

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In re Application of )  
 U S WEST, INC., and QWEST ) DOCKET NO. UT-991358  
 4 COMMUNICATIONS INTERNATIONAL, ) Volume V  
 INC. for an Order Disclaiming ) Pages 285 - 322  
 5 Jurisdiction, or in the )  
 Alternative, Approving the )  
 6 U S WEST, INC., - QWEST )  
 COMMUNICATIONS INTERNATIONAL, )  
 7 INC. Merger. )  
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9 A prehearing conference in the above matter  
 10 was held on March 13, 2000, at 1:36 p.m., at 1300 South  
 11 Evergreen Park Drive Southwest, Olympia, Washington,  
 12 before Administrative Law Judge DENNIS MOSS.

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The parties were present as follows:

14

15 QWEST COMMUNICATIONS INTERNATIONAL, INC., by  
 RONALD J. WILTSIE, II, MACE J. ROSENSTEIN and GINA  
 SPADE, Attorneys at Law, Hogan and Hartson, 555  
 16 Thirteenth Street Northwest, Washington, D.C., 20004.

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U S WEST COMMUNICATIONS, INC., by JAMES M.  
 VAN NOSTRAND and MARY S. HOBSON, Attorneys at Law,  
 18 Stoel Rives, 600 University Street, Suite 3600,  
 Seattle, Washington 98101-3197.

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U S WEST COMMUNICATIONS, INC., by LISA A.  
 20 ANDERL, Attorney at Law, 1600 Seventh Avenue, Suite  
 3206, Seattle, Washington 98191.

21

LEVEL THREE COMMUNICATIONS, INC., by ROGELIO  
 22 E. PENA, Attorney at Law, Nichols and Pena, 2060  
 Broadway, Suite 200, Boulder, Colorado 80302.

23

AT&T COMMUNICATIONS OF THE NORTHWEST, INC.,  
 24 NEXTLINK WASHINGTON, INC., MCLEOD USA  
 TELECOMMUNICATIONS, by DANIEL WAGGONER, Attorney at  
 25 Law, Davis Wright Tremaine, 1501 Fourth Avenue, Suite  
 2600, Seattle, Washington 98101-1688.

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1 RHYTHMS LINKS, INC., and SBC TELECOM, INC.,  
by ARTHUR A. BUTLER, Attorney at Law, Ater Wynne, 601  
2 Union Street, Suite 5450, Seattle, Washington  
98101-2327.

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COVAD COMMUNICATIONS COMPANY, by CLAY  
4 DEANHARDT, Attorney at Law, 2330 Central Expressway,  
Santa Clara, California 95050.

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COVAD COMMUNICATIONS COMPANY and METRONET  
6 SERVICES CORPORATION, by BROOKS E. HARLOW, Attorney at  
Law, Miller Nash, 601 Union Street, Suite 4400,  
7 Seattle, Washington 98101-2352.

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WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION,  
by RICHARD A. FINNIGAN, Attorney at Law, 2405 Evergreen  
9 Park Drive Southwest, Suite B-3, Olympia, Washington  
98502.

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PUBLIC COUNSEL, by SIMON J. FFITCH, Assistant  
11 Attorney General, 900 Fourth Avenue, Suite 2000,  
Seattle, Washington 98164.

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THE WASHINGTON UTILITIES AND TRANSPORTATION  
13 COMMISSION, by SALLY G. JOHNSTON, Assistant Attorney  
General, 1400 South Evergreen Park Drive Southwest,  
14 Post Office Box 40128, Olympia, Washington 98504-0128.

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24 Kathryn T. Wilson, CCR

25 Court Reporter

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

2 JUDGE MOSS: We'll go on the record in Docket  
3 No. UT-991358, which is styled, In re Application of  
4 U S West, Inc. and Qwest Communications International,  
5 Inc., for an Order Disclaiming Jurisdiction, or in the  
6 Alternative, Approving the Merger.

7 We are at the eve of the evidentiary hearing  
8 phase, and we have pending a partial settlement among  
9 some of the parties in addition to some issues that  
10 remain for full adjudication, so we will talk a bit  
11 about process today. Our basic agenda, as I indicated  
12 off the record, we will, of course, take appearances.  
13 The Bench has pending before it a motion to compel,  
14 responses to certain outstanding discovery, and we'll  
15 talk about that. In fact, I'm prepared to decide that  
16 motion today.

17 We have pending a motion for continuance to  
18 reopen discovery and to permit supplemental testimony.  
19 I will not be announcing the decision on that motion  
20 today. I will talk about that in greater detail in a  
21 moment. We will want to talk about our process for  
22 going forward and our schedule for doing that. I'll  
23 want to get the identity of the panel members who will  
24 be presented in connection with the proposed settlement  
25 agreement. We will want to establish an order of

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1 witness presentation and premark our exhibits. We will  
2 do that largely off the record. And then, of course,  
3 we will take up any other business that may come up  
4 during the course of the conference or the parties wish  
5 to bring to our attention.

6         As you all know, this is a proceeding in  
7 which the commissioners have decided to sit. They are  
8 not available to sit with us this afternoon, and hence  
9 the need to defer until tomorrow some of our process.  
10 The commissioners will be here tomorrow, but we will  
11 not be starting until 10:30 in the morning. That is  
12 the first hour at which they are all available, and  
13 they all wish to participate in our activities  
14 tomorrow. After tomorrow, we can be flexible in terms  
15 of our start time. If you are all here, usually we can  
16 start a little early when that's the case and people  
17 don't have to travel down from Seattle, but we'll  
18 discuss that on a day-to-day basis as we see how the  
19 proceedings go so that we can make the most efficient  
20 use of your time and the Commission's time.

21         We do have an evening session scheduled this  
22 week. I believe it's on the 16th, so that will be a  
23 long day, and you may keep that in mind as we plan  
24 other processes. Mr. ffitich, you are looking  
25 surprised.

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1 MR. FFITCH: No.

2 JUDGE MOSS: Let us begin with the first  
3 order of business, which is to take appearances, and  
4 those of you who have previously entered appearances in  
5 the proceeding need only state your name and whom you  
6 represent. Those of you who are entering an appearance  
7 for the first time today, please share with us the  
8 information concerning your employment, business  
9 address, telephone, facsimile, and e-mail, and we will  
10 start with the applicants, Ms. Anderl?

11 MS. ANDERL: Thank you, Your Honor. Lisa  
12 Anderl representing U S West Communications.

13 MR. VAN NOSTRAND: Your Honor, James M. Van  
14 Nostrand and Mary S. Hobson with the firm of Stoel  
15 Rives, representing joint applicant, U S West  
16 Communications.

17 MR. WILTSIE: Your Honor, Ronald Wiltsie,  
18 Mace Rosenstein, and Gina Spade of the law firm Hogan  
19 and Hartson for Qwest.

20 JUDGE MOSS: I believe that takes care of our  
21 applicants. Let's go down the line.

22 MR. PENA: Rogelio Pena with Nichols and Pena  
23 on behalf of Level Three Communications.

24 MR. WAGGONER: Daniel Waggoner on behalf of  
25 AT&T, McLeod Telecommunications, and Nextlink, and

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1 during the week, also appearing on behalf of those  
2 clients will be Gregory Kopta and Mark Trincherro of  
3 Davis Wright Tremaine.

4 MR. BUTLER: Arthur A. Butler appearing on  
5 behalf of Rhythms Links, Inc., and SBC Telecom, Inc.

6 MR. DEANHARDT: Your Honor, Clay Deanhardt  
7 appearing for Covad Communications.

8 MR. HARLOW: Brooks Harlow appearing for  
9 Metronet Services Corporation and Covad Communications.

10 MR. FINNIGAN: Rick Finnigan appearing on  
11 behalf of Washington Independent Telephone Association.

12 MR. FFITCH: Simon ffitch appearing for the  
13 Public Counsel section of the Washington Attorney  
14 General's office.

15 MS. JOHNSTON: Sally Johnston appearing on  
16 behalf of Commission staff.

17 JUDGE MOSS: Do we have other counsel sitting  
18 in the gallery who wish to enter appearances? Seeing  
19 no indication.... Let us pause for a moment here.

20 The first order of business I have on my  
21 agenda is a motion to compel. It is Mr. Harlow's  
22 motion on behalf of Covad Communications Company, and  
23 that was filed on March 7th, 2000. I understand from a  
24 subsequent letter from you, Mr. Harlow, that has been  
25 withdrawn in part, in particular with respect to Data

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1 Request No. 10 and Data Request No. 16-D. Has there  
2 been any further progress on that? Mr. Deanhardt, are  
3 you going to speak to that?

4 MR. DEANHARDT: Yes, Your Honor, I am. Based  
5 on some supplemental responses we received on the 28th,  
6 we are going to withdraw the motion with respect to  
7 Request No. 10; Request 16, Subpart D; Requests 20 and  
8 21 as to Subparts B through E, but not as to Subpart A.  
9 With respect to Request No. 16, our only concern right  
10 now is Subpart 16-B, as in boy. And we also withdraw  
11 with respect to No. 15. I apologize that's out of  
12 order.

13 JUDGE MOSS: Withdrawn as to 15.

14 MR. DEANHARDT: Yes.

15 JUDGE MOSS: Withdrawn as to 16-D.

16 MR. DEANHARDT: Yes.

17 JUDGE MOSS: Now, on 20 and 21, you listed  
18 some subparts there. Does that have matching subparts,  
19 or which one are we talking about?

20 MR. DEANHARDT: 20 and 21 withdrawn as to all  
21 except for A.

22 JUDGE MOSS: I have the parties' written  
23 argument in response.

24 MR. DEANHARDT: I apologize. Those are the  
25 withdrawals, but based on the supplemental responses, we

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1 are going to need to augment the motion with respect --  
2 and it will be slightly different, but with respect to  
3 Request No. 23. This was not originally part of our  
4 motion because we were originally informed there were  
5 no such documents, but the supplemental response has  
6 indicated some issues that need to be discussed, and we  
7 did not receive that supplemental response until March  
8 8th.

9 JUDGE MOSS: I don't have that one in front  
10 of me so I'm going to need a copy of it.

11 MR. DEANHARDT: Yes, Your Honor. I have one  
12 here that I can give you, and we can make others for  
13 later.

14 JUDGE MOSS: We'll just save that one for the  
15 end. As I was saying, I have the parties' argument as  
16 captured by the motion and the response that was filed.  
17 I guess that was a joint applicants' response. Who is  
18 going to handle this for the joint applicants?

19 MS. ANDERL: I will, Your Honor.

20 JUDGE MOSS: Aside from the addition of Data  
21 Request No. 23 to the set that we are going to take a  
22 look at and aside from the arguments that have been  
23 presented, is there anything else you want to add  
24 Mr. Deanhardt, three minutes or less?

25 MR. DEANHARDT: Yes, Your Honor. I think in



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1 three minutes or less there is one thing that needs to  
2 be changed and a couple of issues to highlight. Let me  
3 start with the change. With respect to Request No. 19,  
4 there was a misunderstanding that was conveyed that is  
5 Covad's fault as to the purpose of Request No. 19. We  
6 request, as U S West has stated in their opposition,  
7 that, in fact, wholesale doesn't run the network, and  
8 this is not a request about a network investment. What  
9 this request related to are the competition issues,  
10 evidence that goes to showing that the effect of the  
11 loss of Qwest as a DSO reseller in Washington will, in  
12 fact, cause competitive harm in this environment in  
13 direct response to Ms. LaFave's testimony. It has to  
14 do with comparing the wholesale budget, which is the  
15 group within U S West that works with the CLEC's and  
16 provides services to the CLEC's with that of  
17 Enterprise, which is their advanced services division  
18 that offers their retail services that compete with us,  
19 so that's the purpose of gathering the information, as  
20 to be able to effectively cross-examine Ms. LaFave on  
21 her testimony regarding competitive issues at U S West,  
22 so that's with respect to No. 19.

23 I do think it's important with respect to  
24 Request No. 12, additional remarks. Request No. 12 is  
25 the request that goes to VDSL issues, and I think there

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1 are two important points to be made. The first is  
2 Request 12, and I believe it's 12-B, asks U S West  
3 whether they intend to deploy VDSL in Washington, and  
4 U S West objected to that request, which seems to me to  
5 have direct bearing here. Second, I think it's  
6 important to understand the purpose behind Request No.  
7 12 and the VDSL issues. The purpose here is that we  
8 presented direct testimony in the form of Mr. Moya's  
9 testimony regarding what we believe are efforts by U S  
10 West as a general rule to try and prevent CLEC's from  
11 having access to network elements, particularly in the  
12 DSL space. When you couple that with the loss of Qwest  
13 as a reseller of DSL and a competitive LEC -- there are  
14 a number of issues I can get into with that, but I  
15 won't for the sake of time -- we think it has a  
16 severe -- the totality of all those circumstances goes  
17 to important issues about whether or not this merger is  
18 in the public interest and whether conditions should be  
19 attached.

20 U S West's conduct in Arizona with respect to  
21 their VDSL assets is the conduct of the company  
22 generally and the conduct that I think we can see or  
23 will see echoed in Washington. I think it's also  
24 important that this is material we need for  
25 cross-examination of Mr. Reynolds, who testified that

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1 the reason that U S West is doing what they are doing  
2 in Arizona is because that these are cable services,  
3 and we need to be able to effectively cross-examination  
4 Mr. Reynolds on that point because, in fact, these are  
5 network aspects. Things like fiber would appear to be  
6 DSLAMS that are being moved into the separate  
7 affiliate, and I think it's the network assets, not the  
8 services that determine whether or not there is an  
9 unbundling obligation on U S West's part, so we feel  
10 that we need just the basic answers to some very simple  
11 and straight-forward questions to be able to  
12 cross-examine Mr. Reynolds on that point.

13 Other than that, since I've used up my three  
14 minutes, I will stand on my papers. I will say one  
15 more thing. 16-B is the question about breaking out  
16 loop information based on DSL CLEC's, basically. I  
17 would just suggest that what I'm not looking for is  
18 what U S West has suggested, which is trying to gain  
19 competitive information about my competitors, Rhythms  
20 and the like. What I'm looking for are aggregate  
21 numbers, and again, this goes to competitive issues, so  
22 I'm not seeking specific numbers of loops that have  
23 been purchased by Rhythms or by Jato or Northpoint, but  
24 whether the aggregate number of loops that have been  
25 purchased by DSL companies, and I would also suggest in

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1 my various dealings with U S West on a business and  
2 legal basis that I'm repeatedly reminded by them of who  
3 those DSL companies are, so I find it somewhat hard to  
4 believe that they don't know who they are.

5 JUDGE MOSS: Ms. Anderl, give you a similar  
6 three minutes, I suppose.

7 MS. ANDERL: Thank you, Your Honor. With  
8 regard to the last point that Mr. Deanhardt just  
9 raised, and I believe our position is stated fairly  
10 clearly in our answer, and that is whether a company is  
11 characterized generally as a DLEC or not does not tell  
12 us on any particular loop whether they are purchasing  
13 it for DLEC purposes or CLEC purposes, and we simply  
14 don't believe it's fair to ask us a very general  
15 question on a very tight turnaround to say, Tell us  
16 what the DLEC's are doing.

17 Our supplemental responses to 20 and 21 did  
18 identify central offices in which CLEC's are collocated  
19 and central offices in which CLEC's are not collocated  
20 taking the entire subset of competitive carriers, and  
21 that's not an unfair question. We did break that out.  
22 I don't believe that a further granularity is  
23 appropriate, especially as we stated in our papers, and  
24 some of the carriers for whom Covad seeks information  
25 are not parties to this docket are Covad's competitors,

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1 and I believe you get very close to being able to  
2 discern market share numbers and other potentially  
3 competitively sensitive information from having U S  
4 West comb through its records and say, Here are what  
5 the following carriers are doing or how much they are  
6 purchasing.

7       The VDSL issue is very troublesome because it  
8 does seem like it's a horrible stretch to be bringing  
9 in Arizona information here based on some testimony in  
10 Arizona. We did not raise this as an issue. We felt  
11 we needed to correct and rebut Mr. Moya's testimony.  
12 That's why a few lines about VDSL ended up in  
13 Mr. Reynold's testimony. Putting that in there I don't  
14 believe made it a relevant subject for the hearing in  
15 the first place, or specifically, for additional  
16 discovery on matters which have no pertinence to the  
17 state of Washington, and certainly no pertinence to the  
18 merger, because in all of these, I think the one common  
19 thing that you see running through Covad's data  
20 requests is they are interested in what we've done in  
21 the past or what we are doing today, not how or whether  
22 the merger transaction will affect any of those things  
23 on a going-forward basis, so especially, as I said,  
24 under the late circumstances and tight turnaround,  
25 ample opportunity for discovery up until now, it seems

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1 to me that these data requests are objectionable either  
2 as overbroad, unduly burdensome, or not sufficiently  
3 linked to the merger transaction.

4 With regards to Data Request No. 19, again,  
5 even with Mr. Deanhardt's clarification as to what they  
6 were seeking and why, I don't believe that the  
7 information, if produced, would enable Covad to do the  
8 type of analysis it claims as we mentioned in our  
9 papers. The wholesale division for U S West supplies  
10 services and supports all of the other carriers with  
11 whom U S West deals, including the interexchange  
12 carriers. I don't believe that the level of detail  
13 that Covad is looking for is going to be found in those  
14 budgets or that they are proper discovery just five  
15 days before the hearing.

16 JUDGE MOSS: Speak to that last point for me,  
17 Mr. Deanhardt. Do you have some context into which  
18 these budgets would fit, because I am inclined to  
19 believe that the raw budget data is not going to tell  
20 us anything particularly useful.

21 MR. DEANHARDT: One of the most important  
22 points that we want to make in this hearing is that  
23 there is significant harm to the public interest and to  
24 the future of competition in Washington by virtue of  
25 eliminating a significant CLEC that is an actual

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1 competitor of U S West in the advanced services arena  
2 and in other arenas from being a competitor any longer,  
3 and that goes to basically a couple of points: One is  
4 just the actual building to provide these services, but  
5 another is, for example, having Qwest at hearings like  
6 this or at other hearings, carrier to carrier service,  
7 quality proceedings, for example, trying to work with  
8 the CLEC's in order to increase access to U S West.

9         The budget issue goes to helping to  
10 demonstrate that there is already such a significant  
11 competitive imbalance based on, for example, the budget  
12 that U S West budgets for its retail group versus what  
13 it budgets for wholesale and whether or not that's  
14 adequate, I think that if we see these numbers, you're  
15 going to probably see that they are wildly  
16 disproportionate, particularly based on number of lines  
17 and number of customers, et cetera, that the increased  
18 harm by eliminating a competitor creates a significant  
19 public interest issue here, so that the point is to  
20 rebut the inferences that there is appropriate  
21 competition here and that the loss of Qwest as a  
22 reseller and competitor would not do harm to the public  
23 interest, and I think those budgets would show that.

24         JUDGE MOSS: I think the most efficient thing  
25 to do is to simply go through these one at a time, and

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1 I'll go ahead and give you rulings on them.

2 I want to be sure that I cover everything so  
3 I'm going to start with 10, which I understand has been  
4 withdrawn, and the next one I have is 12, which is the  
5 question concerning the VDSL. It does seem to me that  
6 U S West can answer Part B without too much difficulty,  
7 and it might be pertinent to know that in terms of  
8 questions, that might be directed to Mr. Reynolds on  
9 cross. I don't know if there is a straightforward  
10 engineering answer to Part A or not because I'm not an  
11 engineer, and I'd say if there is a single answer to  
12 that question, U S West should provide it. As to Parts  
13 C, D, and E, the motion to compel is denied.

14 The next one is 13. It appears to me on  
15 reviewing this that U S West made an effort to respond  
16 to this with regard to the nature of proceedings  
17 inquired about in Washington, at least, and that for  
18 the purposes identified, that should be sufficient, so  
19 the motion to compel, any response beyond what has been  
20 provided, is denied.

21 No. 15 was withdrawn. As I review No. 16, it  
22 appears to me that A, C, and D were answered. I must  
23 have had some follow-up and picked up D. That was  
24 withdrawn, I guess. I'm trying to understand my own  
25 notes here. 16-D I have down as withdrawn, so then



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1 that would leave us with 16-B, and U S West says it  
2 doesn't know whether a carrier purchases a loop as a  
3 CLEC or not.

4 MS. ANDERL: I'm sorry, Your Honor. That's a  
5 misprint in the answer. It should have said DLEC, and  
6 in our supplemental response, we corrected that, so  
7 it's the distinction between whether they are a DLEC or  
8 CLEC that Covad is seeking and that we said we don't  
9 know on any given loop.

10 JUDGE MOSS: The question is a little unclear  
11 to me. Mr. Deanhardt, are you asking to be provided a  
12 DLEC, whether they are using them for data or voice or  
13 some other purpose?

14 MR. DEANHARDT: I understand that U S West  
15 doesn't know when it provides a loop it often sometimes  
16 doesn't know what a specific loop is going to be used  
17 for. That is what I asked for here is the aggregate  
18 number of loops being provided to the data LEC's, and I  
19 think that we can provide the background to show that  
20 those are being used for data. All I want is the  
21 aggregate number of loops being provided to them, not  
22 loops being provided for data purposes, but for loops  
23 being provided to data LEC's.

24 JUDGE MOSS: As distinct from other kinds of  
25 LEC's?

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1 MR. DEANHARDT: Yes.

2 JUDGE MOSS: And you suspect U S West knows  
3 which are which?

4 MR. DEANHARDT: Yes.

5 JUDGE MOSS: U S West, do you know which are  
6 which?

7 MS. ANDERL: That's why we objected. Not  
8 always. I know that Covad, Rhythms, and other carriers  
9 were not parties to this docket hold themselves out as  
10 data LEC's, but when I had discussions with counsel  
11 about eliminating this or narrowing the request, I had  
12 concerns about having Covad select a certain subset of  
13 carriers, some of who are not parties to this docket,  
14 and have us produce that subset of information to them.

15 JUDGE MOSS: What about on the aggregate  
16 basis though. Mr. Deanhardt explained earlier that  
17 they didn't really want to identify particular DLEC's  
18 or CLEC's or what have you. Does that relieve your  
19 concern?

20 MS. ANDERL: To some extent. It will still  
21 be a subset of the CLEC market, and if Covad tells us  
22 which carriers are to be included and Your Honor orders  
23 us to do so, we have the ability to produce that  
24 number.

25 MR. DEANHARDT: Your Honor, 16-B already has

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1 four of the carriers. The only additional carrier that  
2 I'm aware of operating in Washington is Jato  
3 Communications. We would add that to the list. I  
4 could limit it to that. I think if there are others,  
5 they probably aren't significant in number of loops to  
6 make a difference to this number.

7 JUDGE MOSS: Let's allow it as modified.  
8 Otherwise, this one is satisfied, as I understand it.

9 18. Help me again. Where do we stand on  
10 this one, because I've got marks by some but not all.

11 MR. DEANHARDT: The responses that we want  
12 supplemented were E, F, H, I, K, and L, and these were  
13 either objections by U S West that the information  
14 wasn't an FCC tariff, which I can address if Your Honor  
15 would like, or again, I believe -- I think these were  
16 all the FCC objections.

17 JUDGE MOSS: Is it the case to the extent the  
18 answer is that these are being provided pursuant to the  
19 specific FCC tariff you can look it up?

20 MR. DEANHARDT: No, Your Honor. What we  
21 asked for were support documents and information about  
22 the tariff and about, for example, the cost  
23 that U S West attributes to the loop in its FCC tariff.

24 JUDGE MOSS: So you want the work papers that  
25 underlie the FCC tariff?

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1           MR. DEANHARDT: Or just the cost. An answer  
2 would be fine. We didn't ask for all the work papers.  
3 What's the cost, just an answer.

4           JUDGE MOSS: What piece of information does  
5 that give you that's useful to the decisions in this  
6 case?

7           MR. DEANHARDT: Again, Your Honor, it goes to  
8 the competitive issues. All of our discovery is  
9 directed to trying to establish --

10          JUDGE MOSS: You are going to have to be more  
11 specific on that.

12          MR. DEANHARDT: I apologize. All of our  
13 discovery, including this and this specific one, goes  
14 to helping us establish, again, that the loss of a DSL  
15 reseller, in which U S West admittedly is on the record  
16 of Covad, as a matter of fact, will, in fact, result in  
17 reduced competition and hurt competition by, among  
18 other things, the fact that U S West right now has the  
19 CLEC's in a price squeeze, because we believe that they  
20 attribute zero to the cost of the loop, while we are  
21 being charged anywhere from 11 to, once the generic  
22 cost docket is done, 18 dollars. The loss of a  
23 competitor causes competitive harm, and we want to show  
24 that the competitive situation here is already bad  
25 enough that we can't lose the competitor, and that's

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1 what these discovery requests go to.

2 JUDGE MOSS: Do you want to be heard on this  
3 point, Ms. Anderl? I let Mr. Deanhardt speak to it.

4 MS. ANDERL: Briefly. Your Honor, I think  
5 the connection with the merger transaction is, again,  
6 strained or tenuous at best. These are similar to the  
7 arguments that occurred months ago when the Northwest  
8 Pay Phone Association sought to conduct a discovery on  
9 U S West's underlying costs or pricing contending there  
10 was potentially a price squeeze, and it needed that  
11 data in order to advocate that some of the merger  
12 synergies ought to be applied to reduced rates.

13 This is a very similar argument, and the  
14 Northwest Pay Phone Association's discovery was denied  
15 on the basis that there was no nexus shown to the  
16 merger transaction. I believe we have just heard the  
17 FCC rule on Friday that there is really no nexus in  
18 this kind of attempt at proof to the merger  
19 transaction. It is what it is now. It's not going to  
20 change after the transaction, and these issues, to the  
21 extent that they had to do with what should the  
22 appropriate price for line sharing be and others, are  
23 going to be taken up in other Commission dockets. I  
24 don't think this is the time or place.

25 MR. DEANHARDT: Your Honor, can I address the

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1 FCC issue?

2 JUDGE MOSS: Let's not take this too far  
3 afield. I haven't seen what the FCC issued. All I've  
4 seen is the trade press reports on the fact that there  
5 was some action by the FCC in connection with the  
6 merger, but go ahead and make a brief comment.

7 MR. DEANHARDT: I would simply suggest that  
8 in reviewing the merger, the FCC is obviously looking  
9 at national issues, including U S West's and Qwest's  
10 ability to compete with some of the other behemoths  
11 that have been created, rather than looking at  
12 Washington specific competitive issues and the effect  
13 of the loss of a competitor here in Washington, which  
14 is what these are directed at and what seems to me the  
15 task of this adjudication is.

16 JUDGE MOSS: I'm not convinced at this  
17 juncture that a response to Subpart E is going to be  
18 material to our proceedings here so I'm going to deny  
19 that subject to you being able to ask Ms. LaFave about  
20 this on the stand, and if it becomes apparent we do  
21 need this information, then we can reopen this  
22 question.

23 As far as the advertisements are concerned,  
24 I'm going to deny that. H is the next one that you  
25 have a concern about. Are CLEC's currently able to

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1 provide DSL service? Does your question mean are they  
2 allowed to do so pursuant to their agreements with U S  
3 West for those loops, or does your question go to the  
4 CLEC's technical capabilities, which U S West says it  
5 does not have a clue as to?

6 MR. DEANHARDT: The former, Your Honor,  
7 rather than the latter. By the way, we know the answer  
8 to this one. I would just like to get it in usable  
9 form so we can present it as evidence.

10 JUDGE MOSS: You can ask the witness.

11 MR. DEANHARDT: What I'm trying to avoid,  
12 Your Honor, is having a specific witness say,  
13 "Specifically I don't know." That's the reason we  
14 asked the question of U S West rather than of specific  
15 witnesses who may say, "I don't know the answer," and  
16 then we are off and running again.

17 JUDGE MOSS: All right. Go ahead and answer  
18 that one.

19 MS. ANDERL: Your Honor, I would just note  
20 that that was not the subject of Covad's motion  
21 originally. This is the first I've heard that they  
22 were unhappy with that response. I thought their  
23 motion was just E, F, I, and L. That's why we did not  
24 respond to that in our answer.

25 JUDGE MOSS: Just go ahead and answer.

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1 MS. ANDERL: All right.

2 JUDGE MOSS: I think you can answer "I" as  
3 well, and I think you should answer K and L too, so to  
4 the extent I've indicated, the motion is granted on  
5 that one. The next one I have is No. 19. I'm going to  
6 deny that, and on 20 and 21, all that's left is Subpart  
7 A; is that right, Mr. Deanhardt, in terms of  
8 controversy, I mean, that's all that's left?

9 MR. DEANHARDT: Yes, and I can narrow it down  
10 more than that. U S West has provided in its  
11 supplemental response information with respect to what  
12 it said were the wire centers where CLEC's are  
13 currently collocated. I think I counted 65 or 69; I  
14 don't remember which. I know, based on some recent  
15 work we've done in the line sharing docket, that there  
16 is actually about 78. All that I'm looking for is the  
17 rest. U S West provided information, but not for all  
18 of the central offices where CLEC's are collocated,  
19 based on the information I have.

20 JUDGE MOSS: You are missing about 12 or 15.

21 MS. ANDERL: Not identified by particular  
22 DLEC's then, but you are contending simply that the  
23 response isn't up-to-date based on what you know.

24 MR. DEANHARDT: Yes. The response that U S  
25 West provided to 20 and 21 was just a list where all



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1 CLEC's, without breaking it out by DLEC versus CLEC or  
2 voice versus data, I can live with that. I don't need  
3 the voice versus data breakout for this, so that's the  
4 reason I'm not going there, but just that there are  
5 some CO's.

6 JUDGE MOSS: I sense a workable ability here  
7 so we will grant the motion with respect to that as we  
8 have had discussion here. And it was not an issue just  
9 now, but I want to remind the parties that when we are  
10 on the record, all comment should be addressed to the  
11 Bench.

12 We had the addition of No. 23. Actually, No.  
13 023 S-1.

14 MR. DEANHARDT: I'll need to frame this issue  
15 because it's not --

16 JUDGE MOSS: This is a supplement to the  
17 motion to compel.

18 MR. DEANHARDT: It is, Your Honor. Would you  
19 like to read it first, or would you like me to frame  
20 the issue first?

21 JUDGE MOSS: Let me have a chance to read it.  
22 It says it will make the information available under  
23 some strict confidentiality provisions, as I understand  
24 it.

25 MR. DEANHARDT: That's my concern, Your

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1 Honor.

2 JUDGE MOSS: What is it you want to do?

3 MR. DEANHARDT: My concern is that this is  
4 information that we would want to use in the hearing,  
5 would need to make notes of, need to be able to  
6 address, and frankly, I should be able to see, and  
7 under the protective order, as I understand it, even  
8 though I am a lawyer, I am precluded from seeing it  
9 because I am employed by Covad.

10 What concerns me here, Your Honor, is that  
11 what we have asked for here is information about  
12 available loops in the network, again, kind of going to  
13 some of the infrastructure and other issues we have  
14 addressed in our testimony as some of the competitive  
15 issues here, and the response that says that this is  
16 information that is proprietary and confidential to me  
17 proves the point. U S West is saying this is  
18 information that has economic value to it as a user of  
19 the network. Covad is also a user of the network, and  
20 to suggest that the information should be available  
21 only to U S West and not to the CLEC's, the response in  
22 itself raises significant competitive issues, but I  
23 think is also inappropriate. If it is information that  
24 U S West has that it uses to address retail sales, for  
25 example, then I don't know why it's confidential at

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1 all. We all have to use a network. That's what 251  
2 is, but I'm willing to not go as far as to fight the  
3 major confidentiality issue yet if we can get this  
4 designated one category down so that I can have access  
5 to it and look at it and determine whether or not  
6 that's an appropriate motion and so that we can use it  
7 in this hearing as appropriate.

8 MS. ANDERL: Your Honor, I guess whether or  
9 not it's highly confidential or not maybe is the second  
10 question. The first question is, should we even have  
11 had to provide it in the first place. I would contend  
12 that, again, there is no nexus to the merger  
13 transaction with this request. Were we placed in a  
14 different situation with attempting to be as responsive  
15 as we felt we could be while protecting our legal  
16 rights and not wanting to delay the proceedings, we  
17 felt that we could provide this if it were treated as  
18 highly confidential material. It is very sensitive  
19 network information. I entered this order a long time  
20 ago, and the propriety of it has not been challenged.

21 I offered to share the information with  
22 Covad's outside counsel, which is the person with which  
23 it could be shared, and without going into anymore  
24 detail about it, if we wanted to have some sort of  
25 incamera review of the documents, we are happy to

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1 defend the confidentiality of that network detail,  
2 which is at quite a detailed level. I believe the  
3 response tells you it's 337 pages long, giving you some  
4 idea that there is, perhaps, a fairly granular  
5 breakdown of information in there.

6 JUDGE MOSS: I think as a first cut, I think  
7 that you are going to have to follow the procedures  
8 with a designated as highly confidential. If you want  
9 to look at it this week, you are probably going to have  
10 to do it on that basis. You are free to challenge the  
11 designation of it as highly confidential. We can take  
12 that up, which may require an incamera review and other  
13 process in order to get that resolved, but I'm not  
14 prepared to do that sitting here today, and I think as  
15 a first cut, I'm going to require you to have your  
16 outside counsel review it pursuant to the terms of the  
17 confidentiality agreement if that's something you wish  
18 to do.

19 If it then becomes apparent to you that it is  
20 data that it is of such moment to the issues pending in  
21 this proceeding that you wish to take the argument  
22 further, then that would be the appropriate time and  
23 way to proceed on that, rather than trying to cut to  
24 the chase on that right now.

25 MR. DEANHARDT: May I ask for a limited

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1 exception, which would be -- one of the reasons I  
2 wanted to see this as opposed to Mr. Harlow is just  
3 based on my knowledge and understanding as to how it  
4 fits within the regular framework of the case, based on  
5 my knowledge of our business. The exception I would  
6 like to ask is that if I could be allowed to see it  
7 subject to an agreement that I won't discuss it with  
8 anybody else in my company, period, ever, until and  
9 unless we get the designation changed.

10 JUDGE MOSS: If you can work that out with  
11 Ms. Anderl or other counsel for the joint applicants  
12 off the record, then certainly you may do that, but I'm  
13 not prepared to order such an exception to the  
14 protective order. The protective order provides a  
15 mechanism that is meant to encourage the exchange of  
16 information, and when it's claimed to be confidential  
17 or highly confidential, then that claim is in the first  
18 instance and the control of the party in possession of  
19 information, and the process by which we overcome such  
20 a claim is one that requires a challenge to be made to  
21 its designation as confidential or highly confidential,  
22 and then we have to consider that an argument on that  
23 point, and typically, it will require an incamera  
24 review. I would prefer that you take it one step at a  
25 time. You've got very capable outside counsel, and I

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1 want to proceed in that way.

2 MR. DEANHARDT: Thank you.

3 MR. HARLOW: Your Honor, if I may, can I ask  
4 that U S West be directed to provide that for my review  
5 here in Olympia since this is where I will be spending  
6 at least the next few days if not the next week and a  
7 half?

8 JUDGE MOSS: Is that possible to do that,  
9 just bring it down here somewhere, or do you have it in  
10 your truck of documents out back?

11 MS. ANDERL: We will obtain it.

12 JUDGE MOSS: We can make a room available  
13 here. We will have a little extra time in the morning.  
14 If thus far is any indication, we probably won't have  
15 any extra time this afternoon, but I know you all are  
16 anxious to work on this case until the wee hours every  
17 night this week anyway, so if you need us to help you  
18 make arrangements for a place....

19 I believe that takes care of the motion to  
20 compel. This next bit will not take as long as you  
21 might think. In meetings with the commissioners last  
22 week in connection with this case, we took up the  
23 motion to continue hearing, reopen discovery, and allow  
24 the filing of supplemental testimony. The  
25 commissioners have decided and asked me to convey to

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1 you all this morning that it is their election at this  
2 moment to carry that motion with the case. The  
3 commissioners do want to take advantage of this week  
4 that has been set aside for the purposes of this  
5 hearing and make as much progress as possible,  
6 hopefully bring it to a conclusion. The commissioners,  
7 however, have also decided that they wish to be  
8 involved in some of our process decisions in this case,  
9 and so they have reserved to themselves the decision on  
10 this particular motion in its various parts.

11 They will hear any argument on the motion,  
12 perhaps as early as tomorrow morning. Perhaps they  
13 will allow the motion to be renewed at some later point  
14 in the case and hear additional argument then. In any  
15 event, they have reserved that decision process to  
16 themselves, and so I will not be giving you a decision  
17 today on that motion.

18 I was just thinking, Mr. ffitch, whether that  
19 has any impact on -- I think not. I think there is  
20 some other developments here that may impact more  
21 directly on the issue of Mr. Brosch. We are still  
22 about 40 minutes away from his planned departure time,  
23 so we will get to that quickly.

24 I want you all to come prepared in the  
25 morning to argue this motion because they may very well

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1 take it up first thing at 10:30 and maybe other process  
2 issues as well. We do have a case that has taken an  
3 interesting turn in that we have a proposed partial  
4 settlement among some parties. That, of course, is a  
5 different species from a full settlement or partial  
6 settlement among all parties. It may require some  
7 special process, and we will follow in general the  
8 process previously indicated, which is to say we will  
9 have a panel of witnesses. We will hear about the  
10 settlement. The commissioners will inquire. As to  
11 what process we have beyond that with the panel or with  
12 respect to these issues, I can't give you an answer  
13 today.

14           What we will do today is identify the panel  
15 members, determine an order of witness presentation,  
16 and premark exhibits. What we will do, under the  
17 uncertain circumstances under which we are all  
18 operating for the reasons I described, is act as if all  
19 witnesses will appear and all cross-examination will be  
20 conducted. Now, that's not to say that you can't all  
21 waive cross-examination with respect to a witness, and  
22 that has the same effect as allowing testimony in by  
23 stipulation, but for present purposes, at least, we  
24 will just go forward as if everybody was going to  
25 appear and present their testimony and be subject to



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1 cross-examination.

2           Now, having said that, I wanted to add the  
3 corollary, I guess, if that's the right word, that I  
4 would like to hear from the parties now as to whether  
5 any -- assuming for a moment that Mr. Brosch's  
6 testimony is to come in -- that is Public Counsel's  
7 witness -- if that testimony is to come in as prefiled,  
8 whether any party wishes to cross-examine with respect  
9 to that testimony. If so, please let me know now. And  
10 hearing resounding silence, it sounds, Mr. Ffitch, as  
11 if Mr. Brosch need not be made present for purposes of  
12 cross-examination, subject to the caveat that the  
13 commissioners may surprise me and say at some point  
14 they would like to hear from him, in which case we will  
15 make arrangements to get him out here and do that, but  
16 I don't really envision that. I think the more key  
17 concern is that there is no party who indicates a  
18 desire to cross-examine your witness, so however his  
19 testimony comes in and if it comes in, that being the  
20 case, I believe in the course of perhaps a five-minute  
21 recess you might be able to inform him of that and save  
22 him a trip.

23           MR. FFITCH: Thank you, Your Honor. I guess  
24 just for clarification, part of our request had been  
25 that in addition if there was no cross-examination that

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1 his testimony be able to come in by stipulation since  
2 he wouldn't be here to sponsor it.

3 JUDGE MOSS: Maybe you will need to take that  
4 up tomorrow with the commissioners present. They will  
5 want to make that decision. I'm not prepared to make  
6 it. Is there something else?

7 MR. FFITCH: It sounds like he needs to be  
8 here then. That's the only way I can interpret that.

9 JUDGE MOSS: My point simply is that the  
10 commissioners are going to have to say about how we  
11 proceed. Mr. Brosch's testimony only goes to the  
12 issues that are proposed to be resolved by settlement;  
13 isn't that the case?

14 MR. FFITCH: Correct.

15 JUDGE MOSS: With respect to the issues that  
16 are proposed to be resolved by settlement, the process  
17 is uncertain as to whether we will be stipulating in  
18 all the prefile testimony that relates to those issues  
19 or whether some witnesses will be required to appear or  
20 whatnot, but if there is not going to be any  
21 cross-examination, that's sort of a key issue. If  
22 nobody wants to cross-examine the witness, I see your  
23 concern is that there will be no one here to sponsor it  
24 on the stand? I think we can work with that. If  
25 necessary, we could have him appear briefly by

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1 telephone to acknowledge that it is indeed his  
2 testimony and that his answers today would be the same  
3 and so on and so forth. Is that what your concern was?

4 MR. FFITCH: Yes, Your Honor. I should have  
5 added it's my understanding, at least from  
6 communications I've received from the other parties,  
7 that they would also stipulate to the admission of his  
8 prefiled testimony and exhibits, but you may wish to  
9 inquire as to that separate piece of it too.

10 JUDGE MOSS: I think the commissioners will  
11 want to inquire about that tomorrow as to what the  
12 parties' desires are with respect to that. I'll ask  
13 about it today too so I'll have a heads up, and I'll  
14 appear so smart tomorrow when I have foreknowledge of  
15 what's going to happen, but no, the commissioners want  
16 to be involved in this discussion about how we proceed  
17 with that aspect of the case.

18 This is a little complicated, and more  
19 complicated than your typical proceeding, so I need to  
20 proceed in that fashion, but I think in terms of  
21 Mr. Brosch, we've established that nobody wants to  
22 cross-examine him. I'm giving you about a 99 percent  
23 assurance that if it should be necessary for a witness  
24 to appear to sponsor that testimony into the record  
25 that we can handle that without having him physically

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1 present, and if I happen to fall into the one percent  
2 of error, then so be it. I'll apologize humbly and  
3 we'll move on.

4 MR. FFITCH: Thank you, Your Honor. We will  
5 have Mr. Brosch available to be reached by phone  
6 tomorrow, and if it's the Bench's preference, then we  
7 will make arrangements for him to travel here. Based  
8 on this, I will advise him not to travel today.

9 JUDGE MOSS: I think that will work fine. If  
10 there is some need, one of the commissioners, for  
11 example, feels a pressing need to have Mr. Brosch  
12 available to inquire into his testimony, whether it  
13 comes in by stipulation or otherwise, we'll accommodate  
14 you.

15 MR. FFITCH: Thank you, Your Honor, and thank  
16 you to the parties as well. I appreciate your  
17 consideration.

18 JUDGE MOSS: I don't think there is anything  
19 else we need to do along those lines right now, so what  
20 I'd like to do is go off the record for a period of  
21 time and get the witness order and exhibits and so  
22 forth. We'll take care of all that housekeeping stuff  
23 and actually take about a five-minute -- and I mean  
24 that. Five minutes I want you all back here and we  
25 will get started on that and give Mr. ffitich time to

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1 make his phone call.

2 (Recess.)

3 (Discussion off the record.)

4 JUDGE MOSS: We're back on the record, and we  
5 have had a fairly extensive effort off the record to  
6 organize our case, and I wish to express my  
7 appreciation to the parties for their efforts to assist  
8 me in that task of case management.

9 We have preliminarily numbered the exhibits,  
10 identified the order of witnesses, and we will be  
11 working this evening to revise the witness and exhibit  
12 list accordingly so that that will be ready for the  
13 parties first thing tomorrow when we begin at 10:30.  
14 Mr. ffitch, I believe you had a couple of matters you  
15 wish to make of record?

16 MR. FFITCH: Thank you, Your Honor. I have  
17 distributed to parties a copy of the document called,  
18 Information on the Proposed U S West Merger. This is a  
19 document that would be handed out to members of the  
20 public who attend the Commission's public comment  
21 hearings on the merger, which are scheduled starting  
22 this coming Thursday. The schedule is on the last page  
23 of this handout. If you didn't get one, I have a few  
24 more here. This is marked as a draft, and this has  
25 been prepared by the Commission's public affairs staff

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1 working with my office. If you have any suggested  
2 changes, please get them to me tomorrow morning, and I  
3 will pass those on to the public affairs staff of the  
4 Commission so that we can finalize it for distribution.

5 The second matter, Your Honor, is I have a  
6 court date on Friday in Thurston County Superior Court  
7 so it may be that we will have another attorney  
8 possibly in the hearing room here. In any event, we  
9 will continue to be available, but there may be some  
10 shifting of counsel from our office.

11 JUDGE MOSS: That's fine. We can't have more  
12 than one counsel participating for a party. We just  
13 ask that you limit yourself to one counsel per witness.  
14 Subject to that rule, that's fine. Anything else?  
15 Okay. I will encourage you all to continue your  
16 efforts outside the hearing room and look forward to  
17 see you all tomorrow at 10:30. Please remember we will  
18 be starting late tomorrow at 10:30. We are off the  
19 record.

20 (Prehearing concluded at 4:25 p.m.)

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