

0177

1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 In the Matter of the Petition)
 for Arbitration of AT&T)
4 COMMUNICATIONS OF THE PACIFIC) Docket No. UT-033035
 NORTHWEST AND TCG SEATTLE,)
5 with QWEST CORPORATION,) Volume III
 pursuant to 47 U.S.C. Section) Pages 177 to 216
6 252(b),)
 _____)

7
8 A hearing in the above matter was held on
9 January 28, 2004, from 1:35 p.m. to 2:30 p.m., at 1300
10 South Evergreen Park Drive Southwest, Room 206, Olympia,
11 Washington, before Administrative Law Judge DENNIS MOSS
12 and Chairwoman MARILYN SHOWALTER and Commissioner
13 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.

14
15 The parties were present as follows:

16 QWEST CORPORATION, by MARY ROSE HUGHES,
17 Attorney at Law, Perkins Coie, LLP, 607 Fourteenth
18 Street Northwest, Washington, D.C. 20005-2011, Telephone
 (202) 434-1606, Fax (202) 434-1690, E-mail
 m.hughes@perkinscoie.com.

19 AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST
20 AND TCG SEATTLE, by LETTY FRIESEN, Attorney at Law, 1875
21 Lawrence Street, Suite 1500, Denver, Colorado 80111,
 Telephone (303) 298-6475, Fax (303) 298-6301, E-mail
 lsfriesen@att.com.

22

23

24

25 Joan E. Kinn, CCR, RPR
 Court Reporter

0178

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

2 CHAIRWOMAN SHOWALTER: Good afternoon, this
3 is a continuation of our open meeting, and we have on
4 our agenda an item that is not strictly speaking an open
5 meeting item but is scheduled now for the convenience of
6 the parties. It is a hearing in the matter of AT&T
7 Communications of the Pacific Northwest and TCG Seattle
8 with Qwest Corporation, I should have said it's the
9 first part of the title is in the matter of the Petition
10 for Arbitration of those parties, Docket Number
11 UT-033035, and we're here on a hearing on the
12 Arbitrator's report.

13 I'm Marilyn Showalter, Chairwoman of the
14 Commission, and with me on the Bench are Commissioners
15 Dick Hemstad and Pat Oshie.

16 And could we take appearances.

17 MS. FRIESEN: Yes, good afternoon, Letty
18 Friesen here on behalf of AT&T Communications of the
19 Northwest Pacific, Inc., and TCG Seattle.

20 MS. HUGHES: Good afternoon, Mary Rose Hughes
21 with Perkins Coie, outside counsel to Qwest Corporation.

22 CHAIRWOMAN SHOWALTER: All right, and because
23 the issues raised are raised by AT&T, I assume that it
24 makes the most sense for you to go first raising your
25 objections and then to hear from Qwest. There are only

0179

1 three issues. You can assume we have read the
2 Arbitrator's report and your briefs. Is a half an hour
3 each side sufficient?

4 MS. FRIESEN: Well, I think it depends on how
5 you want to do the issues. We could do all three issues
6 and we argue them and then Mary Rose. Alternatively I
7 could do issue three, and then you could hear from Mary
8 Rose, we could back and forth that way. I think it's
9 probably preferable to go back and forth so we can take
10 a point-counterpoint within the issue.

11 CHAIRWOMAN SHOWALTER: All right, well, then
12 let's take no longer than ten minutes apiece for each
13 issue.

14 MS. FRIESEN: Okay.

15 CHAIRWOMAN SHOWALTER: And I'm not sure we
16 will need ten minutes, but why don't we proceed that
17 way. And so why don't you take up the first issue in
18 your brief.

19 MS. FRIESEN: Okay, thank you very much.

20 The first issue is entitled Issue Number 3,
21 and it has to do with the definition of a tandem office
22 switch. It has less to do with the definition itself,
23 which the ALJ adopted Qwest's, and Qwest's definition
24 frankly is a restatement of the FCC's rule, the problem
25 we have is implementing that provision. AT&T has been

0180

1 negotiating with Qwest for well over a year now on what
2 the provision itself means. We had proffered language
3 that would clear up that implementation problem, and the
4 ALJ rejected our language. Having adopted Qwest's, we
5 are still stuck with the difficulty of how do we
6 implement.

7 Qwest has repeatedly, although in different
8 veins, argued that we have to prove we are actually
9 serving customers in a comparable geographic area to
10 what their tandem switches are serving. What they're
11 saying or what they have been saying in negotiations is
12 that we need to count loops. As you know, loops are
13 connected to customers, and it's not different than
14 counting customers. The FCC has been really clear on
15 what the requirements are, and the FCC in interpreting
16 its own rule, which is the language that Qwest has
17 adopted, says that you only have to show that the
18 switches are capable of serving a comparable geographic
19 area. You can find that in Paragraph 309 of the
20 Virginia arbitration order wherein the FCC has
21 interpreted its own rule.

22 AT&T has proven that its switches are, in
23 fact, capable of serving a similar geographic area to
24 those of Qwest's tandems. They have essentially
25 conceded that point, they being Qwest, in the TRO

0181

1 proceeding, and they did concede it in fact in the
2 arbitration. So the question remains, why do we have to
3 come up with a test. Why is it that the ALJ in this
4 particular instance didn't resolve the issue, didn't
5 resolve the dispute.

6 Qwest claims that it's because you don't
7 resolve factual issues in an arbitration, that the
8 arbitration is just for determining contract language.
9 Well, I would submit to you that that is not the case.
10 In fact, the arbitration is for resolving the disputes
11 between the parties and only the disputes between the
12 parties. And the FCC instructs that to the extent state
13 commissions decide they don't want to resolve those
14 disputes, then the parties have to bring the disputes to
15 the FCC. And that's what happened in the Virginia
16 arbitration decision, the Virginia commission decided
17 not to resolve the disputes. So we've got a similar
18 problem here. We have this one provision, the parties
19 can not agree on how to implement it, and we're asking
20 you guys to resolve that for us. Tell us what the test
21 has to be, what test does AT&T's switches have to meet
22 before Qwest will pay the tandem rate.

23 Now as we suggested, it's the FCC says is the
24 switch capable of serving a comparable geographic area.
25 That's all the FCC says. The FCC does not say look at

0182

1 the underlying infrastructure and measure it. It
2 doesn't say count loops and see if you have 80% of the
3 loops serving the respective rate centers that subtend
4 the tandems. It merely says determine whether or not
5 the switch is capable of serving a similar geographic
6 area. If it is, then Qwest should pay the tandem rate,
7 and that's AT&T's position.

8 We hope not to have to come back and litigate
9 this particular issue, because we have properly put it
10 before the Commission. The record amply reflects that
11 the parties have been negotiating the issue and that
12 AT&T presented the issue in the arbitration, and so
13 we're asking you for a resolution, hopeful that we don't
14 have to come back just to resolve this issue. We can't
15 agree, and we have been negotiating for some time on it.
16 Thank you.

17 CHAIRWOMAN SHOWALTER: Well, I will just ask
18 one question. Qwest in its brief on the bottom of page
19 2 discusses whether you have proposed language to us in
20 this proceeding here today that was not before the ALJ.
21 Is that the case? I'm looking at the bottom of page 2,
22 there is even less support for the language AT&T
23 proposes for the first time in its petition for review.

24 MS. FRIESEN: You know, I'm sorry, but I
25 don't recall what language it is that we're proposing

0183

1 for the first time.

2 CHAIRWOMAN SHOWALTER: Well, maybe we can
3 hear from Qwest, and if I still have a question, I will
4 ask it again.

5 MS. FRIESEN: If you look at my petition for
6 review, you will see there's no new language in there.
7 AT&T had offered to Qwest sort of a factual statement.

8 CHAIRWOMAN SHOWALTER: Maybe this has to do
9 with another issue. I now realize that I was reading
10 the beginning thinking that was the beginning part, but
11 it wasn't on item 3, I'm sorry.

12 Okay, let's hear from Qwest then.

13 MS. HUGHES: Thank you, Madam Chairwoman,
14 Commissioners. With respect to Issue 2, there is an
15 issue that's common to Issue 5 as well, and I would like
16 to address that up front with respect to both issues.
17 It won't delay my time on Issue 2.

18 CHAIRWOMAN SHOWALTER: Now, wait, are we on 2
19 or 3?

20 MS. HUGHES: We're on 2, but the comments
21 that I would make, the preparatory comments I would make
22 with respect to Issue 2 apply equally with respect to
23 Issue 5, so rather than say them twice, I will --

24 CHAIRWOMAN SHOWALTER: But I thought we were
25 on 3, Issue 3. One of the problems here is we have

0184

1 three issues in front of us, but they are named Issue --

2 MS. HUGHES: 3, 5, and 17.

3 CHAIRWOMAN SHOWALTER: Right.

4 MS. HUGHES: With respect to Issue 3, several

5 -- there is one issue that is common to both Issue 3 and

6 Issue 5. Rather than say it twice with respect to Issue

7 3 and Issue 5, if I can I will address that one issue

8 now, and then I will address more specifically Issue 3.

9 This arbitration is conducted pursuant to a
10 federally mandated time frame. The purpose of the
11 arbitration is to determine contract language, language
12 that will go into the contract that will be the basis of
13 the parties' business relationship under that contract
14 for the term of the contract, which in this case is
15 three years. The purpose of this arbitration is not to
16 assume disputes under contract terms, assume facts that
17 might apply to those disputes, and make decisions or
18 declarations about how those disputes might be resolved
19 on those facts if in fact those disputes actually
20 materialize.

21 In determining the proper contract language
22 to go into this contract between Qwest and AT&T, the
23 Commission's job is to look at competing contract
24 language proposed by the parties and to determine based
25 on the governing law, sound public policy, and the

0185

1 record that the parties have presented to this
2 Commission which party's contract language is more
3 appropriate to go into this interconnection agreement.
4 That is what Judge Moss did here. With all due respect,
5 he specifically declined AT&T's request that he assume
6 that this Commission will order specific contract
7 language, that he assume that under that Commission
8 ordered contract language the parties will have a
9 specific dispute, that he assume facts that AT&T
10 suggests might materialize in the future, and that he
11 right now as part of the definition of a tandem switch
12 state how those premature yet to develop disputes might
13 be resolved. In every respect Judge Moss did exactly
14 what he should have done, and Qwest respectfully submits
15 that the Commission should adopt his resolution here.

16 With respect to Issue 3, the definition of a
17 tandem switch, he heard competing proposals on what that
18 definition should be. Exactly like the commissions in
19 Minnesota, which have previously been presented with
20 AT&T's request to apply a definition, and the
21 commissions in Colorado, he declined to make premature
22 findings on disputes that have not materialized.
23 Further, he looked at the language that both parties
24 were proposing, and he said quite correctly that under
25 the language that AT&T itself proposes and that Qwest

0186

1 has agreed to, the parties have said if they can not
2 agree on whether a specific switch is or is not a tandem
3 switch under this definition, the parties will perform a
4 fact based analysis of geography.

5 Judge Moss correctly said that what AT&T is
6 asking the Commission to do here is completely in
7 conflict with agreed upon language and makes no sense.
8 It would render that agreed upon language a nullity. So
9 with all due respect, Qwest submits that ALJ Moss did
10 exactly what was proper here. In that regard, he did
11 the exact same thing as the two previous commissions who
12 have heard this same dispute did, and we believe that
13 the Commission should adopt the language as proposed by
14 Qwest.

15 In its petition for review, AT&T is no longer
16 challenging the language. To be clear, they're agreeing
17 for purposes now that Qwest's definition of tandem
18 switch is the appropriate definition, but they're asking
19 the Commission to simultaneously rule as part of that
20 definition that every single switch in this state is a
21 tandem switch of AT&T's and TCG's, and it's that latter
22 piece that we say is totally inappropriate.

23 CHAIRWOMAN SHOWALTER: Okay, shall we move on
24 to the next issue.

25 MS. FRIESEN: Yes, I'm assuming you don't

0187

1 want responses.

2 The next issue is Issue 5, and it has to do
3 with how calls are rated and routed and in particular
4 whether or not Qwest can use its definition of exchange
5 service to prevent AT&T from offering an FX competitive
6 service, which is typically referred to as VNXX or
7 sometimes FX-like service.

8 CHAIRWOMAN SHOWALTER: But now this is one
9 where are you in front of us today suggesting that we
10 need to adopt the language that you originally proposed
11 to the Arbitrator, or are you proposing to us today some
12 different language than was proposed to the Arbitrator?

13 MS. FRIESEN: We are proposing today, we have
14 offered up some language to Qwest prior to turning in
15 our petition for review based upon the ALJ's
16 recommendation that we go back to the drawing table and
17 negotiate. As you recall from his report, he
18 reluctantly adopted Qwest's definition, recognizing that
19 it could be used in a discriminatory fashion against
20 AT&T and other providers of FX service.

21 CHAIRWOMAN SHOWALTER: But he also said, if
22 you can't agree on something, he is going with the Qwest
23 and not AT&T's language because he's got to go with one
24 or the other. So my specific question is, isn't the
25 only thing in front of us whether the Arbitrator should

0188

1 have put the default on Qwest's language or your
2 language, and we don't have in front of us any other
3 language?

4 MS. FRIESEN: You have in front of you
5 language that AT&T has offered.

6 CHAIRWOMAN SHOWALTER: What right do we have
7 to order that?

8 MS. FRIESEN: We're asking you to just
9 consider it. Now if you adopt what the ALJ has said, we
10 have some problems with what he said, so it's really a
11 twofold reconsideration that we're asking you to take.
12 Number one is that we have proffered some language, we
13 will hope that you consider it. We did that in the vein
14 requested by the ALJ. The ALJ set it up such that Qwest
15 has no incentive now to negotiate further. If they
16 default to Qwest's language, Qwest will adopt that, and
17 there is no more negotiation.

18 CHAIRWOMAN SHOWALTER: Right. But supposing
19 we love your proposal, what can we do about that? Isn't
20 it the scheme here that this is the so-called baseball
21 style negotiation, and each side puts forth its best
22 language, and if they can't agree, it goes to the
23 Arbitrator, who picks one or the other? I don't see how
24 the --

25 MS. FRIESEN: The language was offered, if I

0189

1 might, I'm sorry to interrupt, the language was offered
2 to help cure some of the problems we have with simply
3 adopting Qwest's language, not the least of which, and
4 the ALJ's determination, as you will recall it's not
5 merely a determination that Qwest's language will
6 govern, but it's also a determination that the parties
7 will engage in a bill and keep arrangement. The problem
8 with bill and keep with respect to FX and VNXX service
9 is that you can't distinguish very easily on your
10 network local traffic from VNXX traffic from anything
11 else that appears to be within the NPA-NXX matches. So
12 that's the difficulty that we're having, we're trying to
13 continue to operate within the reasoning of the ALJ but
14 offer up some solutions to problems that we have
15 discovered with the decision itself.

16 CHAIRWOMAN SHOWALTER: Expressly what is our
17 authority to choose language that is neither what Qwest
18 last offered before arbitration or what you last
19 offered?

20 MS. FRIESEN: What the ALJ does is consider
21 language as you mentioned in the baseball style
22 arbitration and pick one or the other. In this case, I
23 don't think this Commission has any less authority than
24 the ALJ has to do that. What we have done is proffered
25 up language that we believe is consistent with the ALJ's

0190

1 ruling and the evidence in the record, and we're asking
2 you to consider that in baseball style arbitration as
3 well.

4 CHAIRWOMAN SHOWALTER: It seems to me the
5 most we can do is say we like that language, and if
6 Qwest and AT&T agree on it, that's wonderful, but if
7 they don't, the default is, and we have two choices,
8 Qwest's language or your original language.

9 MS. FRIESEN: We're faced with a situation
10 that we believe Qwest will no longer or Qwest really
11 doesn't have the incentive to negotiate further, as you
12 might understand. They have won, they got what they
13 wanted. They did not get, however, the ability to
14 discriminate, we don't believe, against our FX service
15 and their FX service with respect to the use of this
16 exchange service definition.

17 We are, however, troubled by the bill and
18 keep requirement of the order. We don't know how to
19 implement that, and QwestI would venture doesn't
20 either. That very issue came up before the FCC in a
21 case called Starpower Communications LLC, versus Verizon
22 South, Inc., and there the FCC recognized this very same
23 issue wherein Verizon was attempting to use its
24 definition of local service or local, let me get that
25 right for you, its definition in its tariffs of the

0191

1 local serving area against Starpower to offer VNXX
2 services.

3 And several things came up in addition to the
4 bill and keep type proposals. There the FCC recognized
5 that you can't distinguish the kinds of traffic, and
6 it's FCC Order Number 03-278. If I might, I would like
7 to read just a couple of paragraphs so you will see the
8 parallels between the issues in this case and what the
9 FCC determined with respect to it, which is why I'm
10 coming back to you today to say even if you don't adopt
11 our language, please help us with trying to figure out
12 how we're supposed to do bill and keep when we can't
13 distinguish the traffic, we don't have the mechanisms in
14 place for that. So permit me, if you will, just to read
15 from this order very briefly a couple of paragraphs.
16 The first I would like to read to you is Paragraph 9,
17 and it says:

18 For the purposes of billing its own
19 customers, Verizon South --

20 CHAIRWOMAN SHOWALTER: Be sure to go slow
21 enough for the court reporter.

22 MS. FRIESEN: (Reading.)

23 Verizon South rates calls to Starpower's
24 customers as either local or toll based
25 upon NPA-NXX codes assigned to the

0192

1 Starpower customer, not based upon the
2 physical location of the Starpower
3 customer. In other words, for each
4 call, Verizon South compares the NPA-NXX
5 of the calling party's telephone number
6 with the NPA-NXX of the called party's
7 number, and if the NPA-NXX's correspond
8 to the same local calling area, Verizon
9 South rates and bills the call as a
10 local call under its tariff regardless
11 of whether the two parties actually are
12 physically located in the same local
13 calling area.

14 So that sets up the issue for you.

15 The next paragraph I would like to read from
16 very briefly is Paragraph 12.

17 COMMISSIONER HEMSTAD: Read it slowly again.

18 MS. FRIESEN: I will.

19 Verizon South observes that the tariff
20 defines local service as the telephone
21 service furnished between customer
22 stations located within the same
23 exchange area.

24 So here you begin to see that they are
25 comparing just like Qwest is their tariffs, their

0193

1 definitions of the local exchange area, and where the
2 customers are located.

3 Now Verizon concedes that it offers in this
4 decision an FX service just as Starpower did. And then
5 getting to the part that's really most dispositive to
6 the problem that we have here, here the FCC is
7 acknowledging that this matching of NPA-NXX is the way
8 carriers rate and route calls in the industry, and they
9 have done that for a very long time, and it says:

10 Indeed, Verizon South apparently lacks
11 the technical capability to identify
12 virtual NXX calls as non-local based on
13 the physical end points of the call.

14 And then going down into what is Footnote 63
15 in this order, it says:

16 Noting that the virtual NXX traffic can
17 not be distinguished from the local
18 traffic at Verizon's end office
19 switches, the parties to an
20 interconnection agreement would have to
21 conduct traffic studies or develop a
22 factor to identify the percentage of the
23 VNXX traffic for Verizon which would
24 then tell them what to pay or what not
25 to pay.

0194

1 You would have to try and distinguish, in
2 other words what they're saying, what I'm trying to tell
3 you is you have to distinguish the local traffic which
4 is paid for via recip comp from the VNXX and the FX
5 traffic which would be done on a bill and keep basis
6 now. We don't have the systems in place to do that.
7 Verizon didn't have the systems in place to do that. I
8 think it's pretty fair to say that Qwest today doesn't
9 have the systems in place to distinguish those traffic.
10 So we really don't have any way to implement the order
11 in this instance, and so we're asking that you
12 reconsider the order and assume that this traffic should
13 be billed on a recip comp basis and not on the bill and
14 keep since we can't distinguish at this juncture.

15 CHAIRWOMAN SHOWALTER: What was the date of
16 that order?

17 MS. FRIESEN: This was released November 7,
18 2003.

19 CHAIRWOMAN SHOWALTER: And what is its
20 number?

21 MS. FRIESEN: It's FCC Order Number 03-278.

22 CHAIRWOMAN SHOWALTER: Okay.

23 COMMISSIONER HEMSTAD: I'm trying to get the
24 procedural issue clear in my mind as Chairwoman
25 Showalter initiated and now your additional comments

0195

1 here. First, in your offering new language, isn't that
2 in effect asking us or you are seeking a second bite of
3 the apple having lost in front of the Arbitrator, and
4 now you're asking for taking a new cut at language that
5 the Arbitrator didn't have in front of him. But then in
6 any event, whether this issue of bill and keep has a
7 solution, was that essentially offered by the
8 Arbitrator, or was that part of Qwest's initial
9 baseball?

10 MS. FRIESEN: I mean that's two questions I
11 think.

12 COMMISSIONER HEMSTAD: Yes.

13 MS. FRIESEN: Let me answer the first one on
14 procedure, and I think it's best answered by looking at
15 what a piece of the language is that we proffered so you
16 will see that we're not straying from what the ALJ's
17 reasoning was. The ALJ told the parties, in particular
18 told Qwest, you may not use this language to
19 discriminate against AT&T's FX-like service. That is to
20 say, you can't charge toll on their calls while you
21 don't charge your own customers toll. So AT&T offered
22 up some language, rather than leaving that in the order,
23 put it in the contract, and the only language that we
24 have proffered is a single sentence that says:

25 This definition does not prevent either

0196

1 party from providing FX or FX-like
2 service and shall not affect the
3 compensation between CLEC and Qwest for
4 such traffic.

5 Now FX and FX-like service are amply defined
6 in the record, so we know what those are. And all we're
7 trying to do here is adopt what the ALJ said and make it
8 express. We think that this Commission, just like the
9 ALJ had the authority to decide language, has the
10 authority to decide that language today. We don't think
11 it's inconsistent with the Arbitrator's order.

12 Moving to the --

13 COMMISSIONER HEMSTAD: So you would say
14 that's simply an elaboration or a clarification on the
15 decision that the Arbitrator made?

16 MS. FRIESEN: That's exactly what --

17 CHAIRWOMAN SHOWALTER: But if that's your
18 interpretation of the ALJ's decision, what authority did
19 the ALJ have, the Arbitrator have to change a word of
20 language? Wasn't the Arbitrator limited to Qwest's
21 language or your language with a suggestion for how you
22 might go off and solve it by yourselves, but under what
23 authority did an Arbitrator have to change language?

24 MS. FRIESEN: The Arbitrator has the
25 authority to resolve the issues. Now if that means

0197

1 proposing contract language that resolves the issue, I
2 think he has that authority. And if you look back at
3 the 271 process, you will see in the multistate 271
4 multiple times where the Arbitrator in that context
5 proffered language that you will find in Qwest's SGAT
6 today, and Qwest at no time ever balked at that.

7 COMMISSIONER HEMSTAD: But this isn't a 271
8 proceeding.

9 MS. FRIESEN: It's a similar context though.
10 The SGAT is quite similar to the ICA. In fact, it forms
11 the basis of the ICA that we have adopted here.

12 COMMISSIONER HEMSTAD: I understand, but I
13 have had the impression from the beginning that this is
14 a very structured process, that we deal with
15 Arbitrator's decisions, and appeals from that here, and
16 then in turn appeals to the Federal District Court if
17 you're willing to go there.

18 MS. FRIESEN: I don't think you will find
19 law, at least I haven't been able to find law, that
20 says, arbitrator, thou shalt not propose language that
21 resolves disputes. I have not seen that.

22 CHAIRWOMAN SHOWALTER: Proposed language that
23 resolves a dispute is very different than deciding the
24 language or ordering the language. We can propose the
25 same language to you if you want to go off and take it,

0198

1 but it is a very critical distinction here. We have I
2 think been operating under the assumption that the
3 Arbitrator is limited in the end to picking one or the
4 other, and the Arbitrator can suggest and propose but
5 can not decide any other language. Now if you have
6 authority otherwise, you should let us know. Now the
7 271 proceeding, (a) was not even a quasijudicial
8 proceeding of any kind, (b) the arbitrator's proposals
9 could be brought to a state commission, and the state
10 commission was limited to making a recommendation to the
11 FCC, so it was a much less formal process than I think
12 this is.

13 MS. FRIESEN: Well, Madam Chairwoman, I don't
14 disagree with you that it was perhaps less formal, I'm
15 not sure it was but perhaps. I have no case authority
16 that says an arbitrator, and I don't think Qwest does
17 either, that says an arbitrator can not resolve a
18 dispute by proffering language.

19 CHAIRWOMAN SHOWALTER: Ordering. Proffer
20 means a different thing than order.

21 MS. FRIESEN: Ordering language.

22 CHAIRWOMAN SHOWALTER: All right. So that
23 becomes I think an important legal interpretation,
24 either we should find either case authority one way or
25 the other or go back to language or statutes that guide

0199

1 us on what our authority is here.

2 COMMISSIONER HEMSTAD: Then what about my
3 second point?

4 MS. FRIESEN: Your second point, we offered
5 language as resolution to the bill and keep issue in
6 that case. There that language sort of contains our
7 proposal of what we ought to do in lieu of bill and
8 keep, because we have the difficulty in trying to figure
9 out what VNXX traffic is and segregating that from local
10 traffic, because they both look alike to our networks.
11 And so there that's as much as we're --

12 COMMISSIONER HEMSTAD: When you say there?

13 MS. FRIESEN: That language that we offer is
14 much --

15 COMMISSIONER HEMSTAD: To the Arbitrator?

16 MS. FRIESEN: Yes. Well, no, the language
17 that we offer to you in resolution of the bill and keep
18 problem is as much a solution that we're asking you to
19 adopt as it is the language we're asking you to adopt.
20 And here again, we didn't give this to the Arbitrator,
21 because we didn't know he would come up with the kind of
22 solution that he came up with. We have discovered that
23 Qwest has no incentive to continue to negotiate the
24 issue so we can come to an agreed-upon language.

25 COMMISSIONER HEMSTAD: Very narrowly then,

0200

1 the Arbitrator's directive to use bill and keep was
2 something that the Arbitrator himself created, it was
3 not being offered by either of the parties?

4 MS. FRIESEN: That's correct, AT&T didn't ask
5 for bill and keep, and he did decide that issue.

6 COMMISSIONER HEMSTAD: And this then partakes
7 of earlier discussion, is it your view the Arbitrator
8 had the authority to do that?

9 MS. FRIESEN: Within the context of resolving
10 the dispute, I think he does have the authority to find
11 a solution, and that's his solution.

12 CHAIRWOMAN SHOWALTER: Are we ready to hear
13 from Qwest yet?

14 MS. FRIESEN: Yes.

15 CHAIRWOMAN SHOWALTER: We took a little
16 longer than our ten minutes there.

17 Go ahead, Ms. Hughes.

18 MS. HUGHES: Thank you, Your Honor. If I may
19 put this in context, on the definition of exchange
20 service, Arbitrator Moss had two definitions in front of
21 him, the definition that AT&T proposed in its Petition
22 for Arbitration which it filed on August 8th, and the
23 counterdefinition of exchange service proposed by Qwest.
24 The ALJ rejected AT&T's definition of exchange service
25 and adopted Qwest's definition of exchange service. He

0201

1 ordered Qwest's language, Qwest's definition of exchange
2 service, into the new interconnection agreement between
3 AT&T and Qwest. He recommended ordering Qwest's
4 definition of exchange service into the new
5 interconnection agreement between Qwest and AT&T. And
6 in that respect, we believe his recommendation was
7 absolutely proper. It was proper on the law, it was
8 proper on public policy grounds, it was proper on the
9 record that was created for him during the months of a
10 structured, very structured arbitration process over
11 which Judge Moss presided.

12 In rejecting AT&T's definition, Judge Moss
13 said some very important things that this Commission
14 needs to be aware of. He said AT&T's proposed
15 definition raised too many imponderables, he said it had
16 potentially unacceptable consequences in terms of
17 intercarrier compensation, and he repeatedly said that
18 on the record before him there was insufficient support
19 for the definition that AT&T proffered.

20 Qwest's definition is the proper definition
21 of exchange service. We respectfully submit this
22 definition is in the SGAT's throughout Qwest's 14 state
23 region. It's the definition this Commission approved
24 over a lot of scrutiny by all CLEC's involved in the 271
25 process. It's the definition that's well grounded in

0202

1 this Commission's rules governing the definition of an
2 exchange, the definition of local calling area. It's
3 well grounded in the '96 Act. It's the definition that
4 is in place in this state in numerous interconnection
5 agreements between carriers. It is an utterly
6 uncontroversial definition in practice amongst Qwest and
7 other carriers, and there's a reason for that. It's
8 because it is well grounded in the law.

9 The commissions in Minnesota, the commissions
10 in Colorado reached the exact same conclusion that Judge
11 Moss reached here, and that is Qwest's definition is the
12 correct definition. It has been ordered into the
13 interconnection agreements in Colorado and in Minnesota,
14 and we respectfully submit it belongs here as Judge Moss
15 properly ruled.

16 Now, here, today, AT&T is not defending the
17 definition of exchange service that it proposed in its
18 Petition for Arbitration back in August. Instead it has
19 offered just two weeks ago entirely new language for the
20 first time in its Petition for Review, and it asks this
21 Commission not to consider language that went through
22 the arbitration process, that was subject to two rounds
23 of testimony on both sides, sworn testimony, that was
24 subject to discovery, that was subject to
25 cross-examination, that was subject to Judge Moss's

0203

1 questions and probes, that was subject to post hearing
2 briefing. Now that the record is completely closed, a
3 day and a half before petitions for review were due to
4 be filed with Your Honors, AT&T sends entirely new
5 language to Qwest and to this Commission, and it says
6 essentially forget what's happened, we've got new
7 language, and we want you now to look at our new
8 language.

9 The only support we have for this new
10 language is a pleading that we received two weeks ago,
11 three and a half pages from AT&T's attorneys asserting
12 that this new language, pages of it, now respond to what
13 AT&T believes were Judge Moss's concerns. With all due
14 respect, Judge Moss addressed his concerns in his order.
15 He said, this is the proper definition of exchange
16 service, if in the future AT&T has a concern or a
17 problem with implementation of this definition such that
18 AT&T believes any specific service of AT&T's or Qwest's
19 is being improperly applied to this definition, AT&T has
20 recourse, AT&T has recourse under the dispute resolution
21 provisions of the parties' interconnection agreement,
22 and of course AT&T may bring to the Commission a
23 complaint concerning any specific service.

24 And in this regard, what Judge Moss did is
25 identical to what the commissions in Colorado and

0204

1 Minnesota did. They said AT&T complains vigorously
2 about potential future discrimination in terms of how
3 this definition might apply to future services,
4 undefined, vague undefined services of AT&T or other
5 carriers who may opt into this agreement. Those
6 disputes if they ever develop are for the future when
7 the Commission will have in front of it a fully
8 developed record based on facts then developed on the
9 record. It is simply premature to try and take into
10 account ill defined, undefined, vague, unknown,
11 unknowable future services.

12 MS. FRIESEN: I object, this is not an
13 accurate representation of what the other commissions
14 have said, and I just want the record to reflect that
15 objection.

16 CHAIRWOMAN SHOWALTER: All right. But I wish
17 you would address the question, does an Arbitrator or
18 this Commission have authority to order language
19 different from what one side or the other proposes?
20 Where are the ground rules for this sort of proceeding
21 laid out, and what do they say?

22 MS. HUGHES: I am unaware of any rule that
23 this Commission has adopted specifying that in
24 arbitration it prefers baseball approach. Some
25 commissions I know do tell the parties in advance that

0205

1 they regard this as baseball arbitration, so please put
2 up your best language, because we're going to take one
3 or the other. Other commissions have adopted a more
4 flexible approach, and they have looked at the dispute,
5 and they have fashioned language that might be different
6 from language advocated by either side.

7 And so I think the short answer to your
8 question is that it is permissible for an arbitrator to
9 recommend resolution of a dispute along lines that have
10 not been advocated, at least not 100%, by either party.
11 But that is not what's happening here. We do have Judge
12 Moss's recommendation, and his recommendation is that
13 this Commission adopt Qwest's definition because it's
14 the proper definition. AT&T has come back with totally
15 new language and says, well, here, consider this, and so
16 that is what Qwest respectfully submits is totally
17 improper.

18 CHAIRWOMAN SHOWALTER: Improper? I mean do
19 we, do the three of us have authority if we want to
20 exercise it to order the new language that AT&T put
21 forth a couple weeks ago?

22 MS. HUGHES: Chairwoman Showalter, if that
23 language were anchored in a record that this Commission
24 felt was a proper record and that fully explored the
25 parameters and gave both sides full opportunity to

0206

1 present to you evidence concerning the potential impact
2 of that language, I think the answer to that would be
3 yes. But what we have here is no record. We have an
4 end run around a very deliberative arbitration process.
5 We have no witnesses before you today saying what the
6 impacts of this language are or are not. Those
7 witnesses were before Judge Moss, and they addressed
8 other language.

9 Now AT&T can not have it both ways. If they
10 say this new language is merely an enhancement of
11 language that was in front of Judge Moss, all we are
12 doing is tweaking what we think his concerns were and
13 capturing what we think he actually ordered, the answer
14 to that is that's totally wrong. Judge Moss ordered
15 what he ordered, which was Qwest's definition. He
16 specifically repeatedly stated there was an insufficient
17 record to support what AT&T wanted. If on the other
18 hand AT&T says, no, this is new language, this is
19 different, the Commission should consider this, the
20 response to that is, well, even more so, there is
21 absolutely no record to support this language.

22 And this Commission has a well respected
23 history of anchoring its decisions in the record and
24 understanding the impacts of its decisions moving
25 forward. There is no record here. We have had this

0207

1 language for two weeks, and we have no testimony on it,
2 there's been no discovery concerning it, Judge Moss has
3 not reviewed it. This trivializes the arbitration
4 proceedings that have taken place here over the last two
5 or three months pursuant to the federally mandated
6 statute.

7 I am prepared to go through this language and
8 demonstrate to you why it is inappropriate. But again,
9 the bottom line is that to the extent it is intended to
10 advance the same position that AT&T presented to Judge
11 Moss, it should be rejected for all the reasons that
12 Judge Moss said, the record concerning it was incomplete
13 and inadequate, and it had potentially far reaching
14 impacts on intercarrier compensation in this state.

15 CHAIRWOMAN SHOWALTER: I think we need to
16 move on to the next issue, but I do think you should
17 give a minute on the bill and keep issue.

18 MS. HUGHES: Yes, and also I would like to
19 address the Starpower decision if I can, I'm sorry.

20 CHAIRWOMAN SHOWALTER: Well, we used about as
21 much time as AT&T, and both of you used more than we
22 were going to allow.

23 MS. HUGHES: Well, if I could say very
24 quickly on Starpower, Starpower has nothing whatsoever
25 to do with this case. It was not recommended to Judge

0208

1 Moss at all. It was a complaint proceeding on a damages
2 bifurcated proceeding in front of the FCC. It was a
3 contract interpretation case. Ms. Friesen did not quote
4 to you potentially the only relevant portion of that
5 decision, which is Footnote 68 where the FCC
6 specifically says, this is a contract interpretation
7 case, it's based on Verizon's tariffs in that state, we
8 are not making law, we are not making policy, we are
9 defining a specific dispute between two carriers, who
10 were not, of course, Qwest or AT&T, and we're not
11 interpreting Qwest's tariffs here.

12 With respect to bill and keep, Qwest did not
13 address bill and keep during the arbitration process,
14 nor did AT&T. It was not an issue that was in front of
15 Judge Moss in prefiled testimony. And again, it's not
16 something that he ordered in his recommended decision.
17 He ordered Qwest's language. So the implications of
18 what AT&T is suggesting in its new language were not
19 explored on the record.

20 COMMISSIONER HEMSTAD: So what did the
21 Arbitrator say about bill and keep, it was a suggestion?

22 MS. HUGHES: Yes, Commission Hemstad, I
23 believe that is the proper word for it. ALJ Moss
24 suggested that bill and keep may be appropriate, but
25 again he did not order that.

0209

1 CHAIRWOMAN SHOWALTER: All right, we should
2 move to the last issue.

3 MS. FRIESEN: Thank you. The last issue is
4 Issue 17, and this one you're going to have a deja vu
5 on. In the 271 proceeding you will recall that this
6 Commission ordered that CLEC's could use private line
7 facilities to also comingle or send local traffic over
8 as well so that this thing that is an interconnection
9 facility, the line that runs from AT&T to Qwest, if we
10 buy it in a private line tariff, we can still put local
11 traffic on it, and we can combine it with our access
12 traffic. What we do is we channel it so we know which
13 is which. You said we could do that. The FCC has now
14 said we can do that.

15 In the 271 we argued, well, ought we not to
16 pay a UNE rate for the local traffic, that is a TELRIC
17 rate, and the access rate for what is actually access
18 traffic rather than overpaying. You determined that on
19 the intrastate basis we could do that. The FCC said,
20 no, you can't create something called a blended rate,
21 you can't ratchet. A blended rate by definition and
22 discussion throughout not only the 271 proceedings in
23 this state but also in the Triennial Review Order is a
24 rate that assumes a UNE rate or a TELRIC rate for local
25 traffic and an access rate for the long distance

0210

1 traffic. So AT&T said, fine, we won't ratchet, we won't
2 create a blended rate. We said, Qwest, if we're going
3 to use this facility that will carry your traffic to our
4 network, we're going to put your traffic on our spare
5 capacity of this private line that we have paid for, we
6 think you have to pay us in proportion to the amount of
7 traffic you're sending consistent with 47 CFR 51709(B).
8 that's what the FCC has said. When you use these kind
9 of interconnection trunks, each party has to pay its
10 proportionate share.

11 Well, Qwest is coming to you and saying now,
12 no, no, no, we don't have to pay anything, you transport
13 our traffic on your spare capacity, and we'll pay you
14 zero, and in fact we won't even charge more for your
15 ability to do that, we'll just let you pay for the whole
16 facility. Well, frankly, it's quite like having a
17 landlord rent you a two-bedroom apartment, tell you he's
18 going to move into the second bedroom, and by the way
19 he's not going to help pay the rent, he's just going to
20 live there. Now if you needed that second bedroom,
21 you're out of luck, you're going to have to go rent
22 another apartment in addition to the one you're already
23 renting, he's used up your spare bedroom. Well, that's
24 the same thing that Qwest is telling you here today, and
25 the ALJ adopted Qwest's position.

0211

1 In Minnesota the commission there found, no,
2 the cost isn't zero, you know, Qwest is using your spare
3 capacity. That costs you something. You will exhaust
4 the capacity on that trunk faster. You're carrying
5 their traffic, they need to compensate you for it, they
6 need to compensate you at the tariffed rate. You're not
7 changing their tariff, and we're not asking to change
8 their federal tariffs. All we're saying is, Qwest, pay
9 your fare. You have chosen and in fact you have argued
10 to the FCC and to this Commission that we can't charge
11 you TELRIC rates for that, we have to charge you the
12 tariffed rates, we have to charge you the private line
13 rate. And so we're asking the Commission to reverse the
14 ALJ's decision in this instance because we believe
15 what's happened is that he has given away our property
16 to Qwest for free, and we think that that is an unjust
17 enrichment under your state law as well as a taking.

18 Now Qwest will argue with you that, well,
19 Colorado went for that, and I will tell you we're about
20 to appeal that decision. Minnesota didn't go for that,
21 and it's because for the very reason I told you in the
22 analogy of the bedroom, you wouldn't let your landlord
23 move into your apartment rent free or, you know, for no
24 contribution at all and take some of your space, and
25 that's the problem we have. This facility and the

0212

1 confusion that Qwest creates in its brief is that
2 they're doing us a favor by allowing us to send our
3 local traffic over it. What they failed to mention is
4 that they too are sending their local traffic over it to
5 us, and so we really believe in this instance that the
6 Commission ought to reverse the ALJ on this particular
7 decision and order Qwest to pay its tariffed rates,
8 those federally tariffed rates.

9 We're not suggesting you change that rate.
10 Them paying their fair share doesn't change the rate, it
11 doesn't change the fact that AT&T has already purchased
12 the facility and we're paying nonrecurring and recurring
13 rates on it. It merely means that AT&T is sending Qwest
14 a bill for its share of its use of that facility. Now
15 we can send them a bill, or they can credit us for 1/28
16 of that or 1/24 or whatever it is, however many piece
17 parts of that spare capacity it's using, it can just
18 credit our bill that it sends to us. But really we're
19 not changing the rate, we're not changing the tariff,
20 we're just saying pay your fair share.

21 CHAIRWOMAN SHOWALTER: Ms. Hughes.

22 MS. HUGHES: Thank you. Again, Qwest submits
23 that the ALJ properly determined that where AT&T chooses
24 at its option to use spare capacity on previously
25 purchased PLTS service, these are circuits purchased out

0213

1 of tariffs --

2 CHAIRWOMAN SHOWALTER: Can you when you're
3 giving these examples just make it clear to us who is
4 purchasing from whom and whose it is. It's always hard
5 to keep the --

6 MS. HUGHES: Certainly. AT&T purchases at
7 its sole discretion out of Qwest's tariffs private line
8 transport.

9 CHAIRWOMAN SHOWALTER: From Qwest?

10 MS. HUGHES: From Qwest, thank you. In the
11 privacy of its own counsel, AT&T with no involvement
12 from Qwest whatsoever decides whether or not it's going
13 to purchase out of these tariffs private line transport.
14 When AT&T purchases from Qwest private line transport
15 for whatever purposes it wishes to use that, you know,
16 presumably for interstate transport purposes, not for
17 local interconnection purposes, AT&T may from time to
18 time find that it has spare circuits on these PLTS
19 facilities. Totally as an option, Qwest has agreed that
20 if AT&T wishes to put local interconnection traffic on
21 these spare circuits, AT&T may do so. It's totally up
22 to AT&T to exercise this option. AT&T is under no
23 compulsion to exercise this option. However --
24 CHAIRWOMAN SHOWALTER: And whose local
25 traffic is it, which way, both ways?

0214

1 MS. HUGHES: Well, AT&T would, because of the
2 way the parties interconnect, AT&T would direct that
3 both parties' traffic go on these spare circuits.
4 Again, they're spare. If AT&T has a use for them other
5 than local interconnection, presumably AT&T would be
6 using them for that purpose. Putting AT&T's traffic and
7 directing, because it's two-way traffic, Qwest's traffic
8 simultaneously to go over these spare circuits is an
9 option that favors AT&T. Because when this option is
10 exercised by AT&T, it avoids other interconnection
11 costs, other interconnection trunk costs that it would
12 otherwise incur.

13 Again, AT&T does not have to choose this
14 option. If it chooses this option, Qwest will allow the
15 option. There's no additional cost to AT&T to choosing
16 this option. Again presumably AT&T will only put local
17 interconnection traffic over these spare circuits where
18 it saves AT&T money to do that. Under this
19 circumstance, as the Colorado commission has properly
20 found, there's no extra cost to AT&T, there's no cost
21 for Qwest to share. AT&T has already purchased these
22 facilities, and it's AT&T that directs that it be used.

23 AT&T is simply wrong in saying with respect
24 to federally tariffed products that it's not changing
25 the cost of the product by asking that Qwest pay for

0215

1 part of the circuit. It absolutely is. At the end of
2 the day what AT&T wants to come away with is a reduced
3 cost for this circuit. There's a quite distinguished
4 body of federal law which this Commission has already
5 adopted and endorsed in the 271 process that says you
6 can not change the price of interstate tariffs. That is
7 set by the FCC. With respect to intrastate tariffs,
8 Judge Moss we believe correctly interpreted TRO language
9 to say that while commingling of traffic is an option
10 that should be allowed, ratcheting the price of those
11 tariff services is not allowed. And we again believe
12 that there's no additional cost here to AT&T, there's no
13 additional cost to share. I think Arbitrator Moss got
14 it right.

15 CHAIRWOMAN SHOWALTER: If AT&T does not elect
16 to send the traffic in this manner, what alternatives is
17 it using?

18 MS. HUGHES: It will go over local
19 interconnection trunks.

20 MS. FRIESEN: Could I respond to that?

21 CHAIRWOMAN SHOWALTER: All right.

22 MS. FRIESEN: If we choose not to use a
23 private line trunk as an efficient way to exchange local
24 traffic between AT&T and Qwest, then both AT&T and Qwest
25 are going to have to come up with an alternative. Qwest

0216

1 can initiate a one-way trunk from its network to our
2 network and vice versa, or we can both lease
3 interconnection trunks on a UNE rate, or we can find
4 some other way to do it, but both parties in that
5 instance will have to figure out something else. This
6 is a benefit to Qwest as well as to AT&T. It allows
7 Qwest not to have to come up with an alternative for
8 getting its traffic to our network as well.

9 CHAIRWOMAN SHOWALTER: Anything else?

10 Well, thank you very much for your able
11 arguments, and we will take them under advisement. I
12 forget if there's a time line here, but if there is one,
13 we'll meet it.

14 MS. FRIESEN: Thank you very much for your
15 time.

16 CHAIRWOMAN SHOWALTER: Thank you.

17 And this hearing and also this open meeting
18 is adjourned.

19 (Hearing adjourned at 2:30 p.m.)

20

21

22

23

24

25