
3 familiarity with the process?

4 MS. SMITH: I really don't. I know the -- I
5 know that the presence of a third party administrator is
6 set up to avoid slamming, but I don't know -- I don't
7 know to what extent that would need to be done in this
8 case. I don't know. I mean I don't know if this would
9 be something that would be handled by any kind of --
10 well, I guess there wouldn't be an interconnection
11 agreement between MCI and ELI then, so it wouldn't be
12 governed by that.

13 MR. BUCKBERGER: What I understand from this
14 third party is this is a party that keeps track of all
15 the numbers that are in play in the world to make sure
16 that nobody is issuing numbers that have already been
17 being held by another customer somewhere else. So I
18 don't -- I don't know what -- they're kind of the
19 traffic cop that says, hey, these numbers are
20 Aronson-Campbell's and MCI has them, or that's fine,
21 they're going to be able to go over here. That's what I
22 understand, that there's a group.

23 JUDGE BERG: All right. At this time, I
24 think we will rely that the parties themselves will make
25 whatever arrangements are necessary to effect that

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1 transfer or transition, porting of numbers, however it's
2 referred to. If the parties at some point conclude that
3 the Commission needs to be involved or oversee the
4 process in any way, then the parties need to alert the
5 Commission as soon as possible. And I will just let the
6 parties know that I do not regard that process at this
7 point as being something to be managed in the course of
8 this proceeding, but certainly if the parties thought
9 otherwise, then they can take steps to bring it to my
10 attention.

11 Let me ask, Mr. Wiley, for the sake of
12 discussion here today, and understanding that you and
13 your client would not want to waive any rights to
14 bringing claims or presenting the evidence relating to
15 this particular issue, for the sake of discussion, are
16 you willing to go forward and talk about the overall
17 issues to be addressed with the understanding that this
18 will be taken care of in the ordinary course of
19 business?

20 MR. WILEY: And, Your Honor, you're referring
21 to the numbers release issue?

22 JUDGE BERG: Yes.

23 MR. WILEY: Basically holding that issue in
24 abeyance pending what we hope to be apparent resolution
25 later on this month, yes.

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1 JUDGE BERG: All right. Let me ask you
2 first, Mr. Wiley, presuming that that does occur, that
3 those numbers are released and service is transferred to
4 another telecommunications carrier for
5 Aronson-Campbell's lines, is there any part of this
6 complaint that you would seek to go forward on? And
7 what I'm thinking of, would you be looking to bring some
8 cause that was related to the prior withholding of those
9 lines in spite of the release of those lines in the near
10 future?

11 MR. WILEY: Your Honor, I haven't discussed
12 that with my client at this point, and so I wouldn't
13 want to -- but I don't anticipate that being the case.
14 But again, we haven't discussed the past issue. We're
15 so focused on trying to get the numbers, which really
16 sparked the whole formal complaint originally, that we
17 haven't addressed that issue.

18 JUDGE BERG: All right. I want to build some
19 contingency into the process for review after the
20 process is completed to see whether or not there are
21 issues that need to be developed in the course of this
22 case that either carry over from prior conduct or in
23 some way relate to the actual hot cut/porting process.
24 I understand that we may not be able to resolve that at
25 this point in time, but we'll need to have some kind of

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1 follow up to make that clear one way or the other.

2 MR. WILEY: Certainly.

3 JUDGE BERG: Ms. Singer Nelson, anything that
4 you want to say on this point?

5 MS. SINGER NELSON: No, Judge.

6 JUDGE BERG: All right. Then I have some
7 questions, and then let's go to the second major
8 dispute. And just in reading the Commission's Consumer
9 Affairs log, which was attached to the complaint as
10 Exhibit B, consisting of sort of the trail of hearsay
11 accounts of the various communications between parties,
12 and let me also acknowledge that hearsay is admissible
13 in a proceeding such as this, so by characterizing it as
14 hearsay, it's not meant to reflect on either its
15 relevance or admissibility, it appears to me that the
16 essential complaint is that Aronson-Campbell believes
17 that the contract that was negotiated and entered into
18 for service with MCI WorldCom provided for flat rates
19 for certain service at what might be considered a
20 discounted rate, and MCI WorldCom's understanding of the
21 contract is that the contract only guarantees a discount
22 to be applied against a base rate that could be subject
23 to change according to tariff.

24 Mr. Wiley, I will start with you first and
25 see if that captures the essential disagreement between

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1 the parties.

2 MR. WILEY: I think in general it does, Your
3 Honor. What we appear to have, and I have just come
4 into this case shortly before the formal complaint was
5 filed, but when I read the correspondence between the
6 parties over the past few years, I think we have a
7 number of issues that involve tariff construction and
8 application going on and the limits of whether contracts
9 entered into by competitive local exchange carriers are
10 subject to regulatory oversight or completely free from
11 it and the tariffs that apply. What we also appear to
12 have are disputes about how the tariff is properly
13 applied in these circumstances and where the tariff
14 would allow a discount that wasn't afforded. So I think
15 the conflict is on applying the tariff and using the
16 contract to interpret the charges that are being applied
17 under the tariff, which we allege were sporadically
18 applied correctly, or maybe shall I say were
19 infrequently incorrect.

20 So I think where we lie, as you were
21 suggesting earlier as you characterized the issues at
22 the start of the pre-hearing conference, is at a point
23 where we know that there is an amount alleged to be due
24 by us as a customer that involves interpretation and
25 application of a tariff and the contract that purports

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1 to operate under the tariff, and the parties are divided
2 on what that -- how that tariff should be properly
3 applied.

4 JUDGE BERG: Before I turn to Ms. Singer
5 Nelson, Mr. Wiley, do you see that as a mixed issue or
6 mixed scenario of fact and law, or is there some legal
7 determination that would be dispositive of this
8 particular issue?

9 MR. WILEY: I think the former. In other
10 words, I think it's a question of mixed fact and law,
11 but we don't -- and I think Ms. Singer Nelson can
12 address this, but we have had a change in positions
13 advanced by the parties that we dealt with over the year
14 and a half or two years of this dispute within MCI, so
15 that it is not clear to us right now what position they
16 are taking on the charges, not only in terms of the
17 mathematical calculation, but how the contract is
18 applied under the tariff.

19 JUDGE BERG: Ms. Singer Nelson, why don't we
20 start there. Is MCI WorldCom still in a position of
21 developing its, you know, normally I would call it the
22 theory of liability here because it's WorldCom that's
23 owed the money, but in terms of the WorldCom approach to
24 the dispute over charges, is that something that's still
25 being developed within WorldCom?

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1 MS. SINGER NELSON: I would say yes and no,
2 Your Honor. I think at this point it's gotten down to
3 what -- a dispute of fact really as to what WorldCom
4 believes that Aronson-Campbell still owes to WorldCom
5 and then what Aronson-Campbell believes it owes.
6 Because what has happened is over time as different
7 customer service representatives have looked at this
8 account, they have figured out that the rates that had
9 been charged to the customer were incorrect. They were
10 not consistent with the contract. So what the recent
11 customer service representative attempted to do was to
12 reconcile what was charged from the beginning of the
13 contract with what should have been charged under the
14 contract. And the customer service representative
15 believes that she has reconciled that so that the
16 charges currently due are consistent with the contract.

17 So at this point in time, what's in my mind
18 needs to happen is the parties need to figure out where
19 they differ in exactly what is owed. And so I think at
20 this point in time it seems to be more an issue of fact
21 as opposed to a mixed issue of law and fact. But
22 because I'm just getting involved in this case at this
23 point, I'm probably going to have to do a little bit
24 more research to make sure that that's true. If, in
25 fact, it was true at one time, if there was a dispute as

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1 to how the tariff should apply and if there are any
2 legal issues involved here, I'm not aware of any of
3 those legal issues.

4 JUDGE BERG: And then, Ms. Singer Nelson,
5 when you refer to moneys being owed by, the possibility
6 of moneys being owed by or claim of moneys being owed by
7 MCI WorldCom to Aronson-Campbell, is that something that
8 would be more in the way of a credit?

9 MS. SINGER NELSON: Yes.

10 JUDGE BERG: All right, it's not for an
11 exchange of services?

12 MS. SINGER NELSON: No, it's -- it would be a
13 credit that MCI owes.

14 JUDGE BERG: So it all goes to the sort of
15 the underlying determination of what is the correct
16 amount to be billed as a result of either WorldCom's own
17 interpretation or the amount owed by Aronson-Campbell's
18 understanding of the contract.

19 MS. SINGER NELSON: Right.

20 JUDGE BERG: All right. Let me, you know, I
21 will just note for the record that neither party
22 attached the contract to their core pleadings nor
23 provided any background detail, although there are some
24 references to the contract in the various exhibits that
25 have been filed. But let me just sort of clarify what

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1 the status of this contract is and how it developed and
2 beginning with it appears this was a contract that was
3 initially executed in February of 1999 for three years,
4 has this contract expired, or has it continued to remain
5 in effect under some other provision of the agreement,
6 Mr. Wiley?

7 MR. WILEY: Well, Your Honor, I'm not sure if
8 I can answer that without offering a legal conclusion
9 that I'm not sure is justified under the facts. I think
10 the service is still being provided, and we're still
11 being billed. Whether there's by virtue of the fact
12 that we're still accepting service and still paying for
13 it a contract in place, I can't really -- I wouldn't
14 want to say on the record at this point. But they are
15 still our telecom provider, we are still paying for the
16 service, but we are seeking to extricate ourselves, and
17 we believe, and I don't mean to speak for Ms. Singer
18 Nelson, but I believe that we're not stuck to any term
19 at this juncture.

20 JUDGE BERG: Apart from whether or not the
21 agreement is legally enforceable, do the parties
22 continue to operate under the terms and conditions of
23 the contract?

24 MR. WILEY: As best as they can ascertain, at
25 least from Aronson-Campbell's standpoint, their role

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1 under the agreement, yes. And that would also go to the
2 issue of what they believe -- what they have quantified
3 as their charges that should be paid under the contract
4 and thus under the applicable tariff.

5 JUDGE BERG: And those are sums that
6 Aronson-Campbell continues to remit to WorldCom?

7 MR. WILEY: Yes, they do, Your Honor.

8 JUDGE BERG: All right.

9 Anything you want to add, Ms. Singer Nelson?

10 MS. SINGER NELSON: Well, Your Honor, I just
11 wanted to say that there is not an issue as far as
12 WorldCom is concerned about whether or not this contract
13 is still in effect. We're not going to dispute that the
14 services that are being provided right now should be
15 provided pursuant to the terms of the contract. We're
16 agreeing -- we agree to continue to provide the services
17 pursuant to the terms of the contract at this point.

18 JUDGE BERG: Okay.

19 MS. SINGER NELSON: Just so that's not an
20 issue.

21 JUDGE BERG: There were also some references
22 in the pleadings that suggest this is a contract that
23 was previously filed with the Commission or submitted to
24 the Commission for approval. Ms. Singer Nelson, can you
25 clarify that for me, if you know?

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1 MS. SINGER NELSON: I don't know right now
2 whether that is true, but - if it was filed with the
3 Commission, I'm not sure that it was filed for approval
4 by the Commission. I think it was just filed for the
5 record if it was filed. So I will follow up on that,
6 find out if it was filed, and what the reason was for
7 filing the contract if that's the case.

8 JUDGE BERG: And, Mr. Wiley, you make
9 reference to RCW 80.36.150 in your complaint, which
10 addresses contracts filed with the Commission. Do you
11 have a position as to whether the contract was filed,
12 and if so, the purpose or what the status of that
13 contract is?

14 MR. WILEY: Your Honor, I certainly think I
15 would rely on Ms. Singer Nelson's investigation. I
16 couldn't tell if it was or not. I think there was some
17 reference as I gathered the facts for the complaint that
18 it had been, but I haven't seen a copy, you know, and I
19 did not call the Commission and say search your records
20 for that either.

21 JUDGE BERG: My concern arises because of the
22 various ways that the complaint refers to disputed
23 charges.

24 MR. WILEY: Right.

25 JUDGE BERG: For example, just going from the

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1 forward back, and I know it's typical that there might
2 be several terms that are all proper for referring to
3 the same charge, but at one point on page 2, line 13,
4 refers to contract price sheet setting specific rates.
5 At page 2, line 15, negotiated rates. At page 2, line
6 20, contract price terms. And then at page 5, line 4,
7 it refers to tariff application charges. And so I'm
8 just in looking at the pleadings and looking at
9 80.36.150, I was trying in my own mind to determine
10 whether or not, in fact, this is some sort of a contract
11 tariff or whether this falls under paren 2 of 80.36.150
12 that begins, the Commission shall not treat contracts as
13 tariffs or price lists, to figure out how that comes
14 into play. I think it raises an issue that may need to
15 be addressed by the parties.

16 MR. WILEY: I agree.

17 JUDGE BERG: And I'm not looking to resolve
18 it here today. I'm just trying to talk it out so that
19 the parties kind of understand where my uncertainty of
20 mind may lie and where there may be some issue that
21 needs to be developed.

22 MR. WILEY: Your Honor, I agree, and I think
23 part of that is that this is sort of a murky regulatory
24 area now with the 1996 law and what sort of jurisdiction
25 the state commission has over this kind of practice and

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1 this type of provider, and I think those are issues
2 that, legal issues, that would be addressed in the final
3 resolution should this go to a formal hearing.

4 JUDGE BERG: All right.

5 Ms. Singer Nelson, do you agree that there's
6 some issue there that may need to be addressed?

7 MS. SINGER NELSON: Yes.

8 JUDGE BERG: All right.

9 And, Ms. Smith, I understand that Commission
10 Staff is certainly not involved in this case the way the
11 other parties are. Occasionally I will glance over, if
12 I see a signal from you that there's something that you
13 want to comment on, I will provide an opportunity.
14 Otherwise, please feel free to just interrupt me and let
15 me know that you have something to say.

16 MS. SMITH: Thank you, Judge Berg.

17 JUDGE BERG: My other concern in this area,
18 and this does go to some of the murky jurisdiction and
19 legal aspects of the complaint, relate to the reference
20 in the complaint to a violation of 80.36.180, which is
21 entitled Rate Discrimination Prohibited.

22 And let me start out, Mr. Wiley, just make
23 reference to paragraph 2.1 of the complaint where I
24 believe there's a typo. In 2.1, there's reference to
25 conduct contravening RCW 81.36.180, and I presume that's

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1 intended to be 80.36.180?

2 MR. WILEY: Yes, Your Honor, I'm sorry, I'm
3 totally immersed in Title 81, so I do apologize for
4 that.

5 JUDGE BERG: That's all right. The complaint
6 stated RCW 80.36.180 on the first page under the
7 preliminary statement, and so it seemed like a pretty
8 obvious typo, but I wanted to make certain that I wasn't
9 mischaracterizing the basis of the complaint.

10 When I look at 80.36.180, 80.36.180 in
11 particular relates to rate discrimination and the
12 complaint being based on both some disputed charges as
13 well as a practice whereby MCI WorldCom was not
14 releasing the lines of Aronson-Campbell. It seems to me
15 that if there was some basis for discriminatory conduct
16 that was non-rate related that it would have to be
17 grounded in some other violation of a state statute. I
18 just wanted to bring that up just based upon my reading
19 of 80.36.180.

20 MR. WILEY: Your Honor, are you saying that
21 that statutory provision would only go to the second
22 count of the complaint that relates to the retention of
23 the phone numbers as opposed to misapplication of the
24 tariff and/or contract charges; is that what you're --

25 JUDGE BERG: I'm raising that as an issue for

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1 discussion here today so that if the company is making,
2 if Aronson-Campbell as Complainant is taking the
3 position that 80.36.180 entitled Rate Discrimination
4 Prohibited also applies to other practices or non-rate
5 related practices, that I would want that to be made
6 clear by the Complainant in the style in this case so
7 that the Respondent, MCI WorldCom, would, and other
8 parties, would have an opportunity to respond. So I'm
9 -- let me just raise that as another one of those issues
10 that I see here. And the reason why I bring this up,
11 Mr. Wiley, is because if under either cause in chief the
12 Commission finds a violation of a Commission rule such
13 as 80.36.180, the Commission is then required by statute
14 to impose penalties, and so I want to make sure that the
15 statutory basis for a violation is fully developed in
16 the record.

17 MR. WILEY: And again, that might be moot,
18 that whole issue may be mooted by the resolution of the
19 release of the phone numbers.

20 JUDGE BERG: All right. And then I would
21 have some equal concern if we were to go forward on --
22 and this isn't to say that the company can't bring a
23 claim that's related to the contract terms. It just
24 goes to whether or not the cause also constitutes a
25 violation of a state statute that then raises a

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1 situation or creates a situation where the offending
2 party is subject to some fine under state statute. And
3 that goes also to the claim that there is a billing
4 dispute, because as I -- and again, I'm bringing this up
5 as either an issue or for discussion among all the
6 parties here to determine what the issue is, if there is
7 an issue and what the issue would be.

8 When I look at 80.36.180, what it says is
9 that essentially you look at the way one company is
10 being treated in terms of rates, and then you look to,
11 and this is just 80.36.180, there might be other
12 statutes that provide for other bases for a violation
13 that may need to be identified and stated, but 80.36.180
14 says that you take the way the provider treats company
15 A, and you compare it to the way it treats company B or
16 all other companies, and on that basis there's an
17 allegation of discrimination that's prohibited. But it
18 involves this comparison, and when you go to the very
19 last sentence of 80.36.180, it says:

20 This section shall not apply to
21 contracts offered by a
22 telecommunications company classified as
23 competitive or to contracts for services
24 classified as competitive.

25 And again, I'm not -- I don't bring this up

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1 to pronounce what the law is, but just to say there's
2 then in my mind an issue as to if this is a contract for
3 -- if this is a contract, the contract between
4 Aronson-Campbell and MCI WorldCom is a contract offered
5 by a telecommunications company classified as
6 competitive or is a contract for services classified as
7 competitive, then what does that mean in terms of
8 assessing or deciding whether or not rate discrimination
9 has occurred.

10 MR. WILEY: I agree that I think that's
11 another issue raised by the pleadings and by the facts,
12 and at this point I'm not willing to relinquish the
13 claim that it may, in fact, so violate. But I certainly
14 believe that at an evidentiary hearing we would have to
15 address those issues.

16 JUDGE BERG: Okay.

17 And, Ms. Singer Nelson, do you have any
18 comments?

19 MS. SINGER NELSON: I would agree that that's
20 an issue that should be addressed.

21 JUDGE BERG: All right.

22 And, Mr. Wiley, if, in fact, in conducting
23 your own development of the basis for claims and if
24 there is some other statutory basis that needs to be
25 developed or that you intend to present, the fact that

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1 the complaint at Paragraph 2.1 makes reference to RCW
2 81.36, well, 80.36.180 in sequence, which prevents
3 unreasonable charges and practices by telecommunications
4 company providers, I'm going to require that you be more
5 specific in developing your case so that MCI WorldCom
6 has a full opportunity to be aware of the charges that
7 are being made and to develop its answer and response in
8 accordance with the principles of due process. Because
9 that sequence part I think is not sufficient enough to
10 put MCI WorldCom on notice that there may be some other
11 -- there may be a cause of action based upon some other
12 alleged violation of a state statute.

13 MR. WILEY: Is your concern that we amend the
14 pleadings eventually after discovery or that we -- how
15 would we put that before you procedurally?

16 JUDGE BERG: I think that's something that
17 there may be alternatives, but certainly that would be
18 one way at the time that the -- at all points in time,
19 we would look to see what impact some amendment of the
20 pleadings would have on the overall rights of the
21 parties. I think it's something that the Commission
22 always encourages and prefers to see happen as soon as
23 possible, but that I just think it's important to bring
24 that up, that if, in fact, there is something that's at
25 sequence that needs to be addressed that it could be an

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1 issue. Now certainly, you know, WorldCom is in a
2 position of defending itself and raising objections to
3 charges that are brought and that they have not received
4 due and proper notice, but I'm looking to make sure that
5 we identify these issues as soon as possible and raise
6 them and deal with them. And it only comes up because
7 of the at sequence that's stated in the basis for the
8 complaint.

9 And then turning to the affirmative defenses
10 in WorldCom's answer, apart from the request for a brief
11 adjudicative proceeding, Ms. Singer Nelson, I know that
12 it's common practice to assert an affirmative defense of
13 a failure to state a claim upon which relief could be
14 granted, but I just thought I would inquire whether
15 there were any specifics at this point in time that need
16 to be raised as an issue to be addressed.

17 MS. SINGER NELSON: I think generally, thank
18 you, Your Honor, I think generally you raised one of the
19 concerns, that there is -- the Complainants pled in a
20 way that it's unclear as to all of the claims that are
21 being brought against WorldCom. And to the extent that
22 there is a claim that relates to a regulation or a
23 statute that requires or that excepts relationships that
24 are developed through contracts, then that failure to
25 state a claim would go directly to that. If that

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1 exception applies, that contracts can not be the basis
2 for claims of a violation of the statute that's alleged
3 in the complaint, then because a contract is the basis
4 for the relationship between Aronson-Campbell and MCI
5 WorldCom, then we believe that Aronson-Campbell has
6 failed to state a claim. And then just generally as
7 facts were to be developed through discovery, I wanted
8 to make sure that I had stated that as an affirmative
9 defense.

10 JUDGE BERG: All right.

11 Anything from you, Mr. Wiley?

12 MR. WILEY: Well, yes, Your Honor, I mean I
13 think her response has highlighted the problem that this
14 Complainant has had throughout the history of this
15 dispute, particularly in trying to seek assistance from
16 the Staff of the Commission, which is, we don't know
17 what we are being told is applicable, contract, tariff,
18 a mixture of that. It's certainly clear that the
19 Complainant at this stage is not going to be charting
20 out a territory that we're going to cling to throughout
21 the proceeding until we know what the company's position
22 is about why the charges are not accurate in the first
23 place. And I think we have heard today that there has
24 been a change and an evolution in the position of the
25 company with respect to whether a contract applies,

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1 whether they're exempt, whether a tariff is applicable
2 that the contract is interpreted under. We don't know,
3 and so I think it's certainly not surprising that some
4 of the jurisdictional lines are not clearly pled or
5 answered, because the company has been trying to
6 ascertain exactly why they're being charged in the
7 fashion they are. And they sought the assistance of the
8 Staff, who also I think the hearsay documents show were
9 unclear on the basis for the charges as well.

10 JUDGE BERG: Mr. Wiley, in a situation where
11 you have two parties and you have a seller of service
12 and a buyer of service and there's a dispute arises over
13 payment due, do you see one party having a burden of
14 proof?

15 MR. WILEY: I certainly think that typically
16 the company who is establishing -- who is providing the
17 service and establishing the basis upon which its
18 services are being assessed has to explain to a customer
19 how its charges are being applied. I think that's the
20 hallmark of a regulated provider, which clearly the
21 Commission is in the role of watch dogging for the
22 public. In other words, when a regulated utility
23 provides a service and its charges are not clear, the
24 Commission relies on a tariff and in some cases a
25 contract rate that's filed with the Commission and says,

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1 how are these charges being arrived at, regulated
2 provider. And the burdon is certainly on the regulated
3 provider to establish that its rates are in compliance
4 with its tariff or its contract or whatever. So I think
5 that's the premise that's at issue here in terms of the
6 burdon of establishing how these charges should be
7 applied. Now your question goes to the jurisdiction of
8 the Commission in effecting clarification of that, and
9 in this case I'm not sure exactly how or what the role
10 is based on how the conduct is going to be characterized
11 under the law.

12 JUDGE BERG: And, Ms. Singer Nelson, do you
13 understand what I'm trying to get to here, that here I
14 have a party who is styled as a Respondent, but they're
15 the company that claims that, essentially claims that
16 the money is due and owing. Even though it's
17 Aronson-Campbell that's filed the complaint and said,
18 well, we have a -- there's a dispute here over how much
19 is owed, it seems that MCI is the provider of service,
20 and under other circumstances but for the nexus between
21 the fee dispute and the release of Aronson-Campbell's
22 liens, it seems that it would have been MCI WorldCom
23 that would be in the position to, you know, pick a forum
24 and prosecute its claims that its bill has not been
25 paid.

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1 MS. SINGER NELSON: I see your point, Your
2 Honor. I think under the circumstances here, a couple
3 of things. One is Mr. Wiley's comments sounded like
4 they were being -- they would be applied to a regulated
5 company, and MCI WorldCom is a competitive carrier and
6 is not regulated in the way that a typical or that an
7 incumbent local exchange carrier is regulated. That's
8 the first point.

9 Secondly, I think the Plaintiffs who brought
10 the claim in this case bears the burden of proof to show
11 that we violated the statutes and regulations that the
12 Plaintiff alleges that we violated.

13 Now as far as the dispute, the billing
14 dispute, is concerned, WorldCom is not in the habit of
15 bringing billing disputes before the Commission, and
16 that was one of the things that I considered when
17 WorldCom was responding to the Complaint. We filed an
18 Answer. We did not file a Counterclaim, because we did
19 not necessarily want to take the Commission's time and
20 resources to resolve a billing dispute. So I think that
21 the Complainant in this case bears the burdon to prove
22 that its allegations are true. That's where I think the
23 burdon lies here.

24 JUDGE BERG: And this is just so interesting.
25 So in terms of looking at the prayers for relief, we

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1 have a prayer for relief by Aronson-Campbell as the
2 party putatively obligated to pay for services to
3 resolve the money dispute, but there's no similar prayer
4 for that relief from WorldCom, who is the company that's
5 putatively owed the money; is that correct?

6 MS. SINGER NELSON: I don't think that I
7 asked -- I think that I asked that the Complaint and the
8 claims be dismissed. I don't think that I did ask for
9 -- I may have, Your Honor, I don't have the Answer in
10 front of me at this point, but I didn't --

11 JUDGE BERG: No, I understand, no, I am
12 looking right here. I mean there's that such other
13 relief as the Commission may deem just and appropriate,
14 but I don't see anything specifically that says,
15 Commission, we want you to resolve the money dispute.

16 MS. SINGER NELSON: No, and I would ask -- I
17 would prefer to just go through the normal channels to
18 deal with the money dispute, but because the Plaintiffs
19 brought a formal complaint against us, we didn't really
20 have that choice at this point in time. And so I would
21 still like to see the money dispute resolved in the ways
22 that MCI WorldCom typically does that.

23 JUDGE BERG: In looking at your first prayer
24 for relief, Ms. Singer Nelson, dismissal of the claims
25 without prejudice. Does that suggest or does that mean

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1 that WorldCom wants to bring a motion either based upon
2 jurisdictional grounds or some other basis for dismissal
3 of let's say of the fee dispute or other aspects of the
4 Complaint?

5 MS. SINGER NELSON: No.

6 JUDGE BERG: Okay.

7 Mr. Wiley.

8 MR. WILEY: Well, we're also highlighting, I
9 think, some of the dilemmas that we have on this whole
10 case. First of all, as you will recall, Your Honor,
11 when the Complaint was filed, we had the numbers release
12 issue, which still isn't resolved, but that certainly
13 was the primary basis for the Complaint. But you have
14 also raised another issue, which is also raised by the
15 Complaint, which is, how do we get there from here in
16 terms of how do we resolve the billing dispute.

17 One other issue that hasn't been raised but I
18 know Ms. Singer Nelson and I are aware that it's
19 probably a legal issue is the bankruptcy of MCI, and
20 that is how we are going to resolve the billing dispute.
21 I mean this company obviously wants to resolve the
22 amount that is allegedly owed and do it in a way that
23 will put the matter behind it forever. So the problem
24 is, compounded by MCI's bankruptcy, is where is the
25 forum to do that.

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1 We think that there is a jurisdictional basis
2 in the Commission to resolve the billing and tariff
3 application contract dispute and that it may be possible
4 through an ADR provision under WAC 480-09-465 to try to
5 resolve that, particularly if the release of the numbers
6 is resolved. But the status of MCI in bankruptcy clouds
7 the ability to resolve that issue, as far as I
8 understand, and it may be less murky if a regulatory
9 agency helps resolve that. Because as I understand,
10 that is one exception to the complete jurisdiction in
11 the bankruptcy court. And I, at least, have had one
12 case where that was, in fact, the situation, where the
13 administrative agency, in this case the Washington
14 Utilities and Transportation Commission, had
15 jurisdiction over the actions of the party despite the
16 fact that it was in a Chapter 11 proceeding. So we've
17 got another element of confusion here, or shall we say
18 murkiness, because of their status.

19 MS. SINGER NELSON: Your Honor, if I may.

20 I did, Mr. Wiley, contact some people
21 internally, including the attorney at WorldCom that's
22 dealing directly with the bankruptcy, and apparently the
23 dispute would not need to be approved, a settlement or
24 any resolution of this would not need to be approved by
25 the bankruptcy. So that's one issue that's really not

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1 an issue.

2 MR. WILEY: Your Honor, could I ask you to
3 ask her if that's a compromise of a claim why that
4 wouldn't be subject to the bankruptcy court's
5 jurisdiction, unless everybody knows and I don't.

6 JUDGE BERG: No, and I don't mind the parties
7 having some direct dialogue here, because I think what
8 we're -- ultimately the problem that I will have is
9 devising the process that will help the parties develop
10 their cases fairly, become knowledgeable about the other
11 parties' case, and prepare for a hearing or some other
12 process to resolve the disputes that are pending. And
13 so all of this discussion that we're having here is to
14 kind of drive us to that process, and it's to a greater
15 understanding of the issues that I would hope that we
16 would all be able to agree on a process for getting all
17 disputed issues resolved.

18 And, Ms. Singer Nelson, I digressed from the
19 point Mr. Wiley brought up, but maybe this is a good
20 opportunity to respond.

21 MS. SINGER NELSON: Sure. I think that my
22 understanding it's because -- we could resolve it
23 because it's more in the normal course of business,
24 since the amount isn't above a certain amount, the
25 amount in dispute isn't above a certain amount. That's

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1 my understanding. And as far as a method for us to
2 proceed, I don't have a problem with going through
3 perhaps an ADR type process to see if we can try to come
4 to some kind of agreement. We're not really that far
5 apart as far as I understand it.

6 JUDGE BERG: I have a proposal for the
7 parties here. There is a lot of uncertainty, and at a
8 minimum it seems that there's a possibility that both
9 parties' positions may shift somewhat after the issue of
10 hot cutting or porting Aronson-Campbell's lines is
11 effected. So rather than going through an exercise of
12 setting up a procedural schedule at this point in time
13 that would involve discussing discovery, discussing how
14 will evidence be presented, will it be pre-filed, will
15 it be presented direct, rather than going through all of
16 that now, how would the parties feel if we set up
17 another pre-hearing conference in late April to pick up
18 where we leave off here with regards to unresolved
19 issues and take up at that point in time what process
20 should be employed?

21 Would that be satisfactory to you, Ms. Singer
22 Nelson?

23 MS. SINGER NELSON: Yes, Your Honor.

24 JUDGE BERG: And how about you, Mr. Wiley?

25 MR. WILEY: That sounds good, Your Honor.

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1 Just one question on that. Would we at that time also
2 be able to discuss the possibility of triggering
3 480-09-465 on an ADR as well at that point?

4 JUDGE BERG: Let me take a quick look at
5 480-09-485.

6 MR. WILEY: 480-09-465.

7 JUDGE BERG: 465.

8 While I'm looking at that, I will just also
9 mention to the parties that 80.36.150, Contracts Filed
10 with the Commission (3) does state that contracts shall
11 be enforceable by the contracting parties according to
12 their terms. Now with regards to interconnection
13 agreements, the Commission has previously decided that
14 just because parties may provide for alternative dispute
15 resolution processes in their interconnection
16 agreements, it does not mean that the Commission no
17 longer has jurisdiction to accept claims, complaints by
18 parties for Commission resolution. But I just want to
19 bring that to the parties -- to the extent that the
20 contract itself between the parties may provide some
21 alternative dispute resolution process.

22 And in looking at 480-09-465, yes, that would
23 be a good time to bring that up. In fact, if the
24 parties felt even before that pre-hearing conference
25 that that was something they wanted to explore, they

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1 could just bring it up. The Commission has when
2 resources were available engaged in mediation,
3 mediation/settlement processes with parties. And the
4 Commission, you know, favors that, but it's always
5 contingent on a review of the specific type of issues at
6 dispute and whether or not resources are available.
7 Certainly you could bring it up at that time if not
8 sooner, but I would also state that for the most part
9 those alternative dispute resolution processes require
10 that both parties are vested and committed to making the
11 process work.

12 MR. WILEY: I agree, Your Honor, and I did
13 want to state on the record that it is the Complainant's
14 preference that the ADR, if it is considered, be under
15 the jurisdiction of the Commission and not a private
16 arbitrator because of the nature of this issue.

17 JUDGE BERG: All right, well, I will leave it
18 to the parties to kind of explore that and whenever
19 appropriate to present a joint request.

20 All right, let me take a quick look at my
21 agenda to be sure that there isn't something else that
22 would be neglected by extending this out.

23 And I think it would be appropriate, what I
24 will do, the way that we proceed with scheduling these
25 is that we look for a couple of dates where no parties

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1 have conflicts. We don't necessarily expect all parties
2 to know at this point what their schedule is. We would
3 proceed the same way that we did in setting up this
4 hearing where the administrative law division support
5 staff would contact all parties and try and clear a
6 couple of dates on the calendars. But if the parties
7 are aware that they have any conflicts on specific dates
8 say in the week of April 28th, this would be a good time
9 to let me know.

10 MR. WILEY: Your Honor, actually that's the
11 -- the 28th is the only day I have open that week. I'm
12 at a conference out of state for the rest of that week.
13 So I do have the 28th open then.

14 JUDGE BERG: All right. And I'm trying to
15 give a little bit of padding so that things could occur
16 on or around the 16th and still have some time for
17 parties to think things over. What does that week of
18 May the 5th look like for you, Mr. Wiley?

19 MR. WILEY: Other than a workshop here all
20 day on the 9th, I look to be open. I prefer since I'm
21 going to be out of state until 11:00 p.m. the 4th to not
22 have it on the 5th, but other than that, I'm fine.

23 JUDGE BERG: All right, so 6th, 7th, and 8th
24 look okay?

25 MR. WILEY: Right.

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1 JUDGE BERG: And, Ms. Singer Nelson, you
2 don't have to commit at this time, but how do those
3 dates look for you; do you know?

4 MS. SINGER NELSON: The 5th and the 6th don't
5 look good, but otherwise the 7th, 8th, and 9th look
6 fine.

7 JUDGE BERG: All right. And what about April
8 28th?

9 MS. SINGER NELSON: April 28th I think yes,
10 April 28th is fine.

11 JUDGE BERG: All right.

12 And, Ms. Smith, is it all right if we just
13 follow up with you, or do you know?

14 MS. SMITH: Actually, you can follow up with
15 me if you want. I will tell you that I'm out of the
16 office the whole week of April 28th, not that Staff's
17 participation in the subsequent pre-hearing conference
18 is something that you need to really schedule around,
19 but I am out that whole week.

20 JUDGE BERG: Okay. That's the week of the
21 28th?

22 MS. SMITH: Yes.

23 JUDGE BERG: Okay, well, that's very helpful,
24 I appreciate that very much. I think what we will do is
25 focus on May 7th or 8th, look at the Commission's

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1 resources, see if we can all come back together and
2 reassess the positions of the parties.

3 MS. SINGER NELSON: Your Honor, I would ask
4 if we could start discovery in this proceeding at this
5 point. I would like to serve some discovery just to try
6 to get an idea of the Plaintiff's positions on the
7 amounts of money that we owe.

8 JUDGE BERG: Mr. Wiley.

9 MR. WILEY: I think Ms. Singer Nelson is
10 referring to an issue that we have had by E-mail. Your
11 Honor, our preference is that we convene an in-person
12 meeting with MCI representatives and my client rather
13 than spend a lot of time and money on discovery, so my
14 request would be that we hold off on that until the next
15 hearing and in the interim work on trying to either
16 convene a meeting or somehow resolve her request for
17 documentation. But I would like an opportunity for the
18 parties to meet before we start going through those.

19 JUDGE BERG: Let me just take a quick look at
20 the date the complaint was filed. February 6th I have
21 the date that was signed.

22 MR. WILEY: Yeah.

23 JUDGE BERG: Ms. Singer Nelson, I'm not going
24 to order discovery at this time for a couple of reasons.
25 Most importantly because I'm concerned that once

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1 discovery starts, parties move into serious litigation
2 mode. While MCI and Aronson-Campbell I'm sure have
3 brought some good people to the table to try and solve
4 these problems before, I think that both yourself and
5 Mr. Wiley bring a fresh perspective to the dispute and
6 that the two of you have unusual talents in this area,
7 and my hope is that you and Mr. Wiley will be able to
8 bring about a negotiated settlement of all claims once
9 the issue of porting numbers from MCI WorldCom to
10 Electric Lightwave can be effected. If at the time of
11 the next pre-hearing conference, parties have not been
12 able to resolve all disputes, I will be looking to set
13 up an aggressive schedule for the parties to develop and
14 prepare their cases. I understand your concern, but I
15 think there will be sufficient time given the limited
16 issue that will still be on the table from the way
17 things look now for parties to prepare and for the
18 Commission to timely conclude all deliberations in this
19 proceeding. And I will note the request, the response,
20 and the decision in the pre-hearing conference order
21 that will follow.

22 Anything further?

23 MS. SINGER NELSON: No, thank you, Your
24 Honor.

25 JUDGE BERG: All right. Thank you Ms. Singer

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1 Nelson, thank you Mr. Wiley, thank you Ms. Smith,

2 pre-hearing conference is adjourned.

3 (Hearing adjourned at 2:45 p.m.)

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