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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
2 COMMISSION

3 TCI CABLEVISION OF WASHINGTON, )  
4 INC., )  
5 Complainant, ) DOCKET NO. UT-950806  
6 vs. ) VOLUME 2  
7 U S WEST COMMUNICATIONS, INC., ) PAGES 21 - 60  
8 Respondent. )  
9 ----- )

10 A pre-hearing conference in the above matter  
11 was held on December 13, 1995, at 1:30 p.m., at 1300  
12 South Evergreen Park Drive Southwest, Olympia,  
13 Washington before Administrative Law Judge MARJORIE  
14 SCHAER.

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16 The parties were present as follows:

17 WASHINGTON UTILITIES AND TRANSPORTATION  
18 COMMISSION STAFF, by SHANNON SMITH, Assistant  
19 Attorney General, 1400 South Evergreen Park Drive  
Southwest, Olympia, Washington 98504.

20 TCI CABLEVISION OF WASHINGTON and WSCCA,  
21 by GREGORY KOPTA, Attorney at Law, 2600 Century  
22 Square, 1501 Fourth Avenue, Seattle, Washington 98101.

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24 U S WEST COMMUNICATIONS, by LISA ANDERL,  
25 Attorney at Law, 1600 Seventh Avenue, Room 3206,  
Seattle, Washington 98191.

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27 Cheryl Macdonald, CSR  
28 Court Reporter

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APPEARANCES (Cont.)

MCI METRO ACCESS TRANSMISSION SERVICES, by  
BROOKS HARLOW and CLYDE MACIVER, Attorneys at Law, 601  
Union Street, Suite 4400, Seattle, Washington 98101.

ELECTRIC LIGHTWAVE, (by teleconference),  
BRIAN THOMAS, for ELLEN DEUTSCH, Vice-President and  
General Counsel, Post Office Box 4959, Vancouver,  
Washington.

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

2 JUDGE SCHAER: The hearing will come to  
3 order. This is a second pre-hearing conference in  
4 docket No. UT-950806, which is a filing by TCI  
5 Cablevision of Washington, Inc., against U S WEST  
6 Communications, Inc., in which TCI contends that U S  
7 WEST's pole attachment rates are too high. This is a  
8 pre-hearing conference that was set by a notice of  
9 pre-hearing conference dated November 21, 1995. It's  
10 taking place on December 13, 1995 in Olympia,  
11 Washington. The parties are appearing in person and  
12 by telephone conference bridge. The hearing is being  
13 held before administrative law judge Marjorie R.  
14 Schaer.

15 Let's begin by taking appearances and start  
16 with the appearance of the complainant, please.

17 MR. KOPTA: Gregory Kopta, Davis Wright  
18 Tremaine, 2600 Century Square, 1501 Fourth Avenue,  
19 Seattle, Washington 98101. Appearing on behalf of  
20 complainant TCI Cablevision of Washington, Inc., and  
21 intervenor Washington State Cable Communications  
22 Association.

23 JUDGE SCHAER: And for the respondent,  
24 please.

25 MS. ANDERL: Lisa Anderl with U S WEST

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1 Inc., 1600 - 7th Avenue, Room 3206, Seattle,  
2 Washington 98191, appearing on behalf of respondent  
3 U S WEST Communications Inc.

4 JUDGE SCHAER: And for the Commission  
5 staff, please.

6 MS. SMITH: Shannon Smith, assistant  
7 attorney general, 1400 South Evergreen Park Drive  
8 Southwest, P.O. Box 40128, Olympia, Washington  
9 98504-0128 on behalf of Commission staff.

10 JUDGE SCHAER: And next for the  
11 intervenors, start you with Mr. Harlow.

12 MR. HARLOW: Thank you, Your Honor. Brooks  
13 Harlow appearing on behalf of MCI Metro Access  
14 Transmission Services, Inc.

15 JUDGE SCHAER: And then finally Mr. Thomas  
16 or Mr. McMillin, who will appear?

17 This is Brian Thomas who is representing  
18 Ellen Deutsch who is vice-president and general  
19 counsel of Electric Lightwave Inc., Post Office Box  
20 4959 Vancouver, Washington.

21 And may I ask Mr. Thomas what your fax  
22 number is?

23 I'm sorry. I was looking on your  
24 letterhead and didn't see it. Could you give it to me  
25 once again, please.

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1                   And the fax number for Electric Lightwave  
2 is area code 360-253-4425.

3                   Let's begin, Mr. Harlow, with your motion  
4 to intervene, please.

5                   MR. HARLOW: Thank you, Your Honor. Good  
6 afternoon. My name is Brooks Harlow of the law firm  
7 of Miller Nash Wiener Hager and Carlson. Together  
8 with my partner Clyde MacIver we are attorneys for  
9 intervenor MCI Metro Access Transmission Services,  
10 Inc. MCI Metro will not by its appearance and  
11 participation in this case broaden the issues beyond  
12 those as stated in the pleadings. The address of MCI  
13 Metro is MCI, Suite 3900, ARCO Tower, 707 17th Street,  
14 Denver, Colorado, 80202, attention Roger Peña. The  
15 name and address of MCI's attorneys are Clyde MacIver  
16 and Brooks Harlow at Miller Nash. I've given the name  
17 previously. Our address is 4400 Two Union Square, 601  
18 Union Street, Seattle, Washington 98101-2352. Our  
19 facsimile number is 206-622-7485. Additionally  
20 appearing for MCI Metro is in-house counsel Roger  
21 Peña, MCI, Suite 3900, ARCO Tower, 707 17th Street,  
22 Denver, Colorado 80202.

23                   MCI Metro has been registered in this state  
24 to provide both switched and nonswitched  
25 telecommunications services, interexchange and

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1 intraexchange, and as such requires pole attachments  
2 from poles provided by U S WEST and others. The  
3 rates, charges and practices of U S WEST with regard  
4 to pole attachments appear to be an issue in this  
5 proceeding and therefore MCI Metro's interests may be  
6 affected and for that reason MCI Metro petitions to  
7 intervene in this proceeding pursuant to WAC  
8 480-09-430.

9 JUDGE SCHAER: Are there any objections to  
10 the intervention?

11 MS. ANDERL: None from U S WEST, Your  
12 Honor. I would just like a clarification if MCI Metro  
13 is in fact attached to U S WEST owned poles or may be.

14 MR. HARLOW: I don't know the status of  
15 that.

16 MR. KOPTA: I have no objection.

17 MS. SMITH: No objection.

18 JUDGE SCHAER: The intervention will be  
19 granted. Mr. Harlow, are you going to be the contact  
20 person for your client?

21 MR. HARLOW: I would like to be listed  
22 first on the service list, and in addition would ask  
23 that Mr. Pena be served with pleadings and notices as  
24 well.

25 JUDGE SCHAER: How about discovery requests

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1 and other items? Are you asking that you receive two  
2 copies of those from the parties or can they just  
3 serve you and let you serve the rest of your client?  
4 How would that work?

5 MR. HARLOW: If it's not unduly burdensome  
6 -- I don't know what scope of discovery is expected --  
7 Mr. Penya would appreciate receiving service directly,  
8 although certainly in terms of timeliness of service,  
9 anything that's served on us timely, if Mr. Penya gets  
10 it in the mail a few days later that wouldn't be a  
11 problem.

12 JUDGE SCHAEER: Do any of the parties have  
13 concerns about providing duplicate copies to MCI?

14 MS. ANDERL: I'm not sure how it's usually  
15 done. My understanding was -- at least I thought we  
16 just provided local counsel with one copy of things  
17 and they did further in-house distribution. I really  
18 can't say I speak from a great wealth of experience in  
19 this matter, but maybe somebody else knows better how  
20 it's been done in the past. This seems a little bit  
21 burdensome.

22 MR. HARLOW: Well, my experience in the  
23 past has been that many companies have more than one  
24 representative. If it's burdensome we would be happy  
25 either on a pleading by pleading basis or if Your

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1 Honor feels it's unduly burdensome to just have us be  
2 the primary contact.

3 JUDGE SCHAER: Well, I think that it's a  
4 better practice to have one primary contact for each  
5 party and then we know who has to be served and who  
6 was or wasn't served, and to the extent that the  
7 parties choose to and can accommodate you by providing  
8 a second courtesy copy to Mr. Peña, I would encourage  
9 them to do so, but if they're sending out copies of  
10 data requests or other items that are fairly bulky, I  
11 would think that they might want to just get one to  
12 you in Seattle and let you communicate with --

13 MR. HARLOW: I should caution that we're  
14 not authorized to accept service of process, that this  
15 is simply service under the Commission's procedural  
16 rules.

17 JUDGE SCHAER: Certainly. Let's next take  
18 the motion to intervene by Electric Lightwave. Mr.  
19 Thomas, do you have anything to add to your written  
20 petition to intervene?

21 Mr. Thomas has indicated he has nothing to  
22 add, but would like the parties to know that in  
23 response to a similar question as was asked of Mr.  
24 Harlow that ELI does have attachments to U S WEST  
25 poles and thus does believe it has an interest in the



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1 matter.

2 Is there any objection to the motion by ELI  
3 to intervene in this matter?

4 MS. ANDERL: No.

5 MR. KOPTA: No objection.

6 MS. SMITH: No.

7 JUDGE SCHAER: That intervention will be  
8 granted. And it's my understanding that, Mr. Harlow,  
9 that you would like to be excused at this time.

10 MR. KOPTA: Yes, maybe I missed, but I  
11 didn't hear you grant the MCI Metro petition.

12 JUDGE SCHAER: Well, if I didn't grant it I  
13 will do so now. I'm sorry, I thought I had done so  
14 after I had asked for objections.

15 MR. HARLOW: Thank you. Thank you for  
16 excusing me.

17 JUDGE SCHAER: Certainly. Mr. Thomas, did  
18 you wish to continue to participate in this hearing or  
19 did you wish to also be excused?

20 Thank you for your participation and you  
21 may be excused from this proceeding.

22 MS. ANDERL: I'm sorry, Your Honor, did ELI  
23 ask permission to leave also?

24 JUDGE SCHAER: Yes, I'm sorry.

25 MS. ANDERL: I may have been talking to Mr.

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1 Harlow as an aside and I might have missed what you  
2 said.

3 JUDGE SCHAER: I may have missed saying it  
4 clearly enough. I asked them if they would like to be  
5 excused and they said yes, and I assumed that people  
6 could hear me but that may have been a poor  
7 assumption.

8 The next matter I believe to come before us  
9 today is the motion by Mr. Kopta in regard to seeking  
10 to either dismiss counterclaim by U S WEST or  
11 bifurcate the proceedings in this matter, and I think  
12 before we proceed with discussion of that it would be  
13 useful to me, Mr. Kopta, if we could look at the  
14 statute that governs cable complaints for a moment,  
15 and if you could perhaps just walk me through your  
16 theory of the complaint because I'm not certain I'm  
17 understanding it correctly.

18 I went back and reread your complaint this  
19 morning and note that it only refers to 80.54.020, and  
20 my first question is, is your actual complaint here  
21 today based on the authority provided in 80.54.030?

22 MR. KOPTA: It's based on the authority in  
23 80.54 in general, and as to the specific statutory  
24 provisions both 80.54.020 and 80.54.030 would be  
25 appropriate.

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1                   JUDGE SCHAER: 80.54.020 says that rates  
2 must be just, fair, reasonable and sufficient and then  
3 80.54.030 states that -- and I would like you to track  
4 this with me to see if I'm reading the part that you  
5 would think would be relevant to what your client is  
6 doing. "Whenever the Commission shall find after  
7 hearing had upon complaint by a licensee that the  
8 rates, terms or conditions demanded, exacted, charged  
9 or collected by any utility in connection with  
10 attachments are unjust, unreasonable, the Commission  
11 shall determine the just, reasonable or sufficient  
12 rates, terms and conditions thereafter to be observed  
13 and enforced and shall fix the same by order."

14                   Is that what you believe that your  
15 complaint triggered insofar as what this Commission is  
16 supposed to be looking at and determining in this  
17 proceeding?

18                   MR. KOPTA: Yes.

19                   JUDGE SCHAER: Okay. And in triggering  
20 that inquiry, did you believe that the provision in  
21 80.54.070, which requires that the Commission shall  
22 levy attachment rates which are uniform for all  
23 licensees, meant that whatever change might be made to  
24 rates for TCI would also result in changes for other  
25 licensees of U S WEST?

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1 MR. KOPTA: That's my understanding, yes.

2 JUDGE SCHAEER: So what would you  
3 contemplate proving in order to show that the current  
4 rates that are being charged are unjust or  
5 unreasonable?

6 MR. KOPTA: Well, there are two elements to  
7 what our complaint is attempting to bring before the  
8 Commission. The first is a policy issue about whether  
9 pole owners are required to set rates according to  
10 their ownership interests in the poles. To put it  
11 more simply, whether a pole owner is required to have  
12 one rate for a pole that it owns alone and a second  
13 proportional rate for a pole that it owns jointly with  
14 another entity, be it generally another electric  
15 utility or could be another telephone corporation or  
16 it even could be a nonregulated utility as the term  
17 utility is used in 80.54.

18 The issue there is essentially one of  
19 fairness, whether or not in setting rates, obviously  
20 under the statute it's supposed to be just, reasonable  
21 and sufficient, and if a pole owner is recovering its  
22 costs through one rate for a solely owned pole, then  
23 it would be recovering more than its costs if it  
24 charged that same rate for a jointly owned pole  
25 because it doesn't have the same costs in a jointly

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1 owned pole. That's the policy issue.

2           The second issue is application of that  
3 policy to the existing rate in the license agreement  
4 between TCI and U S WEST. According to that license  
5 agreement, U S WEST charges a single pole attachment  
6 rate of \$3.75. It is TCI's contention that that is an  
7 appropriate rate for a solely owned pole but that that  
8 rate should be prorated for jointly owned poles or  
9 poles that U S WEST owns jointly with other entities  
10 including Seattle City Light, Tacoma City Light.

11           JUDGE SCHAER: So would you be putting on  
12 evidence that that amount is sufficient to cover the  
13 costs that the statute requires be covered?

14           MR. KOPTA: Yes.

15           JUDGE SCHAER: And would it be -- is it  
16 your position that U S WEST right now is recovering  
17 too much money, too much revenue from its pole  
18 attachment rates because some of them are charged --  
19 because all of them are charged 100 percent?

20           MR. KOPTA: That is our contention.  
21 Basically what we have to go by is what we know, what  
22 U S WEST charges and what other similarly situated  
23 companies charge. Part of this proceeding is to get  
24 access to the cost information that would allow us to  
25 be able to prove as a matter of proof that that is in

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1 fact the case. Right now all we have to go by is a  
2 single rate of \$3.75 is being charged.

3           By way of example, GTE, which also is a  
4 pole owner, charges \$3.60 for solely owned pole and  
5 \$1.80 for a jointly owned pole. Based on the fact  
6 that they are similarly situated companies charging  
7 pretty much the same rate for a solely owned pole we  
8 believe that it should also charge a similar amount  
9 for a jointly owned pole. Of course, that is subject  
10 to proof in these proceedings, but that's the basis of  
11 our complaint.

12           JUDGE SCHAER: Well, just as a  
13 hypothetical, suppose that U S WEST needed to recover  
14 X amount for all of its pole attachments, however it  
15 recovered them. And imagine secondly that its current  
16 rates were perfect and collected just that amount of  
17 money. Then in that hypothetical if you were to cut  
18 the rates in half on some poles, you would need to  
19 raise them on others in order to continue to collect  
20 that perfect amount of money. Would you agree with me  
21 on that?

22           MR. KOPTA: Yes, that is correct.

23           JUDGE SCHAER: So part of what you're  
24 putting at issue is really what that amount of money  
25 is that they need to collect overall, and then another

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1 part of what you're putting in issue is whether there  
2 is some rate design or some structure of how they  
3 recover that that is legally required or is wiser and  
4 better and more just and more reasonable. Is that --

5 MR. KOPTA: I think that's a different way  
6 of saying what we're trying to do. I mean, basically  
7 what our approach is that from a policy perspective  
8 there should be two separate rates. How U S WEST  
9 decided that it was going to charge one rate for all  
10 poles we don't know. Our assumption at this point is  
11 that it was simply a solely owned pole rate that's  
12 extended to jointly owned poles. If U S WEST puts in  
13 proof that there was some other basis for setting that  
14 and that the \$3.75 recovers the costs, their total  
15 costs for both solely and jointly owned poles, then I  
16 think it would be a matter of negotiation between the  
17 parties to come up with a solely owned pole rate and a  
18 jointly owned pole rate according to the policy that  
19 we would like the Commission to adopt in this case,  
20 which is that you should have two separate rates as  
21 oppose to a blended rate.

22 Right now the contract simply says \$3.75.  
23 Because you have to set rates or U S WEST has to  
24 charge rates that are uniform for all licensees across  
25 the state, there's a very different matter in lowering

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1 rates as against one licensee as opposed to raising  
2 rates against other licensees. I suspect that very  
3 few licensees if any would have any due process  
4 concerns that their rates were lower as a result of a  
5 proceeding involving only one licensee. On the flip  
6 side, I imagine many licensees would have a problem  
7 with having their rates raised as a result of a single  
8 proceeding against one licensee.

9               So that's where we're coming from on this.  
10 If U S WEST is able to prove that it is not recovering  
11 sufficient revenues to cover its costs then it  
12 certainly is free to turn around as a result of this  
13 proceeding and proceed under the contracts that it has  
14 with the licensees, notify them that it intends to  
15 increase the rates and proceed through negotiation and  
16 if necessary bring an action with the Commission  
17 against all of those licensees.

18               JUDGE SCHAER: But it's your complaint that  
19 brings into issue the proper level of the rates and  
20 whether the current rates are sufficient.

21               MR. KOPTA: Well --

22               JUDGE SCHAER: In your complaint does that  
23 under statute that requires the uniformity. Why  
24 was it not your responsibility to make sure that all  
25 parties that you believed needed to be part of this



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1 proceeding were named when you brought this  
2 complaint?

3 MR. KOPTA: Well, again, it's the concern  
4 that what we are asking for is a lowering of rates and  
5 that under those circumstances other licensees would  
6 have no objection to having their rates lowered even  
7 though they were not a party to the particular  
8 proceeding.

9 JUDGE SCHAEER: But if you look at  
10 80.54.030, which we have just done, it states that  
11 once a complaint has been made the Commission shall  
12 determine the just, reasonable or sufficient rates,  
13 and it doesn't really seem to me to say anything about  
14 which direction any rate changes might take.

15 MR. KOPTA: Well, again --

16 JUDGE SCHAEER: As I say, even if the same  
17 amount of money were to be collected you could still  
18 have some rates up and some rates down, if you're  
19 going to change how you spread those revenues.

20 MR. KOPTA: That's exactly right. And what  
21 we're saying is that if, for example, U S WEST puts in  
22 evidence that for a jointly owned pole its rates  
23 should be \$2.50 and then it's solely owned pole rates  
24 should be \$5 and ends up collecting the same amount of  
25 revenue as the \$3.75 -- I'm just choosing numbers as

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1 an example -- I think under those circumstances what  
2 the Commission needs to do is to say the rate as it is  
3 set in the contract right now covers U S WEST's costs.  
4 However, from a matter of policy there should be two  
5 separate rates because otherwise you've got, for  
6 instance, a licensee that is on more jointly owned  
7 poles than solely owned poles and is in effect  
8 subsidizing the solely owned pole rate.

9           So in light of that, then U S WEST should  
10 take that policy determination and notify its  
11 licensees that it is rebalancing those rates to have a  
12 solely owned pole rate and a jointly owned pole rate  
13 and then allow negotiation, which is the whole point  
14 of having a contract as opposed to having a tariff to  
15 set what those rates are to make sure that U S WEST  
16 covers the sufficient amount of revenue that it needs  
17 from its pole attachments. That's what this complaint  
18 proceeding is all about.

19           Part of the problem is that what we are  
20 dealing with here is simply the bare statutes. The  
21 Commission has not promulgated any rules or  
22 regulations for implementing these, nor has there been  
23 a complaint proceeding brought that has gone all the  
24 way to a Commission order. There has only been one  
25 complaint proceeding that I'm aware of and that was

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1 settled prior to determination by the Commission. So,  
2 we're kind of in virgin territory here as far as what  
3 these statutes mean, what's the proper means of  
4 bringing a complaint to the Commission, raising  
5 particular issues before the Commission. So all we're  
6 doing is trying to interpret the statutes as they  
7 exist right now, one of them being 80.54.030 which  
8 we've been discussing in light of the fact that there  
9 has to be uniformity. I mean, unfortunately, there is  
10 not an easy way to sort of put them side by side and  
11 be able say, oh, yeah okay, I can see how this is  
12 going to work.

13               We think that, as outlined in our motion,  
14 that that's the way that it should work, that if  
15 there's going to be any raise of rates then it has to  
16 be something that involves all of its licensees. The  
17 whole point behind the federal statute which gave rise  
18 to the state statute is protection of pole attachment  
19 licensees. I mean, they are in about the worst  
20 position you can be in. They have no realistic  
21 alternative to attach to these poles. And the pole  
22 owner therefore as a monopoly provider has all the  
23 leverage in the world, and this was meant to at least  
24 give pole attachment licensees the opportunity if it  
25 could not reach an agreement with the owner to have

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1 some recourse other than simply the owner saying,  
2 well, take it or leave it.

3           So I think what we are trying to say here  
4 is in light of that policy, in light of the whole  
5 purpose behind the federal legislation and the state  
6 legislation and in light of the language that we have  
7 here in the state statute, what we're talking about  
8 here is a reduction in the current rates, and if any  
9 increase is involved then that needs to involve other  
10 licensees or at least give them the specific  
11 opportunity to be notified by U S WEST if their rates  
12 are going up.

13           I mean, it's not that we're saying that  
14 they're a necessary party that they have to be here.  
15 What we're saying is U S WEST has to notify them under  
16 their contracts we are going to raise your rates or we  
17 are planning to or to file a complaint, and I think  
18 the proper way is to go through the contract first and  
19 then if there can't be resolution, to file a  
20 complaint. But one way or the other ensure that all  
21 licensees are notified by the other contracting party  
22 in their license agreement that there's going to be a  
23 rate increase.

24           JUDGE SCHAER: Have you reviewed the  
25 transcript of our last pre-hearing conference?

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1 MR. KOPTA: Yes, I have.

2 JUDGE SCHAEER: There was rather a lengthy  
3 discussion off the record in that proceeding about who  
4 were and who were not necessary parties, and then  
5 beginning at page 8 of that transcript we went back on  
6 the record and there was discussion there of, again,  
7 whether or not this proceeding was fatally flawed  
8 because there were necessary parties who were not  
9 included, and it was my understanding at that time  
10 that it was your position that this proceeding was not  
11 fatally flawed and that it could go forward. Did I  
12 misunderstand your position then?

13 MR. KOPTA: To the extent that that is what  
14 what your impression was, I think that that is not  
15 accurate. Let me put it this way. What we had said  
16 in our answer or reply to the counterclaim was that  
17 U S WEST had failed to join necessary parties. The  
18 issue of necessary parties is whether or not you  
19 cannot have a resolution of a case without having  
20 everyone here or certain people here that aren't here.  
21 To the extent that we discussed that in the  
22 pre-hearing conference, that is not something that we  
23 were going to pursue that particular issue. It's a  
24 very different issue, however, as to notification and  
25 compliance with the statute.

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1           As I said earlier, it's not that we're  
2 claiming that everybody has to be here for there to be  
3 a resolution. What we're saying is that U S WEST has  
4 to notify those people that there's going to be a rate  
5 increase through the contract and then if necessary  
6 through a complaint proceeding brought by U S WEST,  
7 and allow them to participate or not participate at  
8 their particular option, but it's a question of  
9 following through on contract requirements and  
10 following through on statutory requirements, not  
11 whether or not you cannot have a resolution of this  
12 case without the participation of every licensee.

13           JUDGE SCHAEER: I didn't see anything in  
14 your argument in the motion stating that you are  
15 unable to comply with the schedule that was provided  
16 in the pre-hearing order or that you would be unable  
17 to resolve the case along the lines of the schedule  
18 that was provided there. Did I miss something?

19           MR. KOPTA: No. The thrust of our motion  
20 is that the counterclaim should be dismissed. It's  
21 only if the Commission believes that the counterclaim  
22 has properly been brought that we reach the issue of  
23 whether or not there should be a bifurcation of the  
24 proceedings. It's not that necessarily that this  
25 particular -- that we have a problem with the

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1 schedule. I mean, as far as our complaint goes, we  
2 believe that we can resolve the original complaint  
3 according to the timelines of the schedule that was  
4 originally set up, but after we set up this schedule  
5 there have been discovery requests that have been  
6 exchanged between us and U S WEST, and it's clear from  
7 those discovery requests that there's a great deal  
8 more at issue here than simply the issues raised in  
9 TCI's complain.

10 I mean, what we're talking about here is  
11 establishing a policy for the state of Washington as  
12 to what is the proper means of calculating a pole  
13 attachment rate. And whether it's going to be along  
14 the lines that the FCC has used in setting pole  
15 attachment rates or whether it's going to be something  
16 completely different. Whether it's going to be from  
17 what I gather from U S WEST's position more along the  
18 lines of the way that they set rates for  
19 telecommunications services, and having been through a  
20 few of those proceedings, getting into cost studies  
21 methodologies for computing contribution and average  
22 shared residual costs and total service long-run  
23 incremental cost, that becomes very complicated or can  
24 become very complicated. Certainly has been a hotly  
25 contested issue in recent proceedings involving U S

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1 WEST before the Commission.

2           And if the Commission wants as a matter of  
3 first impression for this Commission to decide what  
4 sort of methodology should be in place for the state  
5 to calculate pole attachment rates, then I think that  
6 it would behoove the Commission to have a fully  
7 developed factual and policy record, and I don't think  
8 that that is going to happen based on the schedule  
9 that we've set out, which was essentially to make sure  
10 that TCI's complaint was resolved within the statutory  
11 required period. That's not the same concern that we  
12 would have with the U S WEST counterclaim.

13           JUDGE SCHAEER: But your complaint had two  
14 elements, one a policy issue of how revenue  
15 requirement for poles should be spread; and one, an  
16 application issue, I believe you called it, of what  
17 level the rates should be, whether the \$3.75 was the  
18 correct rate. And under the statute with the  
19 complaint on that basis, the Commission is required to  
20 determine that just, reason or sufficient rates and  
21 conditions thereafter to be observed and enforced and  
22 shall fix the same by order. So aren't those all  
23 things that the Commission will need to determine in  
24 order to act on your complaint?

25           MR. KOPTA: Well, what the Commission needs



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1 to determine, I think, is what the attachment rates  
2 should be in light of what the contract is between the  
3 parties. I mean, there was a reason that the rate was  
4 set at \$3.75. Our contention is that that rate was  
5 set based on U S WEST's costs, embedded costs, and  
6 that U S WEST simply did not include a jointly owned  
7 pole rate and just made one rate. The inquiry,  
8 therefore, is whether under the contract and the way  
9 that the rate was set under the contract the \$3.75 is  
10 sufficient.

11           If U S WEST wants to change the methodology  
12 under which it computes pole attachment rates under  
13 this contract or raise pole attachment rates under the  
14 contract, then it needs to do it through a different  
15 proceeding than simply a counterclaim against TCI,  
16 which was all it was trying to do is set up the  
17 principle that you need two different and proportional  
18 rates and then establish that the rates that they have  
19 now are over sufficient. If they're not over  
20 sufficient then the Commission can so find and U S  
21 WEST, unlike TCI, can simply notify its licensees that  
22 it's going to increase rates. TCI can't notify U S  
23 WEST that it's going to be -- that it thinks its rates  
24 are sufficient and therefore it's going to modify the  
25 contract to lower the rates. I mean, we're talking

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1 about disparate bargaining here, and the whole point  
2 behind having contracts and also having resort to the  
3 regulatory process -- and, again, we go back to why we  
4 set up -- why Congress set up what it set up and why  
5 the state legislature decided that it was going to  
6 take over jurisdiction of pole attachment rates. It's  
7 to protect licensees from a monopoly environment where  
8 it has no other recourse.

9 JUDGE SCHAER: Is there anything else you  
10 wanted to say in support of your motion?

11 MR. KOPTA: Can I just have a few moments?

12 JUDGE SCHAER: Certainly.

13 (Recess.)

14 MR. KOPTA: I just want to re-emphasize  
15 that what TCI was -- the issues that TCI has raised in  
16 its complaint are fundamentally focused on the policy  
17 issue of having a solely owned and a jointly owned  
18 pole rate. That if U S WEST wants to change that  
19 rate, I mean, basically increase that rate, then a  
20 counterclaim against TCI is not the appropriate way to  
21 do it. Appropriate way to do it under the contract is  
22 to notify licensees of a rate increase, allow time for  
23 negotiation of any rate increase and also allow  
24 licensees, after they have been notified and  
25 allowed the opportunity to negotiate those rates, to

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1 either file a complaint against U S WEST or to have  
2 U S WEST file a complaint against the licensees, and  
3 this counterclaim that U S WEST has made expands the  
4 issues that TCI has raised in its complaint well  
5 beyond what is contemplated by the statute or TCI's  
6 complaint.

7 JUDGE SCHAER: Why wasn't this motion made  
8 at the last pre-hearing conference?

9 MR. KOPTA: Well, this is really more in  
10 the motion -- in the area of a summary judgment  
11 motion. I mean, it's something that we could have  
12 briefed, but I think it became clear on receiving  
13 discovery from U S WEST and beginning to analyze the  
14 issues as U S WEST had presented them that this was  
15 going to be much, much more involved than TCI's  
16 complaint issues and that rather than waiting until we  
17 had gone through the testimony and the hearing process  
18 and simply briefed this issue that it made sense to  
19 raise it right now before we all spent a lot of time  
20 and money and effort and ensure that the issues are  
21 properly -- the issue that TCI raised in its complaint  
22 is properly before the Commission.

23 I think there is some confusion as to the  
24 extent to which TCI's complaint has brought rates, U S  
25 WEST rates, into issue. I mean, basically all we're

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1 saying is there should be a solely owned pole rate and  
2 a jointly owned pole rate. U S WEST has suddenly  
3 turned this into we should have a wholly new set  
4 of rates calculated to a wholly different set of  
5 standards and that's just not part of TCI's complaint.

6 JUDGE SCHAER: But isn't that what the  
7 statute requires the Commission to look at?

8 MR. KOPTA: No. It looks -- what happens  
9 is, again, you have to look at it in terms of the  
10 Commission's obligation or the pole owner's obligation  
11 to have uniform rates. I mean, what this is is like  
12 U S WEST bringing a complaint against Boeing because  
13 Boeing brought a complaint against U S WEST over a  
14 particular rate and saying, well, we don't think that  
15 the rate that you're complaining about is high enough,  
16 so we're going to raise it and it's going to apply to  
17 everybody else that we have a contract with in the  
18 state of Washington. I mean, the way that we view  
19 what's going on here is that we have raised an issue  
20 of policy. U S WEST has raised a different issue of  
21 policy and a different application. Those two things  
22 are totally separate, totally distinguishable, and U S  
23 WEST has chosen the wrong way to go about doing it,  
24 raising its issues, and TCI has chosen the proper way  
25 of bringing its complaint, and that if you want to

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1 involve other licensees in addition to TCI then  
2 there's a way to do that and that hasn't been done  
3 here.

4 JUDGE SCHAER: And why wasn't this brought  
5 within 10 days of your receipt of the pre-hearing  
6 conference order?

7 MR. KOPTA: Well, again this was, as I was  
8 just discussing, this is something more in the nature  
9 of a summary judgment motion as opposed to a pure  
10 12B(6). If you use that express motion that's  
11 directed solely to the pleading. This is taking into  
12 consideration the number of other licensees, also the  
13 extent of information that has been requested and  
14 other information outside that's extraneous to the  
15 pleadings that, again, could have been brought up in  
16 briefs but at this point makes sense to have it  
17 brought before the parties spend a great deal of time  
18 and effort developing a factual case surrounding not  
19 only the issues in TCI's complaint but the much  
20 broader issues that have been raised in U S WEST's  
21 counterclaim.

22 At this point -- I mean, this is having  
23 just gotten discovery and really clarified the extent  
24 to which U S WEST is expanding the issues. This was  
25 the earliest that we felt that we could bring it.

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1                   JUDGE SCHAER:  You haven't included any  
2 affidavits or any other factual material in addition  
3 to your legal arguments, have you, Counsel?

4                   MR. KOPTA:  No.

5                   JUDGE SCHAER:  So why isn't this more like  
6 a 12B(6) motion?

7                   MR. KOPTA:  Well, we are asking the  
8 Commission to take notice of the fact that there have  
9 been other licensees that have been -- U S WEST has  
10 supplied a list of licensees to the Commission.  We've  
11 supplied, or we, on behalf of the cable association,  
12 has supplied a list of its members for distribution to  
13 the Commission so that it can send out additional  
14 complaints.

15                   There have been interventions by other  
16 parties that ordinarily would have no interest in what  
17 TCI's complaint would be because these issues are  
18 things that involve, at least from MCI Metro's  
19 position and ELI's position, competitive interests  
20 that haven't been -- that aren't part of TCI's  
21 complaint.  These are potential competitors or  
22 actual competitors of U S WEST, and so that's another  
23 element that we have as far as an issue of the  
24 competitive effect of any changed methodology or pole  
25 attachment rates that U S WEST is claiming against

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1 TCI, again, another expansion of issues in this  
2 particular proceeding.

3                   So these are things that we did not put in  
4 an affidavit. We could have, I suppose, but it was  
5 our understanding that the Commission could take  
6 notice of the fact that there were a substantial  
7 number of additional licensees in addition to TCI some  
8 of whom have interests that are not shared by TCI. I  
9 mean, they're not adverse but they are different and  
10 that this policy issue that U S WEST raised is more  
11 than just an issue between what is appropriate between  
12 TCI and U S WEST. It is what is appropriate between  
13 U S WEST and competitors, U S WEST and other electric  
14 or regulated utilities, between electric utilities and  
15 other -- and their licensees. I mean, basically if  
16 the Commission were to decide that pole attachment  
17 rates were appropriately set according to a  
18 telecommunications rate formula there certainly is  
19 nothing that would keep Washington Water Power from  
20 saying, well, if that's the appropriate rate then  
21 we'll change that in our contract and then their  
22 licensees who don't know anything about arrangements  
23 between TCI and U S WEST would have no real recourse  
24 to the Commission because they've already decided as a  
25 matter of policy that that's the proper way to set

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1 rates. It's just exponentially expansive, and in the  
2 absence of an actual rulemaking proceeding by the  
3 Commission what we have is rulemaking by counterclaim,  
4 and you will have a lot of people bound by the  
5 Commission's determination in this case who had no  
6 reason to think that that was going to have any effect  
7 on them, and that's just inappropriate.

8 JUDGE SCHAER: Aren't all of those same  
9 people affected by your complaint?

10 MR. KOPTA: No. I mean, all I can do is  
11 guess what U S WEST has in its other license  
12 agreements between other cable companies or any of the  
13 other companies that it's listed. I assume, because  
14 U S WEST has an obligation on statewide rates, that  
15 all of the rates are the same at \$3.75. Again, if we  
16 establish the policy that there should be a jointly  
17 owned rate and a solely owned rate, if there's a  
18 problem with simply cutting that in half then we then  
19 establish as a matter of policy that that's  
20 appropriate. As far as I know every other regulated  
21 utility in Washington observes that, has a solely  
22 owned pole rate and a jointly owned pole rate. So  
23 other licensees are already doing that with other pole  
24 owners, other pole owners are already doing that with  
25 their licensees.



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1                   So all we're dealing with here are  
2 licensees of U S WEST, and essentially it would either  
3 -- what we're asking for is that you let the  
4 Commission establish this as a policy. If that means  
5 that rates are going to change or, i.e., if the solely  
6 owned pole rate will go up then U S WEST should  
7 determine what that rate would be under the contract  
8 and allow notice to those other parties that they can  
9 have the opportunity to participate knowing that it's  
10 their rates that are on the line. So it's only -- we  
11 really are looking at a policy determination here more  
12 than any rate setting. U S WEST has interjected the  
13 rate setting aspect of the issues that currently have  
14 been injected into this proceeding.

15                   JUDGE SCHAEER: Would your client be  
16 satisfied with a theoretical order that said in future  
17 pole attachment licenses proportionate rates should be  
18 set?

19                   MR. KOPTA: Well, not in future pole  
20 attachment licenses but as a matter of Commission  
21 policy that there should be two rates, one for solely  
22 owned, one for jointly owned, and a jointly owned rate  
23 should be proportionate to the ownership in that pole.  
24 If it's a 50 percent ownership it should have a 50  
25 percent jointly owned rate. If it's 75 percent then

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1 it should be 75 percent.

2 JUDGE SCHAER: And an order that said that  
3 but didn't change any existing rates or set any new  
4 rates would be satisfactory?

5 MR. KOPTA: Basically, yes. What we would  
6 be able to do, then, is take this order to U S WEST  
7 and say we need to renegotiate this rate because you  
8 only have a single rate, and at that point we can  
9 develop a rate between the two of us. That's why  
10 there's a contract instead of a tariff that allows the  
11 parties to get together and say, look, let's see if we  
12 can work out a mutually acceptable rate.

13 I mean, the regulatory process is there to  
14 sort of give some recourse to a company that  
15 ordinarily doesn't have any recourse, I mean, has to  
16 either take it or leave it. But by and large I think  
17 that the Commission should encourage bargaining among  
18 parties when there isn't a tariff. It's only when  
19 there are specific issues that are problematic that  
20 the parties should come before the Commission and ask  
21 the Commission's guidance, and that's what we are  
22 doing here.

23 I mean, I would like to think that -- I  
24 mean, we have an ongoing relationship. Whatever  
25 happens in this proceeding we're going to have an

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1 ongoing relationship and that that should motivate  
2 both parties to be able to reconcile their differences  
3 once they get past their particular block and that's  
4 what we're trying to do here.

5 JUDGE SCHAER: Do you have any response,  
6 Ms. Anderl?

7 MS. ANDERL: Well, a lot, I guess. First  
8 of all, I do want to raise an objection, just so that  
9 I'm not deemed to have waived the objection to TCI's  
10 reply that was filed this morning. As I read the  
11 rules a reply is only available as a pleading if a  
12 party requests and is granted permission by the  
13 presiding officer to file a reply and for good cause  
14 shown, and I don't think either of those is present in  
15 this case. To the extent that it just re-argues  
16 issues raised in the motion and addressed in my  
17 answer, I'm not sure that there's a huge amount of  
18 harm to it, but the WAC is there. I think it's there  
19 to kind of put an end to pleadings, and so I therefore  
20 do object to it.

21 JUDGE SCHAER: May I ask you one question  
22 before we proceed? I'm sorry to interrupt your train  
23 of thought, but I want to ask you the same question I  
24 just asked Mr. Kopta while his response is fresh in my  
25 mind. If the Commission were to issue an order that

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1 were to say U S WEST, when you set pole attachment  
2 rates, you should set them in a proportional manner  
3 depending on how much of the pole you own but the  
4 order did not say anything about what those rate  
5 levels should be, did not set any rate amounts, would  
6 you object to that?

7 MS. ANDERL: Well, that's what I was going  
8 to address first.

9 JUDGE SCHAEER: Thank you.

10 MS. ANDERL: And that's, I guess, kind of  
11 along the lines of what I said in my answer is that if  
12 TCI just wants the rate design issues addressed and no  
13 rate change or rate sufficiency then maybe what they  
14 need to do is ask for a declaratory ruling or initiate  
15 a rulemaking because those proceedings are really  
16 better suited to a policy determination, this kind of  
17 global rate design sort of question.

18 I think that in theory we have no objection  
19 to a proportional rate, and I think Mr. Kopta knows  
20 that. As a practical matter, something you should be  
21 aware of is if the rate setting is going to continue  
22 to be governed by contract the terms of the contract  
23 do require U S WEST to provide the parties with 90  
24 days notice of a rate change under the contract, and  
25 also as a practical matter that 90 days notice is due

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1 by October 1 of each year. The parties to the  
2 agreements -- as I understand them they're all the  
3 same -- pay once a year on January 1st for the entire  
4 following year, and so if we got some sort of an order  
5 that changed rates I don't know how we would do it, if  
6 it would just be that the rates were -- I don't know  
7 how we would do it if we didn't just go ahead and  
8 change them as of 90 days before the end of 1996.

9 I guess at this point we feel that the  
10 complaint did bring sufficiency of the rates into  
11 question, and we feel that we probably should have  
12 raised these rates under the contract some time ago.  
13 I guess that's as much our problem as anyone else's,  
14 but to the extent that sufficiency of rates is at  
15 issue here and there might be any adjustment of the  
16 jointly owned pole rate, we definitely want to pursue  
17 and see a determination of a fair, just, reasonable  
18 and sufficient rate for poles, period, wholly and  
19 jointly owned.

20 If the Commission were, as you asked,  
21 directly at this point to say at the next earliest  
22 opportunity to set rates you shall negotiate with at  
23 least one of the absolute terms being proportional  
24 rates, I don't know that we would have any objection  
25 to that. As I said, I think we have already agreed

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1 that in theory we don't have any problem with it. In  
2 practice that's not been the way it's been, but there  
3 are a lot of things that are statewide average rates.  
4 The fact that we don't have a jointly owned pole rate  
5 is not -- I don't think it's an indication that the  
6 \$3.75 is a fair wholly owned pole rate. Did that  
7 answer your question? I think the answer is no, we  
8 don't object if that's what the order says if it  
9 doesn't require us to do anything at this point.

10 JUDGE SCHAER: Well, I guess what I'm  
11 wondering at this point whether if that kind of an  
12 order would satisfy the complainant, and the  
13 respondent has no objection, perhaps the  
14 administrative law judge should take a break and go  
15 get a cup of coffee and let you folks talk settlement  
16 for a few minutes. I'm not hearing where the clash is  
17 at this point.

18 MS. ANDERL: Well, I think maybe we could  
19 go off the record and talk for a few minutes.

20 JUDGE SCHAER: Let's be off the record.

21 (Recess.)

22 JUDGE SCHAER: Let be back on the record.

23 While we were off the record the parties had an  
24 extended discussion of possible settlement of the  
25 disputes involved in this complaint, and I will ask

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1 you to put a summary of the status of where we are at  
2 this moment on the record and of what we're going to  
3 do to look foward in this matter, and I would take a  
4 volunteer for who would like to go first.

5 MR. KOPTA: I guess as the complainant I  
6 would go first.

7 JUDGE SCHAER: All right.

8 MR. KOPTA: Thank you, Your Honor. While  
9 we were off the record we had discussions concerning  
10 settlement, and counsel for U S WEST and counsel for  
11 the Commission in the course of discussions have  
12 raised the possibility of a joint dismissal of the  
13 complaint and U S WEST's counterclaim. The parties  
14 feel the need to negotiate and consider this proposal  
15 further and therefore would request that this hearing  
16 be postponed until Monday, December 18, to allow the  
17 parties to consult with each other and with their  
18 clients to ensure that this at least tentative notion  
19 that a joint dismissal would be appropriate can be  
20 fully discussed and an ultimate resolution reached.

21 JUDGE SCHAER: Do you have anything to add  
22 to that, Ms. Anderl?

23 MS. ANDERL: No, I don't.

24 JUDGE SCHAER: Ms. Smith?

25 MS. SMITH: No.

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1                   JUDGE SCHAER: Thank you. With that we  
2 will stand adjourned until Monday, December 18, at  
3 1:30 in the afternoon. We will then meet by  
4 conference call. We're adjourned.

5                   (Hearing adjourned at 3:25 p.m.)

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