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1                   BEFORE THE WASHINGTON UTILITIES AND  
2                   TRANSPORTATION COMMISSION

3

4 In re Application of US WEST, ) Docket No. UT-991358  
5 INC., and QWEST COMMUNICATIONS ) Volume X  
6 INTERNATIONAL, INC. for an ) Pages 994-1223  
7 Order Disclaiming Jurisdiction, )  
8 or in the Alternative, )  
9 Approving the US WEST, INC. - )  
10 QWEST COMMUNICATIONS )  
11 INTERNATIONAL, INC. Merger. )  
12 \_\_\_\_\_ )

13

14                   A hearing in the above matter was  
15 held on March 17, 2000, at 9:42 a.m., at 1300  
16 Evergreen Park Drive Southwest, Olympia, Washington,  
17 before Administrative Law Judge DENNIS MOSS and  
18 CHAIRWOMAN MARILYN SHOWALTER, COMMISSIONER RICHARD  
19 HEMSTAD and COMMISSIONER WILLIAM R. GILLIS.

20

21                   The parties were present as  
22 follows:

23

24                   AT&T COMMUNICATIONS OF THE  
25 NORTHWEST, INC., NEXTLINK, and ADVANCED TELCOM GROUP,  
26 INC., by Gregory J. Kopta, Attorney at Law, Davis,  
27 Wright, Tremaine, 1501 Fourth Avenue, Suite 2600,  
28 Seattle, Washington 98101.

29

30                   US WEST COMMUNICATIONS, INC., by  
31 Lisa A. Anderl, Attorney at Law, 1600 Seventh Avenue,  
32 Room 3206, Seattle, Washington 98191, and James M.  
33 Van Nostrand and Mary Hobson, Attorneys at Law, Stoel  
34 Rives, 600 University Street, Suite 3600, Seattle,  
35 Washington 98101.

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1 THE COMMISSION, by Sally G.  
Johnston, Assistant Attorney General, 1400 S.  
2 Evergreen Park Drive S.W., P.O. Box 40128, Olympia,  
Washington 98504-0128.

3  
4 PUBLIC COUNSEL, by Simon ffitch,  
Attorney at Law, 900 Fourth Avenue, #2000, Seattle,  
Washington 98164.

5  
6 RHYTHMS LINKS, INC. and SBC  
TELECOM, INC., by Arthur A. Butler, Attorney at Law,  
Ater Wynne, Two Union Square, 601 Union Street, Suite  
7 5450, Seattle, Washington 98101.

8 QWEST, by Ronald Wiltsie, Mace  
Rosenstein, and Gina Spade, Attorneys at Law, Hogan &  
9 Hartson, 555 13th Street N.W., Washington, D.C.  
20004.

10  
11 McLEOD USA, by Mark Trincherro,  
Attorney at Law, Davis, Wright, Tremaine, 1300 S.W.  
Fifth Avenue, Suite 3200, Portland, Oregon, 97201.

12  
13 COVAD and METRONET, by Brooks E.  
Harlow, Attorney at Law, Miller Nash, 601 Union  
Street, Suite 4400, Seattle, Washington 98101.

14  
15 COVAD, by Clay Deanhardt, Attorney  
at Law, 2330 Central Expressway, Santa Clara,  
California, 95050.

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24 Barbara L. Spurbeck, CSR  
25 Court Reporter

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00999

1 JUDGE MOSS: Let's go back on the record in  
2 our proceedings in Docket Number UT-991358. I will  
3 acknowledge my Scot-Irish heritage and wish you all  
4 top o' the morning this morning. We have Dr. Taylor  
5 this morning. And Dr. Taylor, if you will rise and  
6 raise your right hand.  
7 Whereupon,

8 DR. WILLIAM E. TAYLOR,  
9 having been first duly sworn, was called as a witness  
10 herein and was examined and testified as follows:

11 JUDGE MOSS: Please be seated. Thank you.

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

13 BY MR. WILTSIE:

14 Q. Good morning, Dr. Taylor.

15 A. Good morning.

16 Q. Would you please state your name for the  
17 record?

18 A. William E. Taylor.

19 Q. And where are you employed?

20 A. National Economic Research Associates, Inc.

21 Q. And what's your position with National  
22 Economics Associates, Inc.?

23 A. I'm senior vice president, head of the  
24 communications practice, in its Cambridge office.

25 Q. Doctor, did you cause to be filed in this

01000

1 docket Exhibit 160-RT, rebuttal testimony?

2 A. Yes, I did.

3 Q. And did you also cause to be filed Exhibit  
4 161, an attachment to that rebuttal testimony?

5 A. That's correct.

6 Q. Doctor, do you have any corrections to make  
7 to Exhibit 160?

8 A. No, I don't.

9 Q. If I asked you those same questions today,  
10 would you give those same answers?

11 A. I would.

12 MR. WILTSIE: Your Honor, we move the  
13 admission of Exhibit 160-RT and Exhibit 161.

14 JUDGE MOSS: Any objection? Hearing no  
15 objection, those exhibits will be admitted as marked.

16 MR. WILTSIE: Your Honor, we tender Dr.  
17 Taylor for cross-examination.

18 JUDGE MOSS: Thank you. We'll begin with  
19 Mr. Kopta again.

20 MR. KOPTA: Thank you, Your Honor. I'm  
21 going to do a reverse Mr. Trincherro, and say that I  
22 anticipate that Mr. Trincherro will cover the areas  
23 that I would have covered with Dr. Taylor, and I will  
24 say that -- I will leave it to Mr. Trincherro's  
25 capable hands to make sure that that is, in fact, the

01001

1 case.

2 JUDGE MOSS: Go ahead, Mr. Trincherro.

3 MR. TRINCHERO: Thank you.

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

5 BY MR. TRINCHERO:

6 Q. Good morning, Dr. Taylor.

7 A. Good morning, Mr. Trincherro.

8 Q. Your attachment, Exhibit 161, is a  
9 statement of qualifications; isn't that correct?

10 A. That's correct.

11 Q. And in that statement, you indicate that  
12 you've provided testimony in a number of merger  
13 cases; isn't that correct?

14 A. Yes.

15 Q. And there are -- it's a rather long list of  
16 docket numbers, FCC docket numbers and state docket  
17 numbers, and I just wanted -- it's unclear from that  
18 just exactly which mergers, and so I want to just go  
19 through that with you.

20 Did you provide testimony regarding the  
21 Bell Atlantic-NYNEX merger?

22 A. Yes, in several states.

23 Q. And who did you appear on behalf of in that  
24 proceeding, or those proceedings?

25 A. I believe both Bell Atlantic and NYNEX.

01002

1 Q. And what about the Bell Atlantic-GTE case?

2 A. Same answer.

3 Q. And the SBC-Ameritech case?

4 A. On behalf of SBC, yes.

5 Q. So you've appeared on behalf of the bell  
6 companies in each of those cases?

7 A. In those cases, that's correct.

8 Q. In those cases. In any of those merger  
9 dockets, where you appeared on behalf of bell  
10 companies, did you propose any conditions be adopted  
11 by either the FCC or any state commission?

12 A. No, I don't believe any substantive ones.  
13 I found all of those mergers to be in the public  
14 interest.

15 Q. And are you familiar with the FCC's order  
16 in the SBC-Ameritech case?

17 A. Yes.

18 Q. And is it fair to say that, in your  
19 opinion, none of the conditions set forth in that  
20 order are necessary or proper conditions?

21 A. Well, that's two questions. In my opinion,  
22 none of those conditions are necessary. These are  
23 two horizontal firms which don't compete with one  
24 another. Are they appropriate or whatever your  
25 second word was, could be. The companies voluntarily

01003

1 agreed to them, so I presume they wouldn't do  
2 anything that isn't in their self-interest.

3 Q. And in any of these merger cases, where  
4 you've worked on behalf of bell companies, have you  
5 ever suggested that any conditions should be included  
6 on the merger approval?

7 A. I don't believe so. My role has almost  
8 always been refuting conditions proposed by  
9 intervenors and competitors, and actually, I'm not  
10 sure anyone ever asked me if I thought some other set  
11 of conditions might be appropriate.

12 Q. Returning to your qualifications statement,  
13 at pages 16 and 17, you list a number of proceedings  
14 in which you've participated that relate to bell  
15 company entry into the interLATA market?

16 A. Yes.

17 Q. And in those cases, you appeared on behalf  
18 of the bell companies; correct?

19 A. Yes.

20 Q. Which bell companies have you appeared on  
21 behalf of in Section 271 proceedings?

22 A. Let's see. BellSouth in several state  
23 proceedings. Bell Atlantic lately, in New York,  
24 which was finally a success. And I think that's it.

25 Q. Have you ever appeared on behalf of US West

01004

1 in any 271-related proceeding?

2 A. No.

3 Q. As part of the merger between US West and  
4 Qwest, Qwest will have to divest itself of in-region  
5 interLATA services; isn't that correct?

6 A. Yes.

7 Q. And it's your understanding that this is  
8 legally required of US West/Qwest under the  
9 Telecommunications Act of 1996?

10 A. That's correct.

11 Q. As an economist, do you believe that absent  
12 the legal requirement, those divestitures would be  
13 necessary?

14 A. Well, I think probably not, in the sense  
15 that even before the passage of the  
16 Telecommunications Act back in 1996, I believe I was  
17 arguing and certainly believe that competition and  
18 the incentives of vertically integrated firms were  
19 such that the modification of final judgment  
20 restrictions could have been lifted, even absent the  
21 conditions imposed by the Telecommunications Act, and  
22 thus the process of checking whether the conditions  
23 imposed by the act have actually been fulfilled, I  
24 wouldn't have thought would have been necessary.

25 Q. And in fact, prior to the passage of the

01005

1 act, you filed affidavits with Judge Green,  
2 suggesting that enforcement of the ban on regional  
3 bell operating company provision of interLATA  
4 services contained in the modified -- modification of  
5 final judgment was not in the public interest; isn't  
6 that correct?

7 A. That's correct.

8 Q. If you could turn to page eight of your  
9 rebuttal testimony?

10 A. Yes.

11 Q. You state, lines 15 through 18, that US  
12 West's average repair interval in hours for switched  
13 access service decreased by more than 37 percent  
14 between 1997 and 1998. Do you recall that testimony?

15 A. Yes.

16 Q. And you calculated that number using the  
17 FCC's service quality report?

18 A. That's correct.

19 Q. Isn't it true that that report covers a  
20 three-year period between 1996 and 1998?

21 A. Yes, that's correct.

22 Q. And that, in fact, between 1996 and 1998,  
23 US West's switched access repair interval actually  
24 increased by 32 percent, from 8.1 hours in 1996 to  
25 10.7 hours in 1998?

01006

1           A.    Yes, I believe that's correct.  So if we  
2 were to make sure we understood what the report says  
3 for that one measure of service quality, it says  
4 service quality decreased and then increased, and my  
5 response here is that in the statistics cited by Dr.  
6 Mitchell, they are not all low -- they don't all  
7 reflect low levels of service quality or decreases.  
8 And in fact, we see recent increases consistent with  
9 the commitments that Mr. Trujillo has made toward  
10 service quality.

11           MR. TRINCHERO:  Your Honor, I have one more  
12 line of questioning, but I'm not sure that I really  
13 need to do this, and I need a clarification from the  
14 Bench.

15                     At page 23 of his testimony, Dr. Taylor has  
16 a statement that is then supported by a footnote that  
17 references an economic treatise, and it's my  
18 understanding, under the law of this state, that he  
19 has thereby incorporated by reference that treatise  
20 and that we would be free to quote from that treatise  
21 in the brief; is that correct?

22           JUDGE MOSS:  Well, that's a very  
23 interesting question to which I do not have a ready  
24 answer.  To what law do you cite?

25           MR. TRINCHERO:  Well, Your Honor, perhaps

01007

1 if there's any question here, what we should do is  
2 wind Dr. Taylor through this.

3 JUDGE MOSS: If you want to cite me to some  
4 provision and want me to look at it and give you my  
5 judgment on it, I will be happy to do so.

6 MR. TRINCHERO: I don't think that will be  
7 necessary. If I might approach the witness?

8 JUDGE MOSS: Yes, you may. You're going to  
9 hand the witness what?

10 MR. TRINCHERO: A page from the treatise  
11 that's cited in his testimony.

12 JUDGE MOSS: Okay. Do you have a copy for  
13 Counsel?

14 MR. TRINCHERO: Yes, I do.

15 Q. Dr. Taylor, if you can turn to page 23 of  
16 your testimony, lines 13 through 16. There you  
17 state, Economic theory suggests that potential abuses  
18 stemming from vertical mergers, such as vertical  
19 foreclosure and price squeeze, cannot arise when  
20 effective competition exists (or, equivalently,  
21 market power does not exist) at one or more levels  
22 within the merged company. Is that correct?

23 A. Yes.

24 Q. Then you have a footnote that cites to page  
25 235?

01008

1 A. Correct.

2 Q. Of economics of regulation and antitrust?

3 A. Yes.

4 Q. Now, I've handed you what I will represent  
5 to you is a copy of page 235 of that treatise.

6 A. Yes.

7 Q. Does that look familiar?

8 A. Yes.

9 Q. And I take it that the line that you're  
10 citing to is the first sentence of the first full  
11 paragraph?

12 A. That's correct.

13 Q. And that reads, In summary, we have  
14 suggested that harmful effects from vertical  
15 integration are unlikely to occur unless there is  
16 pre-existing market power at one level or both. Is  
17 that correct?

18 A. Yes.

19 MR. TRINCHERO: Thank you. I have no  
20 further questions.

21 JUDGE MOSS: Thank you. Mr. Harlow.

22 MR. HARLOW: Thank you, Your Honor.

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

24 BY MR. HARLOW:

25 Q. Good morning, Dr. Taylor.

01009

1 A. Good morning, Mr. Harlow.

2 Q. My name is Brooks Harlow. I represent  
3 Covad Communications and MetroNet Services  
4 Corporation. Dr. Taylor, when were you engaged by US  
5 West and Qwest in connection with this proposed  
6 merger?

7 A. That's a good question. Shortly before,  
8 maybe a month before the Colorado hearings, which  
9 would have been a month ago, so early this year, I  
10 guess.

11 Q. In January?

12 A. January would be a good --

13 Q. Early January, late January?

14 A. Say early. I can look up my records back  
15 at the ranch, but that's my best guess.

16 MR. WILTSIE: Your Honor, for the record,  
17 the Colorado hearing was the first week of December.

18 THE WITNESS: Oh, I'm sorry. So then we  
19 better back it up into November, because we did file  
20 long before the hearings. Oops. Sorry, again. I  
21 didn't file prefiled testimony in Colorado, so could  
22 have been in the December or November time frame.

23 Q. Sometime between December, November or  
24 January?

25 A. Yes.

01010

1 Q. Okay. Now, you're testifying here as an  
2 economist?

3 A. Yes.

4 Q. And your testimony about the likely effects  
5 of the merger are essentially based on economic  
6 analysis?

7 A. That's correct.

8 Q. And your testimony about the likely effects  
9 of the merger assumes rational economic behavior by  
10 the merged entity; is that correct?

11 A. That's generally the basis of the analysis,  
12 yes.

13 Q. Do companies always behave in a rational  
14 economic manner?

15 A. Not the ones I'm familiar with, no. But  
16 one takes great risks in predicting what firms will  
17 do if you assume they do anything else. Firms don't  
18 persistently do things that are not in their  
19 self-interest.

20 Q. In the long run, you would expect they  
21 would; in the short run, all kinds of things can  
22 happen?

23 A. I think that's fair.

24 Q. Are corporations, especially large  
25 corporations, somewhat political creatures, as well

01011

1 as economic entities?

2 A. We all have many aspects to our behavior,  
3 yes.

4 Q. Are you ever aware of a situation where a  
5 product manager had incentives to build revenues,  
6 market share, or whatever without regard to the  
7 overall ideal rational economic behavior of the  
8 corporation as a whole?

9 A. I don't think I know of any specific  
10 instance, but I wouldn't be surprised if the internal  
11 incentive structures of a large firm might be  
12 misplaced in such a way, but I don't have any  
13 specific case in mind.

14 Q. You refer in your testimony to what you  
15 call concentration. Is that what some of us might  
16 call market share?

17 A. Almost. It's a little more than that.  
18 It's the degree of market share of each participant  
19 in the market, not simply the largest.

20 Q. Oftentimes, that can be expressed in terms  
21 of a percentage for each?

22 A. It can. The measure of concentration that  
23 I cite and that the Department of Justice uses is the  
24 HHI Index, which is the sum of squares of market  
25 shares.

01012

1 Q. In any given geographic and product market,  
2 is there a threshold market share or concentration  
3 above which it is generally recognized that a firm  
4 possesses market power or monopoly power?

5 A. Well, unfortunately those are two questions  
6 cobbled together.

7 Q. Okay.

8 A. There is a level of concentration measured  
9 by the HHI Index, which the Department of Justice and  
10 the Federal Trade Commission used to say that market  
11 is sufficiently concentrated that we would worry  
12 about a merger in such a market. But your question  
13 was, gee, if somebody has 85 percent of the market  
14 himself, does he necessarily have market power. The  
15 answer to that is an unequivocal no. That is, market  
16 share by itself does not bring with it market power.

17 Q. Do you study court cases that look at  
18 market share?

19 A. Yes.

20 Q. Can you think of any court cases where  
21 market share in excess of 80 percent was found and  
22 market power or monopoly power was not found?

23 A. I certainly haven't done an exhaustive  
24 search on that dimension, so I can't answer that.

25 Q. Isn't it generally true that when courts in

01013

1 antitrust cases are looking at market shares in  
2 excess of 80 percent, that nearly all the cases, if  
3 not all the cases, find the existence of monopoly or  
4 market power?

5 A. One, I can't agree with that, but two, I  
6 can tell you that 80 percent of the economists would  
7 say that market power by itself, even 80 percent or  
8 higher, does not necessarily imply the existence of  
9 market power; i.e., the ability to raise price.

10 Q. Would that be a pretty strong indicator of  
11 market power?

12 CHAIRWOMAN SHOWALTER: I think you said  
13 market power does not equal market power. Did you  
14 mean market share?

15 THE WITNESS: Market share, I'm sorry. An  
16 80 percent measure or higher of market share does not  
17 equate to market power.

18 Q. Would that be a pretty strong indicator of  
19 market power?

20 A. Market share is one of a half a dozen  
21 characteristics of a market which give a firm the  
22 ability to raise price, to hold price above a  
23 competitive level profitably. But it's only one of  
24 six. I mean, we can find examples of markets in  
25 which there are two or three firms, one dominant

01014

1 firm, where we would agree that the dominant firm  
2 does not have the ability to raise price.

3 Q. Well, you mention in your direct testimony  
4 and just a moment ago on cross the U.S. Department of  
5 Justice and FTC's merger guidelines.

6 A. That's correct.

7 Q. Do you recall those?

8 A. Yes.

9 Q. In particular, I think you start that  
10 discussion on page 25?

11 A. Yes.

12 Q. Okay. And you state that economists  
13 appraise the effect of a merger based on these merger  
14 guidelines; is that correct?

15 A. I think most economists would do an  
16 analysis that is consistent with them. There's not  
17 substantial disagreement with the guidelines.

18 Q. And turning to page 26, the large footnote  
19 at the bottom, footnote 20.

20 A. Our pagination is different, but I will --

21 Q. Well footnote 20 should be the same in your  
22 copy.

23 A. The footnote I see is 21, starting,  
24 Quantitatively, the merger guidelines?

25 Q. Mine says 20.

01015

1 JUDGE MOSS: Yeah, this may be a pause for  
2 concern. My copy of the testimony also shows this as  
3 footnote 20 on page 26. So if we're working off  
4 different sets of testimony, we need to resolve that.

5 MR. WILTSIE: Your Honor, mine also shows  
6 footnote 20 on page 26. We'll get a copy for the  
7 witness.

8 Q. Page 26, footnote 20, hopefully.

9 A. Yes. I'm with you, Mr. Harlow. Sorry.

10 Q. Thank you. Now, the merger -- referring to  
11 the merger guidelines, as an economist, is this the  
12 kind of analysis that you would recommend in a merger  
13 context?

14 A. Yes.

15 Q. Okay. And to do this kind of analysis, I  
16 assume, as I understand it through your testimony,  
17 you have to look at both the current concentration in  
18 a market and at the change in concentration that  
19 would result from the merger; is that correct?

20 A. That's correct.

21 Q. Okay. And before you do that, I assume you  
22 have to define a relevant geographic market?

23 A. Relevant geographic and product market,  
24 yes.

25 Q. That was my next question. What kind of

01016

1 study or analysis is required to define the  
2 geographic and product markets?

3 A. An analysis, essentially, of what the  
4 substitutes for the service in question are. The  
5 merger guidelines definition of a market looks for a  
6 gap in the chain of substitutes. To find a service  
7 is in the market if its presence in the market would  
8 prevent the dominant firm from raising its price  
9 because customers would substitute to this other  
10 hypothetical service, and the definition of the  
11 market looks for a gap in that chain of substitutes  
12 so that things which are close substitutes are in the  
13 market, things which are not are out.

14 Q. What about the relevant geographic market?

15 A. It's the same answer. That's a difficult  
16 one to apply to telecommunications, but it is the  
17 same answer.

18 Q. And then, pursuant to the merger  
19 guidelines, you have to determine the pre-merger  
20 Herfindahl-Hirschman Index, or HHI?

21 A. That's correct.

22 Q. And what kind of data and study is required  
23 to determine this?

24 A. One needs to know the likely output sales  
25 or capacity, depending on the market that you're

01017

1 looking at, of the firms that are supplying services  
2 in the market. Then you have to be able to square  
3 them and add them up.

4 Q. And then you have to determine the  
5 post-merger HHI, according to footnote 20; is that  
6 correct?

7 A. Correct.

8 Q. What kind of data and analysis is required  
9 for this?

10 A. The same process.

11 Q. Okay. Did you have the data necessary to  
12 develop the pre-merger HHI in this instance?

13 A. Did I have? No.

14 Q. Did you have the data necessary to perform  
15 the post-merger HHI analysis?

16 A. No, the Justice Department did, the federal  
17 -- and found that --

18 Q. I think you've answered the question.

19 A. I did not. That's correct.

20 Q. Did you do an analysis of the substitutes  
21 for service for the various services that Qwest and  
22 US West offered?

23 A. No, I did no quantitative analysis.

24 Q. Did you do any quantitative analysis  
25 specific to the state of Washington?

01018

1 A. No.

2 Q. So am I to conclude from this that you did  
3 not go through the process required by the merger  
4 guidelines to determine the competitive impact of  
5 this merger?

6 A. No, that's not correct at all. I did not  
7 undertake a quantitative study of the type that the  
8 Department of Justice undertook. However, you'll  
9 find in my testimony a description of the markets in  
10 question and my view that the effect of this merger  
11 on the markets in question is negligible.

12 Q. Did the Department of Justice do the type  
13 of quantitative analysis to which you're referring  
14 for the state of Washington?

15 A. I'm not privy to the calculations that they  
16 actually made. By asserting that the merger would  
17 not adversely affect competition in any market in the  
18 United States, they are, in my view, signing on to  
19 the statement that it is their belief that the  
20 increase in concentration, if there is one, in any  
21 market in Washington is negligible by their  
22 standards.

23 Q. But you don't know if they've done this  
24 analysis specifically with regard to the state of  
25 Washington?

01019

1           A.    They have sworn, or at least they have  
2 filed -- I don't know what they have done  
3 specifically, but they have stated that there is no  
4 anticompetitive effect, and they have also stated  
5 that the method by which they ascertained whether  
6 there is an anticompetitive effect is the guidelines  
7 that we're discussing.

8           Q.    So with that qualification, your answer  
9 would be no, you don't know if they've done that  
10 analysis with regard to Washington?

11          A.    I am not privy to their analysis.  You have  
12 to remember the way the Department of Justice or the  
13 Federal Trade Commission does these things is it  
14 receives information from the merging parties, from  
15 intervening parties, does its study, and is silent,  
16 because the question at issue is whether the merger  
17 is likely to violate the law.

18                The Department of Justice doesn't come out,  
19 never comes out with a statement or a paper which  
20 says, Here are the numbers and here's why we believe  
21 the merger is in the public interest.  It simply  
22 declines to attack the merger.

23          Q.    Dr. Taylor, are you able to provide a yes  
24 or no answer to my question?

25          A.    I did.  I started with a yes -- or started

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1 with whichever was the proper one.

2 Q. I heard a lot of explanation, but I don't  
3 believe I heard a yes or no. But, again, simply the  
4 question is, you don't know -- it's correct, is it  
5 not, that you don't know whether the Department of  
6 Justice undertook an analysis of markets in the state  
7 of Washington?

8 A. Well, my answer is I haven't seen what  
9 they've done, and then we can repeat all what I've  
10 said before about why I haven't seen what they've  
11 done.

12 MR. HARLOW: I think the record's clear.  
13 Thank you, Dr. Taylor. No further questions.

14 MR. BUTLER: No questions.

15 JUDGE MOSS: Mr. Butler has no questions.  
16 Mr. Kopta, shall we open the door to you?

17 MR. KOPTA: You can open it, but I'd simply  
18 close it again.

19 JUDGE MOSS: As long as you're not slamming  
20 it, I think that's acceptable. Mr. ffitch.

21 MR. FFITCH: I don't have any questions,  
22 Your Honor.

23 JUDGE MOSS: Ms. Johnston.

24 MS. JOHNSTON: Neither do I.

25 JUDGE MOSS: The Bench.

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1 CHAIRWOMAN SHOWALTER: Oh, boy. Well, I  
2 was hoping there'd be some more questioning.

3 E X A M I N A T I O N

4 BY CHAIRWOMAN SHOWALTER:

5 Q. My claim to fame here is that in your  
6 footnote 19, 18, the author of this treatise, Kip  
7 Viscusi, was a friend of mine in college. We were in  
8 the same math class together and friends after that.

9 A. Both well-educated, then.

10 Q. My ability to ask you questions is probably  
11 somewhat limited, so I just will go back to one issue  
12 that you were getting at, which I think was that  
13 market share does not equal market power,  
14 necessarily. And can you describe for me, in more or  
15 less lay or qualitative terms, under what conditions  
16 that can be so?

17 A. Sure.

18 Q. Or what are the factors that would make it  
19 not so?

20 A. Sure. The other factors that are taken  
21 into account are the market price elasticity of  
22 demand, so suppose you are monopolistic of salt, the  
23 demand for which is probably very inelastic. At some  
24 point, you've got to have salt. If the demand is  
25 very, very inelastic and you have a high share of

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1 that market, it's going to be possible for you --  
2 more possible for you to raise -- try to raise your  
3 price or restrict your output, amounts to the same  
4 thing, and that would have the effect of increasing  
5 price. And you'd probably get away with it because  
6 there aren't many substitutes for salt. Customers  
7 can go to whoever your competitors are, but assume  
8 there are only a few of them, but you've got to have  
9 salt, and pepper won't do.

10 So in that case, we have a very, very  
11 elastic -- inelastic, straight up and down demand  
12 curve for salt. You'd expect, all else equal, that  
13 the higher market share you'd have, the higher  
14 ability you'd have to increase the price in the  
15 market.

16 Conversely, if you're selling something  
17 trivial, selling something people don't need, I'm  
18 hard-pressed to think of an example, but --

19 CHAIRWOMAN SHOWALTER: There are so many  
20 examples, I would think.

21 JUDGE MOSS: How about green carnations?

22 THE WITNESS: Green carnations yesterday,  
23 or tomorrow.

24 Q. Tomorrow.

25 A. Carnations tomorrow, absolutely. You can,

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1 in that case, any attempt to raise the price of  
2 carnations, what's going to happen? Your carnation  
3 customers will look to your competitors, and if you  
4 don't have any competitors, well, they just won't buy  
5 carnations. I've gotten along well in my life  
6 without buying carnations and I could do it even  
7 better if carnations were more expensive. So market  
8 elasticity and demand is a critical issue.

9       Second sort of range of critical issues is  
10 what competitors do. We've assumed you have a high  
11 market share, so your competitors can't be selling  
12 too much in this market, but they can have the  
13 ability to increase their sales, their capacity,  
14 maybe, and if they can, then your ability to raise  
15 price is again circumscribed.

16       A good example of that is the long distance  
17 market in the United States, where, you know, AT&T,  
18 back in the early 1980s, had a relatively large  
19 market share, and yet, as companies like MCI, Sprint,  
20 and Qwest built long distance capacity, AT&T's  
21 ability to raise price in that market became  
22 circumscribed because customers could always shift  
23 their demand now to MCI or to Sprint.

24       The other way of looking at that is that  
25 AT&T couldn't force the market price up by cutting

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1 its output, because people have a choice. They could  
2 go someplace else. Even though MCI might have only  
3 been selling a little bit in 1983 or 1978, they had  
4 all this capacity in their fiber-optic network and  
5 could expand that capacity nearly costlessly to  
6 supply any customer that AT&T wanted to cut.

7 So those are the major reasons. Market  
8 share, by itself, is a big piece of a market power  
9 analysis, but not the entire piece.

10 CHAIRWOMAN SHOWALTER: Thanks.

11 THE WITNESS: Sure.

12 E X A M I N A T I O N

13 BY COMMISSIONER HEMSTAD:

14 Q. Well, looking at page 10 of your testimony,  
15 the very last sentence, and perhaps your response to  
16 Chairwoman Showalter's question answers this, but you  
17 state there, Competitors' claims that merger would  
18 increase the merged company's incentive and ability  
19 to engage in price squeezing, cross-subsidization or  
20 various acts of non-price discrimination have no  
21 foundation in economics or experience in  
22 telecommunications markets. That's quite  
23 absolutistic statements. And your testimony goes on  
24 further to elaborate on that, but are you comfortable  
25 with an absolute assertion?

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1           A.    Yes, I think I am.  And remember that there  
2 are sort of two things going on in that sentence.  
3 One is that the merged company would have or an ILEC  
4 would have some incentive or ability to do these  
5 things, and I think my testimony argues and I've  
6 always believed that they don't have most of the  
7 incentives that are attributed to it, and regulators  
8 such as yourselves ensure that they don't have the  
9 ability.

10                There's even a second piece in that  
11 sentence, which says the merger doesn't increase it.  
12 And that's the -- that's the effect that's really on  
13 trial here, not whether -- even though I believe the  
14 ILECs do not have the incentives and abilities that  
15 competitors ascribe to them, this merger is very  
16 different from the kind of RBOC-to-RBOC mergers that  
17 we've seen before in which people have made  
18 incorrect, I think, but plausible statements that by  
19 increasing the footprint of the company, the  
20 company's incentives to discriminate increase,  
21 because you discriminate a little here and you get to  
22 screw people all over your bigger footprint.  Sort of  
23 sensible.

24                But that doesn't apply here, because the  
25 footprint doesn't change.  This is a vertical merger,

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1 not a horizontal merger. So I think I've got belts  
2 and suspenders to protect me on what I agree with you  
3 is a very absolute sentence.

4 Q. In a different area, you responded to other  
5 testimony with regard to the issue of the intention  
6 of the merged company to reduce payment of dividends?

7 A. Yes.

8 Q. This Commission has never really, I  
9 believe, exercised oversight with respect to a  
10 company's dividend policies. But pursuing the point  
11 of this, is the intention a substantial reduction in  
12 dividends to increase available revenues for other  
13 kinds of activities. At the same time, there is no  
14 commitment by the company to increase capital outlays  
15 over that which has been the average for several  
16 years in this state, and I assume it would be the  
17 same environment in other states, which would suggest  
18 that those additional revenues will be used for  
19 purposes other than the network infrastructure.  
20 Would you agree with that?

21 A. No, I don't think I would. I mean, I think  
22 I agree with you that the effect of the dividend  
23 policy is to free up money that can be used -- put to  
24 other uses, that would otherwise go to dividends to  
25 stockholders. It's possible to do that in this

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1 merger, I think, because Qwest and US West together  
2 represent a higher growth company and stockholders  
3 are willing to take returns in the form of capital  
4 gains or dividends, and by increasing the forecasted  
5 future growth rate, they can afford to cut the  
6 dividend.

7         So all we know is that the company has more  
8 money after everybody is paid, because they're not  
9 paying the stockholders in cash anymore. They have  
10 more money that they can invest. Now, the company  
11 has made a commitment in Washington, as I understand  
12 it, to hold investment no lower than historical  
13 levels. To me, that's not a statement at all about  
14 -- that commits it at all to invest no more than  
15 that. I mean, my understanding is this combined firm  
16 is very anxious to provide long distance service in  
17 this state and other states, to provide integrated  
18 broadband services to customers, get Internet -- get  
19 people on the Internet at high baud rates, and to do  
20 that is going to require investment.

21         What Qwest, in my view, is looking for in  
22 the merger is kind of the last mile. They want US  
23 West's kind of 25 million customers, and if it's  
24 going to take investment to be able to sell the sort  
25 of services that Qwest is offering, Qwest/US West

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1 together want to offer to those folks, you know, I  
2 think that is going to be where the investment goes.

3           And I'm perfectly -- I understand a concern  
4 that you don't have investment commitments. I guess  
5 I would just say that, as an economist, dollar  
6 commitments to investment always make me nervous,  
7 because investment is an input; it's not an output.  
8 And if I were looking for commitments, which, of  
9 course, I'm not, I'd much more respect commitments  
10 for service quality and for things like that for  
11 outputs, for things that the company will have to  
12 make happen rather than some amount of money that  
13 they're required to spend.

14       Q.    Okay. One final question. The parties  
15 here have -- some of the parties have come to a  
16 settlement with regard to certain requirements on the  
17 retail side. Would it be your position as an  
18 economist that while this may ultimately be in the  
19 rational interest of the applicants here, it also  
20 would not be necessary in order to protect public  
21 interest?

22       A.    Yes, I think that characterizes my view. I  
23 don't think it's necessary. I think US West/Qwest  
24 together have every incentive to provide high-quality  
25 retail service, particularly after the merger, when

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1 they're trying to get long distance and advanced  
2 service customers. The commitments I don't think are  
3 harmful in the sense the company is willing to do it,  
4 and I can understand why it would make public  
5 advocates feel better about the merger. They have a  
6 guarantee. I don't think it's necessary, but people  
7 buy insurance.

8 COMMISSIONER HEMSTAD: Thank you. That's  
9 all I have.

10 COMMISSIONER GILLIS: No questions.

11 JUDGE MOSS: I have a couple of follow-up  
12 questions, Dr. Taylor.

13 E X A M I N A T I O N

14 BY JUDGE MOSS:

15 Q. I'm still focused back here on page 10 of  
16 your testimony.

17 A. Yes.

18 Q. Commissioner Hemstad asked you a question  
19 about the last sentence on that page. I just want to  
20 be clear about what you're saying here and ask you,  
21 do you recognize that such incentives exist and you  
22 are just testifying that the merger does not  
23 significantly increase them, or are you suggesting  
24 that such incentives do not exist?

25 A. Well, certainly the statement itself says

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1 the merger isn't going to increase them.

2 Q. Yes.

3 A. Beyond that, the incentives which exist, I  
4 would argue, and I believe my testimony outlines that  
5 there is no incentive in telecommunications markets  
6 today to engage in a price squeeze or to  
7 cross-subsidize, and there is no -- there is  
8 conceivably incentives for non-price discrimination  
9 elsewhere. There is no ability to engage in a price  
10 squeeze because of imputation, cross-subsidization,  
11 because you have effectively an AFOR in this  
12 proposal. That is, prices will be frozen or capped  
13 independent of where costs get assigned for the next  
14 four years, so there's no ability to cross-subsidize.

15 And there's no ability to engage in acts of  
16 non-price discrimination because FCC's rules and your  
17 rules and the FCC order, I think, was fairly clear  
18 about the effect of the proposed merger on all of  
19 these forms of anticompetitive behavior.

20 Q. You have perceived correctly that I am  
21 concerned by the FCC's order in this regard, and some  
22 of the things it said, which I'm trying to explore  
23 with you.

24 A. Sure.

25 Q. Your position relative to those concerns.

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1 I want to follow up on one point you just made. When  
2 you talk about a form of AFOR, you're referring to  
3 the proposed settlement agreement that's been filed  
4 in this proceeding?

5 A. That's correct, to the price commitments  
6 that are in that agreement.

7 Q. And without those?

8 A. Well, without those, I guess I understand,  
9 correct me if I'm wrong, that US West/Qwest would be  
10 under traditional rate of return regulation in this  
11 state, and if that were the case, then you would have  
12 to rely more heavily on your accounting separations  
13 and other rules to avoid cross-subsidization, because  
14 it would be possible, there would be an incentive in  
15 a world like that, to shift costs into the regulated  
16 for regulated services and away from -- and away from  
17 the unregulated services.

18 Q. I think this is my final question. I am  
19 looking at the FCC's order in the Qwest  
20 Communications and US West matter that was released  
21 on March 10th of this year. And I don't know if you  
22 have that. I don't think you necessarily need it in  
23 front of you for my question, but I'm looking at page  
24 22, where the FCC says, We agree with McLeod's  
25 argument that by combining US West's incumbent LEC

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1 business and Qwest's competitive LEC and  
2 interexchange businesses, the merged entity will have  
3 an increased incentive to discriminate against  
4 competitive LECs currently competing or entering the  
5 US West region and against competing interexchange  
6 carriers. And I just want to ask you if you simply  
7 disagree with that?

8 A. I don't think I do, because if you finish  
9 the paragraph, you'll understand what the FCC is, at  
10 least in my view, trying to say. It's not a clear  
11 argument. They say what you just quoted, that  
12 essentially, by bringing together a long distance  
13 company and a local company, these incentives are  
14 going to increase. Then it goes on to say, Sure, but  
15 that's just the situation that US West or any other  
16 ILEC or even RBOC could have done absent the merger.  
17 It's no different from the ability that US West has  
18 today to provide long distance service out of region.

19 So the way I interpret the rest of that  
20 paragraph is to say, yeah, it may increase these --  
21 it may have these bad effects, but they're no worse  
22 bad effects than the telecommunications act  
23 implicitly took into account when it said that  
24 provision of long distance services out of region was  
25 in the public interest.

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1           And if you look at the end of the  
2 paragraph, I mean, it sort of comes to that  
3 conclusion. Even without a separate subsidiary, the  
4 FCC finds that these potential issues that it  
5 discussed in the paragraph we're discussing don't  
6 justify denying the application because the benefits  
7 outweigh the costs.

8           JUDGE MOSS: Thank you, I appreciate that.

9           CHAIRWOMAN SHOWALTER: I've got a follow-up  
10 on one of your questions.

11           E X A M I N A T I O N

12 BY CHAIRWOMAN SHOWALTER:

13           Q. That was on the issue of  
14 cross-subsidization. I think I heard you say that if  
15 the settlement agreement is approved, there's no  
16 incentive for cross-subsidization?

17           A. Yes.

18           Q. Under those circumstances, would there  
19 remain or not an incentive for cross-subsidization in  
20 areas affected by or involving wholesale competition  
21 or would those incentives go away because of the  
22 settlement agreement on the retail side?

23           A. Well, let's see. The reason the retail  
24 cross-subsidization incentive goes away is because  
25 whatever the company tries to do with its costs on

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1 its books, it can't raise its prices. So there's no  
2 way it can be subsidizing competitive services with  
3 regulated services because it can't raise the price  
4 of those regulated services.

5 For wholesale services, I think the  
6 situation is solved in a different way. Wholesale  
7 service prices are set by -- generally, by TELRIC.  
8 That is, by forward-looking economic costs, not by  
9 the accounting costs of the firm. So even if, going  
10 forward, US West in Washington remained under  
11 traditional rate of return regulation, there's no  
12 effect that its bookkeeping could have on the prices  
13 that it would be permitted to charge for unbundled  
14 network elements or -- well, there's no cross-subsidy  
15 possibility for resold services because they're tied  
16 to the retail price.

17 So for those services, I think it's more or  
18 less irrelevant what kind of regulation you have here  
19 in Washington. They can't raise the price of an  
20 unbundled network element because they claim some  
21 cost has been flowed to interstate.

22 Q. So if there was a price cap, there would be  
23 an incentive, I take it, for the company to try to  
24 keep its share of retail customers under that price  
25 cap. And wouldn't that mean there is an incentive in

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1 some form that is adverse to competitors?

2 A. Well, I think you put your finger on it.

3 It has an incentive to compete.

4 Q. Yes.

5 A. Yes, to lower its costs if it can, to  
6 provide higher-quality service, to find out what its  
7 customers want. That's going to make it harder for  
8 competitors, you're right. That's competition.

9 That's a good thing.

10 Q. But then, one of the things that makes it  
11 harder for competitors is to interconnect and do  
12 various things with the incumbent. And are you  
13 saying that that particular problem was taken care of  
14 by 271 issues, that the company has a general  
15 incentive to cross the 271 threshold and, therefore,  
16 once it does, that's sufficient or at least it's  
17 sufficiently neutral toward the competitors that we  
18 don't have to worry about that particular competitive  
19 incentive to be uncooperative with competitors?

20 A. Well, you may always have to worry about  
21 it. Competitors will always bring it to your  
22 attention, so it will always be a worry of yours, but  
23 the act sort of defined where that line was going to  
24 be drawn in the sand. That is, if 14 points of the  
25 checklist are met, in your opinion, and all of the

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1 footnotes that have been added to that since the act  
2 has been passed, then it was deemed to be in the  
3 public for this vertically integrated company to be  
4 providing both long distance and local service.

5           The key point, I think, for the merger is  
6 that because it so increases the incentive of the  
7 merged company to get into long distance, I think  
8 whatever -- wherever it is on this spectrum of  
9 welcoming competition or hindering it, in your view,  
10 it's going to be moving on towards the welcoming side  
11 as a result of the merger.

12           CHAIRWOMAN SHOWALTER: Thanks.

13           JUDGE MOSS: Redirect.

14           MR. WILTSIE: Very briefly, Your Honor.

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

16 BY MR. WILTSIE:

17           Q.    Dr. Taylor, when Mr. Harlow was questioning  
18 you, he was referring to the Department of Justice  
19 guidelines. I wanted to review that process with  
20 you. Are you aware of the Hart Scott Rodino Act?

21           A.    Yes.

22           Q.    That's the act, I'm correct, that requires  
23 merging companies to make the filings that trigger  
24 the antitrust investigation; is that correct?

25           A.    Yes.

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1 Q. To your knowledge, have Qwest and US West  
2 made such a filing with the Department of Justice?

3 A. Yes, they have.

4 MR. HARLOW: Your Honor, I'm going to  
5 object. This goes beyond the scope of my cross. I  
6 didn't inquire regarding Hart Scott Rodino.

7 MR. WILTSIE: I beg to differ, Your Honor.  
8 When he was asking about whether the Department of  
9 Justice had performed certain measurements, that fell  
10 within the Hart Scott Rodino Act.

11 JUDGE MOSS: Yeah, the Hart Scott Rodino  
12 act, part of the analysis that takes place in the  
13 wake of or as a result of having to comply with that  
14 is the HHI analysis, isn't it?

15 THE WITNESS: That's correct, yes.

16 JUDGE MOSS: So I think it is within the  
17 scope.

18 Q. Now, as part of that investigation, the  
19 Department of Justice looks at actual competition?

20 A. Yes, it does.

21 Q. And potential competition?

22 A. Both, yes.

23 Q. And I believe you also mentioned geographic  
24 markets?

25 A. It defines both geographic and product

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1 markets, yes.

2 Q. Now, we can say with almost a certainty  
3 that the Department of Justice looked at this merger  
4 on a nationwide basis, can't we?

5 A. It did at least that, yes, but it often  
6 does it -- it does it at a much more geographically  
7 circumscribed level, as well. The example I always  
8 take are, in the RBOC mergers, you wonder is the  
9 Department of Justice looking at this thing from some  
10 90,000 feet and asking about the U.S. in general, and  
11 I would say no, because all of those mergers were  
12 actually -- the Justice Department actually forbade  
13 and conditioned because they had overlapping cellular  
14 properties.

15 The Justice Department went into every  
16 little MSA, every little RSA, tiny little towns in  
17 rural areas and said, You can't complete this merger  
18 unless -- because there are two licenses in Oak  
19 Ridge, Tennessee, and you would have both of them.  
20 So you've got to drop one. So in that sense, we know  
21 that the Justice Department looks at a very granular  
22 level at competition as part of the Hart Scott Rodino  
23 process.

24 Q. And as part of that granularity, they  
25 certainly would have looked at the effect of this

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1 merger in the US West territory, the 14-state  
2 territory?

3 A. Oh, yes.

4 Q. And my understanding is each of those 14  
5 states have their own regulatory schemes for US West?

6 A. Yes.

7 Q. So in your professional opinion, do you  
8 think that the Department of Justice would have  
9 looked at each state and the effect of competition in  
10 each state of this merger?

11 A. Well, yes. I mean, in the same sense that  
12 I mentioned about differences in markets. That is,  
13 about where you happen to hold cellular licenses. I  
14 think all of those are relevant criteria that the  
15 Department of Justice would look at in order to make  
16 the decision that it made.

17 Q. Now, correct me if I'm wrong, Doctor, but  
18 my understanding is the Department of Justice granted  
19 early termination to this process?

20 A. That's my understanding.

21 Q. They could have invoked a much more  
22 grueling investigation?

23 A. Yes, my understanding is when you file with  
24 the Department of Justice, you file enough  
25 information to satisfy, in your opinion, at least,

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1 the requirements of Hart Scott Rodino, and hopefully  
2 to persuade either the Justice Department or the  
3 Federal Trade Commission that the merger's in the  
4 public interest.

5         If you fail to do that, the enforcement  
6 agency will come back with what is called a second  
7 request, which is something firms like to avoid,  
8 because it is, in addition, a great deal more  
9 information. And I understand in the US West-Qwest  
10 merger, there was no second request required.

11         Q. And the standard that the department is  
12 applying is that the merger will not tend to  
13 substantially lessen competition or create a  
14 monopoly; is that correct?

15         A. In any line of commerce and in any section  
16 of the country, yes.

17         Q. You're also familiar with the FCC order  
18 that came out last week?

19         A. Yes.

20         Q. I believe the FCC order stated that the  
21 public benefits here outweigh any anticompetitive  
22 effect?

23         A. Yes, it says that.

24         MR. WILTSIE: I have no further questions,  
25 Your Honor.

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1 JUDGE MOSS: Thank you. Any re-cross? All  
2 right. Nothing further from the Bench. Dr. Taylor,  
3 we appreciate your being here this morning, and thank  
4 you for your testimony.

5 THE WITNESS: Thank you.

6 JUDGE MOSS: According to my list, that  
7 brings us to the conclusion of the applicants'  
8 witnesses. Ms. Anderl, Mr. Wiltsie.

9 MR. WILTSIE: Yes, Your Honor, with one  
10 potentially housekeeping matter. As the Commission  
11 may be aware, the divestiture sale of assets and  
12 customers to comply with 271 by Qwest, it was  
13 announced, I believe yesterday. We have copies of  
14 that press release for everyone, just so that the  
15 Commissioners and the intervenors are aware of it.

16 JUDGE MOSS: Is this something you want to  
17 be part of the record or something you just wish to  
18 use to inform us fully as to what we read in our  
19 morning reading?

20 MR. WILTSIE: We could make it an exhibit,  
21 Your Honor, if you so desire.

22 JUDGE MOSS: It's really up to you whether  
23 you want to make it an exhibit or not, unless the  
24 Bench wants it.

25 CHAIRWOMAN SHOWALTER: I think it should

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1 be.

2 JUDGE MOSS: All right. Let's make it an  
3 exhibit, then. We will mark it -- okay. We'll mark  
4 it as 450, and I'm going to just mark it as a Bench  
5 exhibit, since that's where the request is coming  
6 from. And assuming there's no objection, it appears  
7 to be a safe assumption, it will be admitted as  
8 marked. This would appear to be a good moment for  
9 our morning --

10 MR. BUTLER: Before we do that, Your Honor,  
11 we have the stipulated list of withdrawal or  
12 strike-outs from US West and Qwest witness  
13 testimonies that were responding to or rebutting the  
14 testimony of Jo Gentry for Rhythms, which will not be  
15 offered.

16 JUDGE MOSS: Okay.

17 MR. BUTLER: I have that for you now, and  
18 I've handed out a copy to all the Counsel.

19 JUDGE MOSS: All right. We can take care  
20 of that now. Other counsel have this already?

21 MR. BUTLER: Yes, they do.

22 JUDGE MOSS: And this is a stipulation?

23 MR. BUTLER: Yes, it is.

24 JUDGE MOSS: I wonder if I should make this  
25 an exhibit.

01043

1 MR. KOPTA: Probably be a good idea.

2 JUDGE MOSS: I think that would be a good  
3 idea, Mr. Kopta, what do you think?

4 MR. KOPTA: I do.

5 JUDGE MOSS: All right. That's what we'll  
6 do. We'll make this Exhibit 451. I'll treat it also  
7 as a Bench exhibit. And everybody has it, so I'm not  
8 going to bother to read it into the record. Okay.  
9 Any other housekeeping matters? All right.

10 This will be a good moment for our morning  
11 recess. I would, of course, suggest 15 minutes, but  
12 let's try to be back by five before the hour by the  
13 wall clock.

14 (Recess taken.)

15 JUDGE MOSS: Let's go back on the record.  
16 Mr. Ward, will you please raise your right hand.  
17 Whereupon,

18 CHARLES L. WARD,  
19 having been first duly sworn, was called as a witness  
20 herein and was examined and testified as follows:

21 JUDGE MOSS: Thank you. Please be seated.  
22 Ms. Hobson.

23 MS. HOBSON: Thank you.

24 JUDGE MOSS: No, I'm sorry. I've lost  
25 sense of the order here. We're finished with the

01044

1 applicants, aren't we?

2 MR. KOPTA: I'd be happy to cross Mr. Ward.

3 JUDGE MOSS: The penchant for asking  
4 leading questions on direct probably will carry the  
5 day, in any event. Go ahead.

6 MR. KOPTA: Thank you, Your Honor.

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

8 BY MR. KOPTA:

9 Q. Mr. Ward, would you state your name and  
10 business address for the record, please?

11 A. My name is Charles L. Ward. My business  
12 address is 1875 Lawrence Street, 15th Floor, Denver,  
13 Colorado 80202.

14 Q. Mr. Ward, do you have before you what has  
15 been marked for identification as Exhibits 170-T and  
16 171, which are the direct testimony of Charles L.  
17 Ward and Exhibit A to that testimony?

18 A. Yes, I do.

19 Q. Were those documents created by you or  
20 under your direction and control?

21 A. Yes.

22 Q. Do you have any corrections or  
23 modifications to make to those exhibits?

24 A. Yes, I have a few corrections and  
25 modifications. First, on page one, in the

01045

1 description of my responsibilities at AT&T, in the  
2 second line of that answer, it refers to my  
3 responsibility for seven states. I now have  
4 responsibility for 14 states.

5 JUDGE MOSS: What line? Oh, this doesn't  
6 have lines.

7 MR. KOPTA: I apologize, Your Honor. I  
8 just realized that, as Mr. Ward and I were discussing  
9 this morning, that this copy doesn't have lines.

10 THE WITNESS: It's the question that  
11 begins, Please state your responsibilities at AT&T,  
12 and it's in that first sentence in the second line of  
13 that sentence. I have responsibility for 14, not  
14 seven states.

15 JUDGE MOSS: Thank you.

16 THE WITNESS: Then, on page 11, on the  
17 sixth line on that page, the sentence in that line  
18 that begins, The applicants should adopt the 27  
19 service, that number should be 45.

20 On page 25 of the testimony, on the fifth  
21 line from the bottom, there's a reference to tests  
22 all Utah-specific requirements. That should be all  
23 Washington-specific requirements.

24 And then, finally on page 48, the third  
25 line from the bottom, there's another reference to 27

01046

1 service quality measurements, and that should be 45.  
2 Those are all my corrections.

3 Q. And with those corrections, are exhibits  
4 170-T and 171 correct, to the best of your knowledge?

5 A. To the best of my knowledge, yes.

6 Q. And if I asked you the questions that are  
7 contained in Exhibit 170-T, would your answers be the  
8 same as those contained in that exhibit?

9 A. Yes.

10 Q. Mr. Ward, do you also have before you what  
11 have been marked for identification as Exhibits 172,  
12 173, and 174, which are Exhibits B, C and D to your  
13 testimony?

14 A. Yes, I do.

15 Q. And did you cause to have those exhibits  
16 attached to your testimony?

17 A. Yes.

18 Q. And are those exhibits true and correct, to  
19 the best of your knowledge?

20 A. To the best of my knowledge, yes.

21 MR. KOPTA: Your Honor, I would move  
22 admission of Exhibits 170-T, 171, 172, 173, and 174.

23 MS. HOBSON: No objection.

24 JUDGE MOSS: Hearing no objection, they  
25 will be admitted as marked.

01047

1 MR. KOPTA: Thank you, Your Honor. Mr.  
2 Ward is available for cross-examination.

3 JUDGE MOSS: Thank you, Mr. Kopta. And who  
4 will be doing the honors?

5 MS. HOBSON: Mary Hobson. I'm representing  
6 US West.

7 JUDGE MOSS: Go ahead.

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

9 BY MS. HOBSON:

10 Q. Good morning, Mr. Ward.

11 A. Good morning, Ms. Hobson.

12 Q. Mr. Ward, as I understand your testimony,  
13 AT&T does not oppose the US West-Qwest merger per se,  
14 but you are merely seeking to have conditions imposed  
15 as part of the approval of that merger; is that  
16 correct?

17 A. Yeah, I think the conditions that we  
18 proposed are very important to bring this merger into  
19 conformity with the public interest.

20 Q. And the reasons that you believe that the  
21 Washington Commission should impose these conditions  
22 as part of the merger approval process are contained  
23 in your testimony, is that correct, your prefiled  
24 testimony?

25 A. Yes, I think in the prefiled testimony,

01048

1 there's a description of the types of problems that  
2 exist today with US West and how those might be  
3 exacerbated by this merger and the conditions,  
4 therefore, to try to preclude that.

5 Q. Mr. Ward, likewise, the conditions that you  
6 would seek to have imposed are also presented in your  
7 testimony and the exhibits that have been identified  
8 this morning; is that correct?

9 A. I believe it's Exhibit 171, primarily, yes.  
10 I think that's --

11 Q. That's okay. Thank you. And by the same  
12 token, if for some reason the merger should not go  
13 forward, you would not have reason to present these  
14 concerns and these conditions at the Commission  
15 today, would you, as a purely hypothetical question?

16 A. Well, if we didn't have a hearing, we would  
17 be considering other alternatives, as we have in the  
18 case of the access services complaint we brought.

19 Q. You would be presenting your concerns that  
20 are contained in your testimony in other forums to  
21 this Commission if this merger were not to go  
22 forward?

23 A. To the extent that they involved merely US  
24 West's performance and not the possibility that that  
25 performance would deteriorate as a result of the

01049

1 merger.

2 Q. I want to direct your attention to page 12  
3 of your prefiled testimony.

4 A. Hopefully, we've got the page numbers  
5 paginated. I apologize for the lack of line numbers.

6 Q. I am hopeful. What I'm hoping to find  
7 there is the heading Section 251 and 252. Do you see  
8 that?

9 A. I have that, yes.

10 Q. I noticed that you devoted considerable  
11 amount of your testimony, 16 pages, by my count, to  
12 cataloging instances where you believe US West has  
13 failed to perform its obligations under Sections 251  
14 and 252 of the federal act; is that correct?

15 A. I'll accept that it's 16 pages. There is  
16 quite a discussion of US West's performance, yes.

17 Q. Could you point out for the Commission any  
18 issue that you believe would be eliminated if this  
19 Commission were to reject the merger that is before  
20 it?

21 A. I'm not sure I understand the question.

22 Q. Referring to the 16 pages that you've  
23 devoted to Section 251 and 252 issues, I'm asking if  
24 you could point the Commission to any issue regarding  
25 Section 251 or 252 compliance that you would believe

01050

1 would simply be eliminated if the Commission were to  
2 disapprove this merger?

3 A. I'm trying to sort the negatives. I'm  
4 sorry. To the extent that US West's behavior absent  
5 the merger would continue as it has in the past, then  
6 I would see -- I would not see any of these issues  
7 going away if the merger wasn't approved. I think  
8 I've got all the negatives right.

9 But the issue in front of the Commission is  
10 are these behaviors going to get worse as a result of  
11 the merger. And I fear that they will.

12 Q. Okay. Do you have any reason to believe  
13 that the merged company's obligations under the  
14 federal act will be any different than US West's  
15 existing obligations?

16 A. I certainly don't expect any of its legal  
17 obligations to change, nor do I think any of its  
18 incentives or its behaviors will change, and I fear  
19 they'll get worse.

20 Q. Okay. And you are not testifying, are you,  
21 that AT&T has no other forum or remedy for the issues  
22 that it raises in your testimony, besides seeking a  
23 position of the conditions of the merger, do you?

24 A. Well, I think, at this point in time, as  
25 far as any performance issues associated with the

01051

1 interconnection agreement, I don't believe we do have  
2 another forum, because there aren't any measures.

3 Q. You don't -- but you have a forum in the  
4 sense that you could bring an enforcement action  
5 under the interconnection agreement, you could bring  
6 a complaint before the Commission, could you not?

7 A. Of some limited scope, yes.

8 Q. Well, the scope would be limited to  
9 whatever you felt the violation of your  
10 interconnection agreement was, I assume?

11 A. And whatever terms that interconnection  
12 provided for us to bring an action, measures in  
13 performance, those kinds of things.

14 Q. Let's look at page 22 of your testimony.

15 A. I've got it.

16 Q. There you list several of the conditions  
17 that you feel need to be imposed by this Commission  
18 in connection with the issues that you've sectioned  
19 out as being problems with the 251 and 252 compliance  
20 of US West, is that correct, beginning on page 22?

21 A. That's correct.

22 Q. And the first of these conditions, starting  
23 there at the first bullet point, asks that Qwest and  
24 USWC must negotiate in good faith with the CLECs; is  
25 that correct?

01052

1 A. That's correct.

2 Q. Now, that statement is simply a restatement  
3 of what the federal law already requires?

4 A. I believe it does.

5 Q. And the second part of that first bullet  
6 point, which speaks to US West and Qwest allowing  
7 CLECs to negotiate, if they wish, an interconnection  
8 agreement or resale agreement covering more than one  
9 state, that is not, as you understand it, a present  
10 requirement of federal law, is it?

11 A. That's my understanding. I think, given  
12 what I heard reinforced by Mr. Reynolds earlier in  
13 the week about the fact that US West does a lot of  
14 its business on a region-wide basis would support  
15 this type of an approach and it would also be an  
16 efficient approach, as the ROC collaborative has  
17 proved.

18 Q. Bur Mr. Ward, the question, as I  
19 understood, what you're asking the Commission here to  
20 do was make that a condition of the merger, that US  
21 West would be required to do that. Now, that's a  
22 different question, is it not, than whether or not it  
23 might be a good idea for US West to agree to do that  
24 or Qwest to agree to do that?

25 A. I certainly don't expect Qwest to agree to

01053

1 do it.

2 Q. Okay. Let's talk about the pick and choose  
3 option, which I believe is the second bullet point,  
4 captured in the second bullet point there on page 22  
5 of your testimony?

6 A. I see that.

7 Q. Are you aware that this Commission has  
8 already passed -- or has already addressed these  
9 issues in an interpretive and policy statement issued  
10 on November 30th of last year?

11 A. I'm not aware of that. I'm sorry.

12 Q. So AT&T is not here before the Commission  
13 in this proceeding seeking to revisit the issues that  
14 the Commission has spoken on in its policy statement;  
15 is that correct?

16 A. Well, I'm not sure what the Commission's  
17 policy statement said, so to the extent that they  
18 adopted pick and choose, then I'm comfortable with  
19 that. If they did not adopt pick and choose, then I  
20 would urge them to reconsider that in the context of  
21 this merger.

22 Q. Okay. To the extent that the Commission  
23 has issued an interpretive and policy statement and  
24 US West is acting in compliance with that  
25 interpretive and policy statement, do you believe

01054

1 that additional conditions need to be imposed by this  
2 Commission at this time on the subject of pick and  
3 choose?

4 A. Well, I think you've got me at a little bit  
5 of a disadvantage in that I don't know what the  
6 Commission's interpretive statement said. If it  
7 adopted pick and choose as a policy, then this is  
8 redundant. If they denied it, then I think it's  
9 something that should be considered.

10 Q. So that's a point that you'd have. If,  
11 hypothetically, the Commission had denied it, you  
12 wish to have the Commission revisit that in the  
13 context of this merger case?

14 A. Yes.

15 Q. On the subject of reciprocal compensation  
16 obligations, has US West failed to pay AT&T any  
17 reciprocal compensation under its interconnection  
18 agreements in Washington, that you're aware of?

19 A. I have to apologize. I'm not aware if US  
20 West has paid us or not. I'm sorry.

21 Q. Are you aware of what AT&T's  
22 interconnection agreement in the state of Washington  
23 requires with regard to reciprocal compensation?

24 A. I haven't looked at that provision  
25 recently. I'd be happy to review that, if you want

01055

1 to pursue these questions.

2 Q. I don't think that will be necessary.

3 A. Okay.

4 Q. With regard to the question of the  
5 provision of UNEs in full compliance with the FCC's  
6 UNE remand order, according to the terms and  
7 conditions of that order, the ILECs were given 120  
8 days from the publication of the order to come into  
9 compliance; isn't that correct?

10 A. I believe that's correct.

11 Q. And has that time yet elapsed?

12 A. I think it's sometime in May, if I recall  
13 right. So I would expect that US West will do what  
14 regulatory agencies tell it to do, as they typically  
15 wait for orders to take effect before they do  
16 pro-competitive things.

17 Q. So you're not, then, asking this Commission  
18 to impose a condition speculating that US West will,  
19 in the future, violate an order or requirement that  
20 it's not presently under an obligation to perform,  
21 are you?

22 A. I think the Commission needs to think about  
23 the possibility that US West post-merger, US West  
24 pre-merger will violate Commission orders. And while  
25 we're dealing with a situation where there's a change

01056

1 in ownership, it's not at all clear what the  
2 post-merger entity is going to adopt in the way of  
3 policies or behaviors.

4           And I think Mr. Blackmon earlier stated  
5 very clearly in his testimony in support of the  
6 stipulation that there are protections that should be  
7 adopted by the Commission to anticipate the  
8 possibility of deteriorating behavior. I think those  
9 conditions apply equally, if not more importantly to  
10 the wholesale competitive side of the business than  
11 as they do to the retail side. So in answer to your  
12 question, I think the Commission is right to  
13 anticipate the possibility.

14           Q. Well, Mr. Ward, have you heard anything in  
15 this proceeding that causes you to believe that the  
16 merged entity is going to develop a policy of  
17 violating federal orders under -- issued by the FCC?

18           A. Well, I would cite, and I would have to dig  
19 out the particular data request, I believe it was 19,  
20 in which US West and Qwest responded to an AT&T data  
21 request regarding the FCC's jurisdiction over LATA  
22 boundaries. And in there, Qwest said the FCC has  
23 exclusive jurisdiction, but that the combined  
24 companies haven't developed a policy yet on that. So  
25 that makes me very suspect about what the post-merger

01057

1 companies are going to do regarding the federal law  
2 and state law.

3 Q. Excuse me, Mr. Ward. Let's see if we can  
4 stick to the subject of the UNE remand order for a  
5 minute.

6 A. Well, you were asking about violations of  
7 federal law, so --

8 Q. Well, I was asking you about whether you  
9 had any evidence that the companies had developed a  
10 policy or stated a policy that would indicate that  
11 they intend to violate any federal order, and  
12 specifically any federal order relating to the UNE  
13 remand process?

14 A. And my answer was that the companies have  
15 not stated that they won't. They've stated they  
16 haven't decided.

17 Q. Okay. And is that your testimony with  
18 regard to the UNE remand order?

19 A. I don't know where to draw the line  
20 relative to what US West/Qwest will or will not  
21 comply with.

22 Q. Did you review the testimony that was filed  
23 in this case by Mr. Reynolds?

24 A. I did.

25 Q. Did you read Mr. Reynolds' testimony with

01058

1 regard to US West's plans to comply with the UNE  
2 remand order?

3 A. I did.

4 Q. Thank you. I take it, then, going back to  
5 my original question, that you are asking this  
6 Commission to speculate that US West will, in fact,  
7 despite Mr. Reynolds' sworn testimony to the  
8 contrary, violate -- intends to violate the UNE  
9 remand order and, as a result of that speculation,  
10 you're asking the Commission to impose a particular  
11 condition here; is that correct?

12 A. The conditions that we're proposing are not  
13 in any way harmful to the company if it complies.  
14 And so I guess the answer to your question is yes, in  
15 that it's not clear -- the company has not been --  
16 Qwest, let me speak to Qwest, has not been  
17 forthcoming in defining what it is and is not going  
18 to do post-merger.

19 In the absence of that, I think this  
20 Commission should adopt measures that would incent  
21 the post-merger company to comply, both with the law,  
22 with competitive objectives that this Commission and  
23 the legislature in Washington has laid out, and the  
24 things necessary to foster the development of  
25 competition. You can worry far less about

01059

1 performance on the retail side of things if you've  
2 got a viable competitive market.

3 Q. Mr. Ward, I'm directing your attention to  
4 the bottom of page 23. I hope that you can stick  
5 with me here in the context of my questions. I'm  
6 simply getting at your recommendation that the  
7 Commission adopt a specific condition relating to the  
8 UNE remand order. My question is, you seem to be  
9 asking that the Commission speculate that US West  
10 will, in fact, or the merged company will, in fact,  
11 violate a federal order, and that your speculation is  
12 sufficient to seek imposition of a special condition  
13 on this merger with regard to that order; is that  
14 correct?

15 A. Yes.

16 Q. Thank you. Now, you are also proposing  
17 conditions relating to OSS; is that correct?

18 A. That's correct.

19 Q. Doesn't the current undertaking by the ROC  
20 address your concerns there, at least insofar as they  
21 go to independent third party testing?

22 A. The developments in the ROC collaborative  
23 give me some hope that there will be a reasonable  
24 disposition of those issues, but we're -- we passed  
25 the fourth anniversary of the act. I'm not convinced

01060

1 that the current activity towards the ROC  
2 collaborative will necessarily result in satisfactory  
3 outcome for competitors and for the Commission.

4 Q. But again, Mr. Ward, if we can kind of  
5 stick to the context of the questions.

6 A. I'm talking about ROC collaboratives.

7 Q. We are on the subject of what you're asking  
8 this Commission to impose. You're asking that the  
9 Commission require the merged company to undergo  
10 independent third party testing with regard to its  
11 OSS; is that correct?

12 A. That would be satisfied to the extent that  
13 the ROC collaborative proceeds.

14 Q. Okay.

15 A. But it's not a given that that would  
16 result, that that will ultimately conclude.

17 Q. All right. And doesn't the ROC effort also  
18 answer your request that the CLECs and this  
19 Commission have the opportunity to participate in the  
20 evaluation of US West's OSS?

21 A. Yes.

22 Q. Thank you. You next asked that the  
23 Commission require US West and Qwest to commit,  
24 complying with the FCC's March 1999 advanced services  
25 order. Do you recall that testimony?

01061

1 A. Yes.

2 Q. Do you have any evidence that US West is  
3 not complying with the FCC's advanced services order  
4 in Washington at this time?

5 A. I don't.

6 Q. Let's look at page 28 of your testimony, if  
7 you would?

8 A. I'm sorry, which page?

9 Q. Twenty-eight.

10 A. Twenty-eight.

11 Q. And in the middle of that page, I see the  
12 section labeled 271 Compliance. Are we still on the  
13 same page?

14 A. We are.

15 Q. AT&T participated at the FCC in the merger  
16 proceeding on this and advocated their position that  
17 the merged company had not made an adequate showing  
18 with regard to the 271 compliance piece of the  
19 merger; isn't that correct?

20 A. That's correct.

21 Q. Have you read the FCC's March 10, 2000  
22 order approving the US West-Qwest merger?

23 A. I have to apologize. I've not been to my  
24 office since then, so no, I have not seen that order.  
25 I have seen some press releases associated with it.

01062

1 Q. So as I understand it, though, you're the  
2 vice president of government affairs for AT&T?

3 A. In the western region, yes.

4 Q. I thought you corrected your testimony  
5 today to say that it was 14-state region?

6 A. That is the western region.

7 Q. Oh, I understand.

8 A. I only had a part of the western region  
9 before.

10 Q. Okay. And wasn't -- isn't this issue of  
11 whether or not the US West-Qwest merger goes forward  
12 a big regulatory initiative -- or at least goes  
13 forward without conditions, I'm sorry, that that's a  
14 big regulatory initiative for AT&T at this point,  
15 isn't it? This whole subject is a big deal at AT&T  
16 at this time?

17 A. Yes, very important to us.

18 Q. Okay. Nonetheless, you indicate to me that  
19 you haven't had the opportunity during this week to  
20 catch up with actually reading that order?

21 A. Correct.

22 Q. Okay.

23 A. I haven't read the legislation on Minnesota  
24 this week, either.

25 Q. Well, in that case, I wonder if you're

01063

1 aware that the AT&T advocacy at the FCC on the  
2 question of 271 compliance appears to have carried  
3 the day. Would you agree with that assessment, or  
4 you just don't know?

5 A. Judging from what I am aware that the FCC  
6 imposed on the merger, I am somewhat doubtful that we  
7 carried the day.

8 Q. With regard to the question of Section 271  
9 compliance, you have doubts as to whether or not that  
10 position of AT&T was reflected in the FCC order?

11 A. In total.

12 Q. Okay. Well, I guess you're probably not  
13 then prepared to answer the next question, which is  
14 what is it that you think the Washington Commission  
15 could do with regard to this question that differs  
16 from or improves upon what the FCC has ordered? You  
17 don't know that, do you?

18 A. I don't. I'm sorry.

19 Q. The FCC is the regulatory body which  
20 ultimately decides the issue, at least before it goes  
21 to the courts, as to whether an ILEC has or has not  
22 complied with 271; isn't that correct?

23 A. With input, yes.

24 Q. Okay. And the -- well, I guess you don't  
25 know. I ask you to accept, subject to check, that

01064

1 the FCC ordered that Qwest provide a detailed report  
2 prior to completion of the merger with regard to its  
3 intentions for 271 compliance. Can you accept that?

4 MR. KOPTA: Your Honor -- excuse me. I  
5 didn't mean to interrupt.

6 Q. Can you accept that, subject to check?

7 MR. KOPTA: We had a discussion yesterday  
8 about subject to check. I believe that the  
9 discussion was that that was to be numbers and things  
10 that one could look at, as opposed to interpretations  
11 of legal documents.

12 JUDGE MOSS: Well, I can see where this is  
13 going, and I see a couple of possibilities. One is  
14 that we can furnish this witness with a copy of the  
15 relevant material and have him review it each time a  
16 question is asked, or we can follow a procedure  
17 whereby he will be asked these questions subject to  
18 check and you can take it upon yourself to check. I  
19 agree with what you said, and I'm frankly willing to  
20 proceed either way.

21 If you would like the witness to be  
22 furnished with a copy of the order so that he can  
23 respond to these questions, which I think bear very  
24 directly on his testimony, and therefore are  
25 important to the Commission to hear, we can do it

01065

1 that way. Or we can have the questions and you can  
2 do the laboring oar. What is your preference, Mr.  
3 Kopta?

4 MR. KOPTA: Well, if Mr. Ward is going to  
5 be asked questions about the order, I think he should  
6 have a copy.

7 JUDGE MOSS: All right. Let's proceed in  
8 that way. I think we'll probably get a better record  
9 that way, in any event. I'll have to hope that you  
10 are prepared to cite to different parts of the order,  
11 having anticipated perhaps that Mr. Ward would have  
12 read it.

13 MS. HOBSON: Well, and I fear, Your Honor,  
14 that this could be a fair bit of to do about not very  
15 much, because I really only had that single question.  
16 But I would be happy to have Mr. Ward look with me at  
17 the FCC order if we can find it.

18 JUDGE MOSS: Let's do that, and we can  
19 focus the question that way. I believe the witness  
20 has now been furnished with a copy of the FCC's March  
21 10 order.

22 MS. HOBSON: You're right. Thank you.

23 MR. KOPTA: Excuse me, I don't seem to a  
24 have a copy of it myself.

25 JUDGE MOSS: I'm willing to bet US West has

01066

1 another copy.

2 MR. KOPTA: Since they were passing them  
3 out earlier in the hearing, I wouldn't take that bet.

4 MS. ANDERL: Your Honor, I gave my copy to  
5 the witness. I don't -- and the other copies that we  
6 have seem to be missing a couple of pages.

7 MS. HOBSON: I really only have one  
8 question on this point, and if I could just pose it,  
9 I'd share my copy with Mr. Kopta.

10 JUDGE MOSS: I think that's probably --  
11 let's go ahead.

12 MS. HOBSON: All right. I apologize for  
13 this.

14 Q. We were speaking simply about the question  
15 of Qwest's compliance with 271, and I direct your  
16 attention to paragraph three of the order that you, I  
17 believe, now have a copy of. And I would ask you if  
18 you could look at the second sentence of paragraph  
19 three, and if you would review that material for a  
20 moment?

21 A. I've reviewed that.

22 Q. Okay. The FCC has ordered, has it not,  
23 that as a condition of approval of the merger, that  
24 prior to closing the merger, the applicants must  
25 submit a full report identifying the buyer of the

01067

1 divested businesses, details on any and all  
2 activities provided by the merged entity on behalf of  
3 the buyer, the term sheets and the contract of sale,  
4 including any agreements related to the services; is  
5 that correct?

6 A. That's correct.

7 Q. And the Commission then goes on to indicate  
8 that they will be -- in that paragraph, and perhaps  
9 you haven't had a chance to read this. But the  
10 Commission goes on and indicates that once the  
11 detailed report is filed, that there will be a notice  
12 and a comment period, does it not?

13 A. Yes, it does.

14 Q. And you would expect that AT&T would have  
15 the opportunity to participate and comment at that  
16 time?

17 A. I would expect that we would participate  
18 with that.

19 Q. Thank you. So based upon that admittedly  
20 cursory reading of the act at this point, do you have  
21 anything that you wish to tell the Washington  
22 Commission with regard to 271 that it needs to do to  
23 assure the compliance in addition to what the FCC has  
24 ordered?

25 A. Well, I think that the component of 271

01068

1 compliance that is missing is the notion of how  
2 customers are treated through this divestiture and  
3 the degree to which customers will be given an  
4 opportunity to change carriers if they choose to.  
5 And that's something that -- I'm not aware that  
6 that's covered within the scope of the FCC's order,  
7 but it certainly is something that this Commission  
8 has taken up at various times. So that and watching  
9 what the FCC is doing relative to the divestiture as  
10 it affects the state of Washington.

11 Q. Okay, thank you. Let's talk about your  
12 attached service quality conditions for a little  
13 while.

14 A. Okay.

15 Q. I'm referring your attention directly to  
16 what has been marked and admitted as Exhibit 172,  
17 which is also identified as Attachment B.

18 A. Okay.

19 Q. Am I correct that the essence of your  
20 recommendations with regard to service quality  
21 conditions consists of this local competition's  
22 user's group, or LCUG --

23 A. That's a bad acronym.

24 Q. Definitely. -- service quality  
25 measurements; is that correct?

01069

1 A. Yes.

2 Q. And those measures were adopted by LCUG on  
3 August 8, 1998; is that correct?

4 A. I think developed would be -- that would be  
5 the date of this particular vintage of these  
6 measurements, yes.

7 JUDGE MOSS: Did you mean August 28?  
8 That's the date that appears on my document.

9 THE WITNESS: Yes.

10 MS. HOBSON: Oh, you know, August 28th. I  
11 stand corrected. Thank you.

12 THE WITNESS: So do I.

13 Q. You've got to listen to these questions  
14 carefully.

15 A. Thank you.

16 MR. KOPTA: I keep telling him that.

17 THE WITNESS: The whole question.

18 Q. Every bit. Am I correct, then, that these  
19 measures were developed and -- well, I guess  
20 developed by LCUG well in advance of the announcement  
21 of the US West-Qwest merger?

22 A. Yes.

23 Q. And obviously they were not prepared in  
24 connection with this merger case or with the US  
25 West-Qwest merger?

01070

1           A.    No, these were prepared by a group of  
2 competitive local exchange carriers in an effort to  
3 define the types of measures and performance levels  
4 and remedial penalties that should be associated with  
5 the various interfaces that we have to deal with in  
6 dealing with the incumbent local exchange carriers.

7           Q.    Okay.  So these measures were not developed  
8 expressly for US West?

9           A.    Correct.

10          Q.    Or the merged company?

11          A.    Correct.

12          Q.    They're intended for all ILECs?

13          A.    Yes, both as it deals -- and I think I  
14 misspoke earlier, to the extent that I may have  
15 limited the application of these two competitive  
16 local exchange carriers, this would also affect  
17 access services or any wholesale type purchases.  But  
18 yes, you're right.

19          Q.    And they were not created in reaction to  
20 conditions that the CLECs have experienced in the  
21 state of Washington, in particular; is that true?

22          A.    These are developed by the -- from the  
23 experience that CLECs have experienced all over the  
24 country.

25          Q.    Okay.  Other than in other -- in cases in

01071

1 other jurisdictions in which the US West-Qwest merger  
2 was being considered, has AT&T advocated the use of  
3 these particular service quality measures anyplace  
4 else?

5 A. I don't have a litany, but given the timing  
6 of this, I'm confident that we have brought these  
7 forth in any of the 271 applications, in any  
8 negotiations with ILECs for performance measures. I  
9 mean, the vintage may be different, based on timing,  
10 but this reflects the most current vintage of these  
11 measures.

12 Q. How about in carrier-to-carrier service  
13 quality dockets in various state commissions?

14 A. You know, I would hope that we had, but I  
15 don't have personal knowledge of that.

16 Q. Is AT&T participating in this Commission's  
17 carrier-to-carrier service quality docket, number  
18 UT-990261?

19 A. We better be.

20 Q. Can you tell me why AT&T did not offer  
21 these particular service quality measurements in that  
22 docket?

23 A. I don't know.

24 Q. I want to direct your attention back to  
25 your prefiled testimony, to page nine. There I'm

01072

1 looking at the last answer at the bottom of the page.  
2 You indicate that several CLECs have submitted lists  
3 of conditions that they would like to see imposed in  
4 connection with this case, and you state, quote,  
5 Although the conditions overlap in some ways with the  
6 conditions I had proposed in this testimony, AT&T's  
7 conditions encompass the broader scope of issues and  
8 are more stringent in areas such as service quality.  
9 Is that your testimony?

10 A. Yes.

11 Q. In other words, the CLECs in this case, or  
12 the CLECs in this case, are not entirely united on a  
13 single set of conditions that they feel should be  
14 imposed in connection with this merger; is that  
15 correct?

16 A. I would agree with that. I think each  
17 party in this case is presenting a set of measures  
18 based on their immediate concerns with their current  
19 business experience. Our experience with US West in  
20 a variety of states and our work with the local  
21 competition users groups -- group brought us to the  
22 point where this seemed like the most comprehensive  
23 state-of-the-art type of set of measures and remedies  
24 that we could put forward here.

25 Q. Thank you. It's true, is it not, that all

01073

1 of the Washington CLECs that are participating in the  
2 carrier-to-carrier service docket aren't also  
3 involved in this case, involved in today's case?

4 A. I don't know.

5 Q. Well, isn't the carrier-to-carrier  
6 proceeding where all the parties that have chosen to  
7 intervene in that docket and have the opportunity to  
8 review and comment and where an evidentiary record  
9 can be built for the provisions that are actually  
10 adopted, isn't that a more efficient context for this  
11 Commission to deal with competing views on what is  
12 necessary and what would be most effective from the  
13 CLECs' standpoint?

14 A. I suppose in some ways having a generic  
15 proceeding can take longer and be more deliberative.  
16 That's part of the problem, is we've got a change  
17 coming upon us right now relative to this change in  
18 ownership. I would not object if the Commission  
19 found, in the context of the carrier-to-carrier  
20 proceeding, that some other set of rules were  
21 appropriate, but the reality is we have nothing now  
22 that sufficiently addresses the carriers' problems in  
23 dealing with US West as a supplier.

24 Q. And that's true whether or not we're in the  
25 merger context; right?

01074

1 A. I think it gets exacerbated by the merger,  
2 because we don't know about the new owner.

3 Q. Okay. AT&T filed comments in that  
4 carrier-to-carrier service quality docket about a  
5 week ago last Friday, did it not?

6 A. I will accept that. I'm not sure.

7 Q. You don't have a copy of those with you?

8 A. I don't.

9 Q. And you're not familiar with their content?

10 A. I am not, no.

11 MS. HOBSON: I'm sorry, Your Honor. I  
12 wonder whether Mr. Kopta has a copy of his client's  
13 comments that were filed in the carrier-to-carrier  
14 service quality docket last week.

15 MR. KOPTA: I do not. I was not  
16 representing AT&T in that particular docket.

17 MS. HOBSON: Well, I only have one copy of  
18 this document myself.

19 THE WITNESS: I assume it recommends  
20 carrier-to-carrier measures.

21 MS. HOBSON: Well, so I'm not exactly sure  
22 how I should proceed.

23 JUDGE MOSS: If you want to go to another  
24 line, you can copy that over the luncheon recess,  
25 which we'll be taking in about 15 minutes.

01075

1 Q. All right. Hold that thought, then.

2 A. Okay.

3 Q. You are recommending that the Commission --  
4 or I'm sorry, excuse me. What are you recommending  
5 that the Commission do with the materials that are  
6 contained in Attachment C, which has been labeled and  
7 admitted as Exhibit 272 -- or 172 in this docket?

8 JUDGE MOSS: Is it 173, or Exhibit C? Is  
9 this the petition of AT&T Communications?

10 MS. HOBSON: Yes.

11 JUDGE MOSS: That's 173.

12 THE WITNESS: That's 173.

13 Q. I'm sorry.

14 A. That's included as a demonstration of what  
15 we recommended in the New York 271 proceeding. That  
16 contains a smaller set of performance measures, and  
17 I'm attaching that by virtue -- just to illustrate  
18 the kinds of measures that we are proposing. These  
19 are very similar to what the Commission in New York  
20 adopted in the 271 proceeding, as I understand it,  
21 and the LCUG measures, then, are an expansion of  
22 those, if you will, to address more areas of concern  
23 in terms of performance and remedies. So it's more  
24 for purposes of illustration.

25 Q. You're not actually, then, asking the

01076

1 Commission that they adopt Exhibit 273 as an  
2 additional --

3 A. 173?

4 Q. I'm sorry, 173.

5 A. That's okay.

6 A. No.

7 Q. As additional conditions on this merger?

8 A. No.

9 Q. You testified in the -- well, I'm sorry,  
10 before I get there, so how exactly is Exhibit 173  
11 supposed to interrelate, for the Commission's  
12 purposes, with Exhibit 172?

13 A. Well, as I said, just as a demonstration of  
14 the type of measures we put forth in the New York  
15 case in the context of the 271 proceeding, they are  
16 measures that we thought were important in that  
17 context in evaluating New York's performance relative  
18 to 271.

19 I think when you get to a 271 application,  
20 though, you're kind of dealing with a final exam  
21 situation, not an effort to improve the performance  
22 as we go along. And the LCUG measures are more  
23 comprehensive in terms of dealing with realtime  
24 performance issues and trying to get improvement.

25 Q. But Mr. Ward, am I mistaken? I thought

01077

1 that the LCUG measures were simply that, that they  
2 were measures, and that in the absence of something  
3 else, you would not have the self-executing penalties  
4 and remedies that you have testified are necessary;  
5 isn't that correct?

6 A. Well, maybe we -- maybe I'm  
7 misunderstanding the LCUG measures. My impression  
8 was that they included performance remedies.

9 Q. They include remedies?

10 A. Mm-hmm.

11 Q. Can you point to me anyplace in your  
12 testimony or in the exhibit that would indicate that?

13 A. Well, it's a large exhibit, as you know.

14 Q. I know. Maybe this would be a bit more  
15 fruitful. I certainly don't want to interrupt your  
16 process, if you think it's going to result in an  
17 answer to that question, but I could direct your  
18 attention to page 48 of your prefiled testimony.  
19 There, at the top of the page -- this is what  
20 confused me. In that first paragraph, you say AT&T  
21 recommends that the set of measures be based on the  
22 service quality measurements that the local  
23 competition user group, LCUG, developed with penalty  
24 plans based upon with what AT&T proposed in New York  
25 for Bell Atlantic-NYNEX. That's your testimony, is

01078

1 it not?

2 A. That is, and I apologize for my confusion.

3 Q. So my understanding is that what we have  
4 with the LCUG document is simply a set of performance  
5 measures, and that we would have to look at the NYNEX  
6 material to get to the point where we see penalties?

7 A. That would be correct.

8 Q. Thank you.

9 A. I apologize.

10 Q. But I take it, Mr. Ward, that you're not  
11 suggesting that this Commission simply adopt the  
12 Exhibit 173 penalty provisions wholesale, that  
13 they're merely meant as an example of what you might  
14 like to see this Commission provide; is that correct?

15 A. In conjunction with the measures in the  
16 LCUG, yes.

17 Q. It's not your position, for example, that  
18 this merger presents precisely the same threats to  
19 the competitive market that the Bell Atlantic entry  
20 into the interLATA long distance market in New York  
21 presented, is it?

22 A. Similar threats, yes.

23 Q. Okay. Well, directing your attention to  
24 page 10 of Exhibit 173. I direct your attention to  
25 the last sentence in the first full paragraph,

01079

1 beginning with the word "however." Would you read  
2 that into the record, please?

3 A. However, this plan has also been tailored  
4 to the circumstances in New York and reflects AT&T's  
5 efforts to enter the local market here using both the  
6 UNE loop and UNE P entry strategies.

7 Q. So the information that's contained in  
8 Exhibit 173 has, in fact, tailored to New York and to  
9 Bell Atlantic and AT&T's efforts there; isn't that  
10 correct?

11 A. That's what that says, yes.

12 Q. Okay. Now, weren't the proposed penalties  
13 based upon Bell Atlantic's market cap and the levels  
14 that AT&T thought were appropriate to deter that  
15 company's activities in New York?

16 A. Bell Atlantic's market cap?

17 Q. Yeah.

18 A. I don't know.

19 Q. You don't know?

20 A. I was not involved in developing those.

21 Q. I direct your attention to page seven of  
22 your Exhibit 173.

23 JUDGE MOSS: Of 173?

24 MS. HOBSON: 173.

25 Q. And I wonder if you could just read the

01080

1 first two sentences of the paragraph beginning at the  
2 top of that page?

3 A. On page seven?

4 Q. Yes.

5 A. Beginning with "Past experience."

6 Q. Yes.

7 A. Past experience with Bell Atlantic-NYNEX's  
8 incentive plan shows that even an annual risk amount  
9 at the 150 million level would likely be treated as a  
10 mere cost of doing business. As the Commission knows  
11 well, the first year fines of approximately \$70  
12 million that Bell Atlantic-NYNEX paid for poor end  
13 user service under the performance regulation plan  
14 had little impact on Bell Atlantic-NYNEX's commitment  
15 to provide good end user service.

16 Q. Thank you. Now, there's no evidence  
17 anywhere in this record that would support the notion  
18 that US West's activities in Washington state are  
19 sufficiently similar to Bell Atlantic's activities in  
20 New York state to justify this just being adopted  
21 wholesale by the Commission; is that correct?

22 A. Correct.

23 Q. Are you aware that AT&T's proposed LCUG has  
24 already been rejected by both the Colorado and Utah  
25 commissions in their carrier-to-carrier

01081

1 deliberations?

2 A. Having just gotten the responsibility for  
3 Colorado and Utah, I would have to admit I don't know  
4 that.

5 Q. Okay. Now, the proceeding from New York,  
6 from which you obtained the petition and the  
7 performance incentive plan, that's back to Exhibit  
8 173, that's a 271 proceeding, is it not?

9 A. Yes.

10 Q. Is there any reason that AT&T could not  
11 present the same advocacy in Washington in its 271  
12 proceeding with US West?

13 A. Well, I would expect that we would, but  
14 again, waiting for a 271 petition to fix the ongoing  
15 performance problems seems a little backwards. The  
16 objective would seem to me to be, Let's get service  
17 quality established, let's get competition  
18 established, and then evaluate whether or not it's  
19 adequate and sufficient to grant US West 271 relief.

20 Q. While you're on the subject of the remedies  
21 for service quality, on page 47 of your prefiled  
22 testimony, if you would turn there, please. Page 47,  
23 looking at the bottom of the page, you make the  
24 statement, This Commission currently does not have  
25 the power to require US West pay such penalties to

01082

1 injured carriers, but this proceeding presents the  
2 right opportunity for the Commission to ensure that  
3 the merged company complies with service quality  
4 standards. Do you see that testimony?

5 A. Yes, I do.

6 Q. Are you suggesting that this Commission can  
7 expand its legal authority in the context of this  
8 merger?

9 A. Not at all. I'm suggesting that, with the  
10 kinds of self-executing remedies that we're  
11 proposing, that there would be the possibility of  
12 improving US West's competitive behavior.

13 Q. But you've admitted that the Commission  
14 currently does not have the power to require US West  
15 to pay the penalties to injured carriers, haven't  
16 you?

17 A. That's in the context of a complaint  
18 proceeding.

19 Q. Okay. Are you inviting the Commission to  
20 impose a condition on this merger -- as a condition  
21 on this merger something that they don't have the  
22 authority to order directly?

23 A. I don't believe so, given that Staff and  
24 the companies have proposed a similar set of  
25 penalties, self-executing, numerative penalties, so I

01083

1 don't think I'm proposing anything inconsistent with  
2 that proposal.

3 Q. But the Staff and the company are, of  
4 course, offering to do that voluntarily, is that  
5 correct, or the company is voluntarily offering to do  
6 that?

7 A. Yes.

8 Q. As opposed to having the Commission order  
9 conditioning the merger on that basis?

10 A. That's a difference.

11 Q. I want to get to the subject of access  
12 charges in your testimony, if we could.

13 JUDGE MOSS: This might be a convenient  
14 moment, then, if you're changing subjects, to take  
15 our luncheon recess.

16 MS. HOBSON: I probably have 10 minutes  
17 left.

18 CHAIRWOMAN SHOWALTER: I have a conference  
19 call anyway.

20 JUDGE MOSS: We unfortunately will have to  
21 resume after lunch. So we'll be in recess until  
22 1:15.

23 MR. HARLOW: Your Honor, a couple of the  
24 remaining witnesses, including Covad witness Moya,  
25 have plane scheduling issues. I don't know if the

01084

1 Commission's tied up during lunch. If there's any  
2 chance to return early -- it doesn't look like it.  
3 1:15. Thank you.

4 JUDGE MOSS: We're in recess.  
5 (Lunch recess taken.)

6 JUDGE MOSS: We're back on the record after  
7 our luncheon recess, and Mr. Ward remains on the  
8 stand. And Ms. Hobson, I believe you're in the midst  
9 of your cross.

10 MS. HOBSON: Thank you.

11 Q. Mr. Ward, at the break, I handed you a  
12 document that -- I handed you a document that we were  
13 attempting to discuss this morning. In the context  
14 of just to put us back where we were, we were talking  
15 about the carrier-to-carrier service quality docket  
16 in Washington, and I had asked you a question about  
17 the carrier-to-carrier docket being a proceeding  
18 where parties that had intervened in that had the  
19 opportunity to review and comment and build an  
20 evidentiary record for the provision of the service  
21 quality rules that will eventually be adopted. Do  
22 you remember that line of questioning?

23 A. Yes, I remember that.

24 Q. And then I had asked you whether AT&T filed  
25 comments in that docket last Friday, March 10?

01085

1 A. I remember that.

2 Q. Okay. Do you know, sir, who Susan Proctor  
3 is?

4 A. Yes, I do.

5 Q. Would you tell us, for the record?

6 A. Ms. Proctor is an attorney in AT&T's -- a  
7 contract attorney in AT&T's -- working for AT&T's law  
8 group.

9 Q. And have you had the opportunity to  
10 determine to your own satisfaction whether Ms.  
11 Proctor, on behalf of AT&T, did in fact file such  
12 comments last Friday in this Commission's  
13 carrier-to-carrier service quality docket?

14 A. Yes.

15 Q. Directing your attention to page six of  
16 those comments, there the Commission had posed  
17 certain questions to the parties of that docket,  
18 regarding how they -- or requesting comments as to  
19 how the Commission should proceed with the  
20 carrier-to-carrier service quality rule-making; is  
21 that not correct?

22 A. That's my understanding of this stage in  
23 this proceeding, yes.

24 Q. And one of those questions was seeking a  
25 comment on whether or not there were alternatives to

01086

1 rule-making, such as looking at tariffs or SGATs that  
2 would permit the Commission to accomplish that  
3 action; is that correct?

4 A. That's my understanding, yes.

5 Q. And isn't it true that AT&T filed the  
6 following -- made the following comment in response  
7 to that question. There are no alternatives to a  
8 formal rule-making process that would effectively  
9 produce the same desired results. Is that AT&T's  
10 position?

11 A. That's the statement in our comments in  
12 this rule -- or in this carrier-to-carrier  
13 proceeding. I think that this merger provides a  
14 different set of circumstances in that you've got  
15 nothing in the interim to deal with the fact that  
16 there's going to be a significant change in ownership  
17 of US West.

18 Q. Okay. Let's look at page 52 of your  
19 testimony, if we could, please. And actually, I'm  
20 directing you to the topic that is discussed in full  
21 on page 52, but I actually want to direct your  
22 attention to page eight, which I believe is kind of a  
23 preview of that discussion.

24 A. Okay.

25 Q. There, in the middle of the paragraph,

01087

1 about halfway down the page, it is your testimony, is  
2 it not, that there is a real danger that the merger  
3 will harm the public interest because, once US West  
4 and Qwest merge, US West could raise its access  
5 charges to all carriers. Is that your testimony?

6 A. Yes.

7 Q. Isn't the level of US West's access charges  
8 fully regulated in the state of Washington?

9 A. It is.

10 Q. And haven't terminating access charges been  
11 set at cost by this Commission?

12 A. I'm not sure that's my understanding of  
13 what the Commission has done. I think the Commission  
14 has -- my understanding is that the Commission, on  
15 the access prices, has identified an amount of  
16 subsidy associated with access services and has  
17 created a separate element for recovering that, but  
18 the access prices the carriers pay are not priced at  
19 cost.

20 Q. Including the -- well, the prices that you  
21 pay if you include a separate subsidy element are not  
22 priced at cost; is that your testimony?

23 A. Which we pay, yes.

24 Q. Won't the merged company's access charges  
25 also be fully regulated by this Commission?

01088

1           A.    Well, I'm not exactly sure what the status  
2 of that would be, given the pendency of the  
3 stipulation.

4           Q.    Let's assume for the moment that the  
5 stipulation that was presented earlier in these  
6 proceedings is, in fact, adopted by the Commission?

7           A.    Is adopted?

8           Q.    Is adopted.

9           A.    Okay.

10          Q.    Would US West, or the merged company, under  
11 that agreement, have the opportunity to unilaterally  
12 raise access charges?

13          A.    My understanding of the terms of the  
14 stipulation is that the company would be agreeing to  
15 cap access prices.

16          Q.    Okay. So they would not have the  
17 opportunity to unilaterally raise access prices;  
18 correct?

19          A.    As near as I can tell. Nor would they have  
20 the opportunity to reduce them, though.

21          Q.    That's your understanding of the agreement,  
22 that the companies will not have the opportunity --

23          A.    Let me rephrase that. The Commission or  
24 intervenors would not have the opportunity to bring  
25 forth a reduction.

01089

1 Q. And likewise, if the Commission -- or if  
2 the merger were otherwise approved without that  
3 stipulation, the merged company would have fully  
4 regulated access charges; true?

5 A. You lost me there with the --

6 Q. Okay. Assume for the moment,  
7 hypothetically, that the merger is approved, but the  
8 stipulation is not a part of that approval.

9 A. Is not a part of it, okay.

10 Q. Then the access charges would still be  
11 subject to the full regulation of this Commission?

12 A. Yes.

13 Q. Directing your attention now to the subject  
14 which begins on page 60 of your prefiled testimony,  
15 six-zero, this is the subject of rural exchange  
16 sales. You are asking that the Commission impose a  
17 three-year moratorium on any sale of rural exchanges  
18 in the state; is that correct?

19 A. I'm asking the Commission to?

20 Q. To impose --

21 A. Yes.

22 Q. -- a three-year moratorium?

23 A. Yes.

24 Q. And it's AT&T's position, is it not, that  
25 US West has failed to adequately invest in rural

01090

1 exchanges?

2 A. That's an independent -- there is evidence  
3 to that effect in terms of service quality and the  
4 availability of services, yes.

5 Q. So it is your position that US West  
6 provides poor service quality to rural customers?

7 A. I've not done a study of where US West's  
8 service problems are, in terms of whether they're in  
9 rural or urban areas, but they have a poor service  
10 quality reputation.

11 Q. Well, if those two conditions are accurate,  
12 in other words, that there's been inadequate  
13 investment and there is poor service quality in rural  
14 exchange, might it not be in the best interests of  
15 rural customers for this Commission to approve the  
16 sale of those exchanges to another carrier who will  
17 provide better service?

18 A. Well, that's certainly a possibility, and I  
19 think there's also a possibility that the sale of US  
20 West to Qwest will result in better quality service  
21 for Qwest customers, as well as those companies that  
22 are trying to compete with Qwest, but we don't know.

23 Q. Right. But in this case, in the case of  
24 rural -- hypothetical rural exchange sales, we don't  
25 even have any data, any information to evaluate, do

01091

1 we? We're talking purely hypothetically here about a  
2 three-year moratorium on rural sales when we don't  
3 even have any buyers to evaluate?

4 A. That's true, but we've also got a proposal  
5 associated with some moratorium on pricing, some  
6 commitments to investment. I mean, there are  
7 acknowledgements on the part of the company and the  
8 Commission that some provisions, some transitional  
9 provisions need -- or the Staff, I apologize -- that  
10 some transitional provisions need to be incorporated.  
11 This would strike me, given that -- especially given  
12 the proposal to cap investment based on retail lines,  
13 that this would almost reinforce the need for this  
14 kind of additional condition. Otherwise, you start  
15 selling lines and you avoid the investment off the  
16 issue.

17 Q. Well, as I understood your testimony, and  
18 you can correct me if I'm wrong, but your express  
19 concern is that since there's been inadequate  
20 investment and poor service in these exchanges, US  
21 West should not be permitted to sell them for three  
22 years; isn't that your testimony?

23 A. Well, it's -- that's certainly part of it,  
24 but there's also the notion that the sale of  
25 exchanges results in cost structure changes for the

01092

1 selling party, as well was the buyer, and that those  
2 changes, in the context of the merger, the Commission  
3 -- I think the Commission should be concerned about  
4 those in the context of the merger.

5 Q. Well, focusing for the moment -- we'll move  
6 to that, but focusing for the moment just strictly on  
7 the subject of the benefit or detriment to the  
8 customers in rural exchanges, isn't it the case that  
9 in the past, state commissions that have looked at  
10 the question of sales have determined that sales to  
11 smaller carriers, other carriers than US West, has  
12 been in the public interest, the public is better off  
13 when those sales take place?

14 A. I've not looked at all the orders, but to  
15 the best of my knowledge, there are no instances in  
16 which a Commission has stopped a sale of exchange.

17 Q. Now, turning to your concerns -- if AT&T  
18 has concern -- about the sale of exchanges from the  
19 standpoint of being a wholesale customers of US West,  
20 is that part of your concern here?

21 A. To the extent that we're currently in a  
22 position where we could enter the market through our  
23 existing interconnection agreement.

24 Q. Okay.

25 A. Yes.

01093

1 Q. Well, isn't it the case, then, that your  
2 concerns would relate to your interconnection  
3 agreement and your abilities to continue to or expand  
4 whatever activities you might be engaged in those  
5 exchanges?

6 A. Well, that and the provision of access  
7 services in those exchanges. I mean, we buy more  
8 than just the interconnection services from US West.

9 Q. And so if exchanges were sold, then there  
10 would be a question of whether the buyer -- what  
11 kinds of assurances the buyer is willing to give  
12 customers like AT&T about access charges, about  
13 interconnection agreements and so on?

14 A. Yes.

15 Q. And if US West were to attempt to sell  
16 exchanges, you'd expect that a docket would be  
17 established and AT&T would have the opportunity to  
18 intervene and express those concerns in the context  
19 of that docket, would you not?

20 A. Yes.

21 Q. And again, depending on the carrier that  
22 buys, hypothetically buys a hypothetical group of  
23 exchanges, the kind of assurances that the buyer  
24 might give AT&T, your company might find itself in a  
25 position where it is as well off or better off than

01094

1 it is with US West continuing to own those problems.  
2 Isn't that true, from a hypothetical standpoint?

3 A. From a hypothetical standpoint, that is  
4 correct.

5 Q. Now, currently US West is engaged in  
6 certain rural exchange sales in its territory; is  
7 that not the case?

8 A. That is my understanding. I don't know if  
9 there's any in Washington, but --

10 Q. And are you aware that the Citizens  
11 Telephone Company, some version of that name, is the  
12 buyer of those exchanges in several US West states?

13 A. Yes.

14 Q. And isn't it also the case that AT&T had  
15 intervened in many, if not all of those sale dockets?

16 A. Many, if not all.

17 Q. And hasn't AT&T recently reached an  
18 agreement with the Citizens Telephone Company, such  
19 that it has withdrawn its participation in those  
20 dockets?

21 A. I'm hesitating, because I believe that we  
22 have -- in some instances, we've withdrawn relative  
23 to the issues with Citizens, the buyer, but I don't  
24 believe we've withdrawn in all cases relative to US  
25 West, the seller.

01095

1 Q. In the state I'm familiar with, in Idaho,  
2 do you know whether you have withdrawn entirely?

3 A. I don't, I'm sorry.

4 Q. Thank you.

5 A. It wouldn't surprise me if we had in Idaho.

6 MS. HOBSON: Thank you. That's all the  
7 questions I had.

8 JUDGE MOSS: Mr. Wiltsie.

9 MR. WILTSIE: I have no questions for this  
10 witness.

11 JUDGE MOSS: Does Public Counsel have any  
12 interest in cross-examining this witness?

13 MR. FFITCH: No, thank you, Your Honor.

14 JUDGE MOSS: Does Staff?

15 MS. JOHNSTON: No, Your Honor.

16 JUDGE MOSS: Does the bench have questions  
17 for this witness?

18 CHAIRWOMAN SHOWALTER: I have one.

19 E X A M I N A T I O N

20 BY CHAIRWOMAN SHOWALTER:

21 Q. I think -- a question arising from this  
22 morning's discussion on remedies and penalties, but  
23 if the Commission were to go along with your  
24 recommendation and impose several conditions, the  
25 conditions that you lay out as a condition of the

01096

1 merger, I'm wondering what the remedies are for  
2 violation of them.

3 Obviously, the merger would go through,  
4 presumably, so that these are not conditions that are  
5 a condition precedent to the merger, such as divest  
6 some part of your business or else the merger cannot  
7 proceed?

8 A. Correct.

9 Q. These are --

10 A. With the exception of the 271 provisions,  
11 where they have to divest their intraLATA service.

12 Q. Yes, but that would be an example of a  
13 condition precedent.

14 A. Right.

15 Q. So that's what the FCC did. That's easier,  
16 because here's the condition, and if you don't meet  
17 it, you can't merge.

18 A. Correct.

19 Q. There's maybe another set of conditions,  
20 and maybe some of them are in the settlement  
21 agreement, but they might be conditions that would  
22 play out in a certain way, a certain known way -- I  
23 think I'll skip that. I can think of it in another  
24 term, say maybe a merger savings.

25 If you said a condition of the merger is

01097

1 that \$20 million of merger savings will be applied to  
2 the ratepayers, that couldn't occur until after the  
3 merger, but it would be known prior to the merger how  
4 it would all play out?

5 A. Correct.

6 Q. But the conditions that you're suggesting,  
7 I guess I'll call behavioral conditions, that we  
8 won't approve the merger unless you promise to behave  
9 in a certain way after the merger. And in that case,  
10 what happens if the condition is not met?

11 A. Well, the conditions that I would urge the  
12 Commission to adopt at least, if not on a permanent  
13 basis, at least on an interim basis, relative to  
14 behavior. If the behavior is not there, then there  
15 would need to be penalties associated with that, much  
16 like the proposal that Staff and the company has  
17 brought forward on customer service. If customer  
18 service levels at the retail side are not met, then  
19 penalties are due those customers.

20 The situation we have right now is that  
21 there aren't carrier-to-carrier service quality  
22 performance measures or penalties in the state of  
23 Washington. There's very little, if any, in our  
24 interconnection agreement, and the Commission is  
25 undertaking a rule-making, as was just pointed out

01098

1 during my cross-examination, to look at that. That  
2 hasn't happened yet and you're facing a situation  
3 where there's going to be a change in ownership  
4 probably before those rules are put in place.

5 Q. How much before would you -- I know that  
6 you just can't really predict when we're going to be  
7 done with our rule-making, but --

8 A. Nor can I predict when Qwest will be ready  
9 for the merger.

10 Q. Do you think it's less than six months'  
11 time?

12 A. My understanding is that we've been at the  
13 rule-making for quite some time. I don't recall the  
14 exact dates associated with that, and that this is  
15 another round in an effort to try to get to these  
16 performance measures. And the dilemma that we really  
17 face -- I mean, I'm interested, from AT&T's  
18 perspective, in being able to provide the customers  
19 that choose AT&T for local service the best quality  
20 service we can, and we're in a position of having to  
21 rely on US West in being able to do that.

22 The Staff's proposal recognizes that US  
23 West's provision of service to its customers is  
24 possibly subject to deterioration, and they've  
25 proposed some measures relative to that. The service

01099

1 we provide to customers is equally subject to  
2 deterioration, and so I would urge the Commission to  
3 look at adopting these wholesale measures and then  
4 penalties for failure to perform.

5 And that really will give the Commission,  
6 then, an opportunity to see if there is a  
7 deterioration or an improvement in the service to end  
8 users, as well as to carriers, competitors, that are  
9 providing service to end users.

10 Q. So if we did that, would that replace the  
11 various rule-makings or proceedings that we have  
12 going on, it's because we would already have approved  
13 these conditions with sanctions as a condition of the  
14 merger, so US West would be out from under whatever  
15 general proceedings we had?

16 A. I would suggest that, given there is  
17 pendency of the rule-making in front of the  
18 Commission, that any conditions here would be  
19 replaced by the general rule. As was pointed out,  
20 there's an opportunity for more input in the  
21 rule-making, more deliberation about the rules and  
22 the penalties, and I think very possibly the outcome  
23 of that is going to be a better, more comprehensive  
24 set of rules, maybe not. Maybe they'll be the same  
25 ones that we're adopting here or that we're

01100

1 recommending here, but I would think that the rule  
2 would be something that would replace a condition  
3 adopted here.

4 Q. Let's say -- turn to page 23 of your  
5 testimony. You've got, beginning with a condition  
6 there about a condition of provisioning UNEs in full  
7 compliance with the FCC's remand order.

8 Now, would you propose that we make that a  
9 condition of the merger, and violation of which would  
10 carry some penalty?

11 A. That one's -- I'm not really thinking of  
12 this one in terms of the penalty provisions. I would  
13 think that the violation would include something far  
14 more serious than, you know, a \$5 credit to a  
15 customer who didn't get his service installed on time  
16 kind of thing.

17 Q. I mean, it's the question, if we put this  
18 as a condition of the merger, what do we do about it  
19 in the merger docket proceeding if it's not carried  
20 out?

21 A. This is one of those areas that would  
22 probably take more of a formal proceeding to enforce  
23 the condition, as opposed to the measures with  
24 performance penalties.

25 Q. But then, wouldn't --

01101

1 A. Operational kinds of measures.

2 Q. Wouldn't that really amount to the same  
3 thing that would happen without the condition being a  
4 condition of the merger if, in that case, anyway, if  
5 the company hasn't complied with the FCC's UNE remand  
6 order, wouldn't there be just exactly such a  
7 proceeding to enforce it?

8 A. Probably so.

9 Q. And then, so on the next page, maybe it's  
10 page 25, on the OSS provisions. So are you -- if you  
11 propose that as a condition of merger, US West must  
12 use an independent third party test to verify OSS, is  
13 that the context? I think so. And then there would  
14 be penalties for failure to do that contained in the  
15 merger, in our merger order. Is that what you're  
16 proposing?

17 A. Well, I think in this case there may be  
18 some other remedy that could be involved, is -- I  
19 mean, obviously, if they're not pursuing this type of  
20 a track, then presumably you could order them to  
21 comply and do such a thing. It's -- in some of these  
22 kind of gross behavior kinds of things, rather than  
23 operational kinds of things, I think putting a stake  
24 in the ground, in the context of the merger, puts  
25 them on notice that these are the kinds of behaviors

01102

1 that the Commission expects, puts the Commission in a  
2 position to say, You're in violation of our merger  
3 approval, rather than the alternative, being  
4 somebody's got to bring an action and go through all  
5 that process. The Commission would have said, this  
6 is the outcomes that we expect you to pursue, and  
7 you're in violation of an order, rather than us  
8 having to come in on a complaint basis.

9 Q. And then, on the question of authority,  
10 obviously, if the parties agree to a bunch of  
11 conditions and they agree to be bound by it, in  
12 effect, they've contracted for these penalties, but  
13 if they haven't -- have not agreed and we are  
14 imposing these conditions, I guess the Commission  
15 would be saying we're not going to approve the merger  
16 unless you do agree to be bound by these penalty  
17 provisions, and if you don't agree, well, then, don't  
18 merge, but if you merge, you will have bound yourself  
19 to these penalties. So in effect, you get to the  
20 same place, but with an unwilling -- a willing  
21 applicant only insofar as because they might want to  
22 merge --

23 A. Right.

24 Q. They then reluctantly, you could say, agree  
25 to the penalties?

01103

1           A.    I think there was some discussion about SBC  
2 in that context earlier, and their agreement to  
3 conditions in the FCC approval.

4           Q.    So is that your answer for how you get to  
5 potentially some penalties that -- and maybe even a  
6 procedure that we would not have authority to order  
7 directly?

8           A.    Yeah.

9           Q.    But we have authority not to order it  
10 indirectly, but just to say this is the condition of  
11 the merger, of our approval of the merger?

12          A.    Yeah.  Obviously, that would be something  
13 that would have to be looked at from a legal  
14 perspective as to whether or not that's something  
15 proper, but I think, in terms of the Commission  
16 adopting a condition that involves service  
17 performance with penalties, I think that would be  
18 very right and reasonable, and it puts the ball in  
19 the company's court to perform.  I mean, you're not  
20 imposing a fine or a penalty on them unless their  
21 failure to perform develops.

22          Q.    So what I take it you may be saying is that  
23 where there are some objective kinds of behavior,  
24 there can be objective penalties imposed, assuming  
25 the legality of it, but on these other more broader

01104

1 conditions that you're suggesting, you're not  
2 thinking self-executing penalties necessarily would  
3 go along with those conditions; they're more  
4 statements by the Commission of what it expects?

5 A. I think even that would be helpful, and I  
6 agree that certainly the measures of performance  
7 objective, system performance, order completions,  
8 those kinds of things, are things that can be  
9 measured very objectively. I think a statement of  
10 policy from the Commission as to what it expects the  
11 post-merger company to behave like with or without  
12 some penalty associated with it is helpful, also.

13 Q. And then all of these conditions, in your  
14 view, I take it, are justified because of your fear  
15 that things will be worse under the merged company?

16 A. It kind of goes to the devil you know  
17 versus the one you don't know, yes.

18 Q. Do you think this Commission needs fairly  
19 strong evidence supporting such a fear before it  
20 proceeds to impose several conditions to avoid the  
21 fear becoming a reality?

22 A. To the extent that the company's  
23 performance is in its own control and that it's bad  
24 performance that results in the penalties, I think  
25 you're really setting for the Commission and for

01105

1 customers in Washington a safety net; that we're not  
2 -- you're not condemning the company, you're just  
3 establishing an insurance program should things turn  
4 the wrong way.

5 CHAIRWOMAN SHOWALTER: Thanks.

6 JUDGE MOSS: Redirect?

7 MR. KOPTA: I don't have anything further.

8 JUDGE MOSS: Thank you very much. Mr.

9 Ward, we appreciate your testimony. We release you  
10 from the stand, subject to recall.

11 THE WITNESS: Thank you.

12 JUDGE MOSS: And I believe, then, that  
13 brings us to McLeod.

14 MR. HARLOW: I understand Mr. Moya was  
15 going to go next, by agreement of the parties.

16 MR. TRINCHERO: We have agreed to that.

17 JUDGE MOSS: Parties agreed to that. All  
18 right. Then we'll have Covad's witness, Mr. Moya.  
19 Whereupon,

20 TERRY MOYA,  
21 having been first duly sworn, was called as a witness  
22 herein and was examined and testified as follows:

23 JUDGE MOSS: Please be seated. Thank you.

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

25 BY MR. HARLOW:

01106

1 Q. Good afternoon, Mr. Moya.

2 A. Good afternoon.

3 Q. Would you please state your name for the  
4 record?

5 A. Terry Moya.

6 Q. By whom are you employed, Mr. Moya?

7 A. Covad Communications.

8 Q. What is your position?

9 A. Senior vice president, ILEC relations,  
10 external affairs.

11 Q. Do you have at the witness table there with  
12 you Exhibits 220-T, 221, and 222?

13 A. I do.

14 Q. Was Exhibit 220-T your testimony prepared  
15 under your direction and supervision?

16 A. It was.

17 Q. And are Exhibits 221 and 222 the exhibits  
18 referenced in your prefiled testimony?

19 A. Yes.

20 Q. If I were to ask you the questions  
21 contained in Exhibit 220-T at this time, would your  
22 answers be the same as contained in that exhibit?

23 A. Yes, they would.

24 MR. HARLOW: Your Honor, we offer Exhibits  
25 220-T, 221 and 222.

01107

1 MS. ANDERL: No objection.

2 JUDGE MOSS: Hearing no objection, they  
3 will be admitted as marked.

4 MR. HARLOW: The witness is available for  
5 cross, Your Honor.

6 JUDGE MOSS: Ms. Anderl, are you going to  
7 start out on this witness?

8 MS. ANDERL: Yes, I am. Thank you, Your  
9 Honor.

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

11 BY MS. ANDERL:

12 Q. Good afternoon, Mr. Moya.

13 A. Good afternoon.

14 Q. My name is Lisa Anderl. I represent US  
15 West. Mr. Moya, you stated that you're the senior  
16 vice president of ILEC relations and external  
17 affairs; is that right?

18 A. That's correct.

19 Q. Do your responsibilities encompass only the  
20 ILEC US West or all ILECs in the areas in which Covad  
21 operates?

22 A. All.

23 Q. So you have national responsibility?

24 A. Yes.

25 Q. And what are your primary duties and

01108

1 responsibilities?

2 A. It's -- my responsibilities are to manage  
3 our supplier. Our supplier in this case happens to  
4 be the ILECs. Working at executive levels throughout  
5 the ILECs to ensure that they perform for us for us  
6 to be successful in market.

7 Q. And in order to fulfill that, those  
8 responsibilities, does that require that you be  
9 familiar with both the ILEC service offerings, as  
10 well as Covad's own service offerings?

11 A. I know -- I know something about the ILEC  
12 service offerings, because I came from one. I used  
13 to work for US West. But I also know ours in general  
14 terms, yes.

15 Q. Mr. Moya, have you ever appeared as a  
16 witness before?

17 A. Not in a public PUC hearing, no.

18 Q. Did you prepare your testimony?

19 A. With help from inside counsel.

20 Q. In preparation for appearing here today,  
21 did you read the testimony of all of the other  
22 witnesses in this docket?

23 A. I did not.

24 Q. Did you read the testimony of any of the  
25 other witnesses in this docket?

01109

1 A. I breezed through some of it, but not of  
2 any great significance.

3 Q. Did you read Mr. Reynolds' rebuttal  
4 testimony?

5 A. To my own? Rebuttal to my testimony? I  
6 don't remember the individual's name, so --

7 Q. Did you read the testimony of the US West  
8 witness who -- or witnesses who rebutted your  
9 testimony?

10 A. Yes.

11 Q. Have you reviewed Covad's discovery  
12 requests to US West and US West's responses to those  
13 requests?

14 A. I breezed through them.

15 Q. Are you aware of whether or not Covad filed  
16 comment with the FCC in connection with the US  
17 West-Qwest merger proceeding at the FCC?

18 A. I do not know.

19 Q. Is that not an area of your responsibility?

20 A. No, we have FCC attorneys in D.C. that  
21 handle that, other counsel, general counsel.

22 Q. Do you have a senior vice president within  
23 the company who would be responsible for the FCC  
24 advocacy?

25 A. I don't know the actual level, but all the

01110

1 FCC advocacy comes under our GC. Drew Conniff  
2 (phonetic) is our General Counsel.

3 Q. Are you familiar with what Covad's advocacy  
4 to the FCC was in connection with the US West-Qwest  
5 merger?

6 A. We have -- I would assume, based on --  
7 consistent with what we have here, that we oppose the  
8 merger.

9 Q. But you don't know whether Covad filed any  
10 comments?

11 A. I do not.

12 Q. So it would be safe to say that you did not  
13 read those comments, if they were, in fact, filed?

14 A. That would be a safe assumption.

15 Q. Are you aware, Mr. Moya, that the FCC  
16 issued an order on March 20th -- or 10th, rather, in  
17 connection with the US West-Qwest merger?

18 A. I'm aware of it, yes.

19 Q. Have you read that order?

20 A. I have not.

21 Q. Is this merger proceeding an important  
22 issue to Covad?

23 A. Yes, it is.

24 Q. Has the FCC order been made available to  
25 you?

01111

1 A. It's at my office.

2 Q. How many states is Covad currently  
3 operating in?

4 A. Oh, I don't know. We measure it right now  
5 based upon how much -- how many COs are actually  
6 deployed, and so I don't know the actual number of  
7 states.

8 Q. Do you know how many central offices in  
9 Washington you are deployed in?

10 A. I do not know the exact number, no.

11 Q. Do you know a rough number?

12 A. It would be a guess. No, I don't feel safe  
13 to say.

14 Q. And is it correct that Covad has been  
15 offering services in Washington since December of  
16 1998?

17 A. That's correct.

18 Q. Mr. Moya, did you move directly from US  
19 West to Covad, or was there an intervening employer?

20 A. No, direct.

21 Q. And Mr. Knowling, who is the CEO of Covad,  
22 what was his position, if you know, prior to assuming  
23 the leadership position at Covad?

24 A. He was the executive vice president of  
25 network operations. He was essentially the number

01112

1 two person at US West.

2 Q. In your testimony, you describe what you  
3 did for the first four and a half years you spent at  
4 US West. What did you do for the last two and a half  
5 years that you were there?

6 A. I worked in network organization through  
7 outside plant construction, I did contracting for  
8 outside plant construction, and I also did the  
9 finance, all capital application for building of the  
10 network throughout the entire US West region.

11 Q. And when did you leave?

12 A. July of '99.

13 Q. And do you know when Mr. Knowling changed  
14 jobs?

15 A. I believe it was June of '98.

16 Q. On page four of your testimony, you  
17 describe how Covad's service works. I have some  
18 general questions for you about that testimony. You  
19 state that ADSL and SDSL are the two most popular  
20 types of DSL. Do you recall that testimony?

21 A. Yes.

22 Q. Do you mean there that they are the two  
23 most popular types for Covad or within the industry  
24 or --

25 A. Well, it's been our experience that's what

01113

1 most customers want. I mean, obviously we don't know  
2 what everyone else is selling, but from our  
3 perspective, that's what all our customers would like  
4 to have.

5 Q. Do you have any sort of breakdown in terms  
6 of what proportion of your DSL services are ADSL  
7 versus what proportion are SDSL?

8 A. I have no idea offhand. My marketing folks  
9 would know that, but I don't keep track of it.

10 Q. And what about IDSL. How much of your  
11 service is IDSL, do you know?

12 A. IDSL, unfortunately, is a higher percentage  
13 of service, because that's all we can provision over  
14 much of the facilities within these regions.

15 Q. Do you have any idea of what percentage of  
16 IDSL you deploy?

17 A. I'm sorry, I don't know percentages.

18 Q. So between those three types of DSL, you  
19 can't give me any idea, as we sit here today, which  
20 one is most used in the Covad network?

21 A. Well, right now, I would -- again, this is  
22 a guess and it's not an actual -- I would tend to  
23 think that the ADSL and the SDSL is going to be a  
24 higher percentage, because more businesses want our  
25 service, and that's how we started. IDSL tends to be

01114

1 more of a consumer, because it's somewhat limited in  
2 its speed. And consumers, in general terms, would  
3 much rather have something than nothing, but  
4 businesses much prefer the higher speeds.

5 Q. It's correct, is it not, that not all of US  
6 West's loop plant is comprised of all copper loops?

7 A. That's correct.

8 Q. And is it correct that some US West loops  
9 are provisioned over digital loop carrier systems --

10 A. Yes.

11 Q. -- which consist of fiber feeder cable and  
12 copper distribution cable?

13 A. That's correct.

14 Q. And can Covad offer DSL service over those  
15 digital loop carrier loops?

16 A. If we had access to the remote terminals,  
17 the network, if we were given access to those.

18 Q. Can you offer IDSL over those loops without  
19 access to the remote terminals?

20 A. Yes, with a fair amount of difficulty.

21 Q. Is it correct, Mr. Moya, that IDSL and SDSL  
22 cannot share an existing voice grade line, cannot  
23 share the spectrum with a voice grade line?

24 A. SDSL uses the entire spectrum.

25 Q. What about IDSL?

01115

1 A. I believe that is right, but I'm not an  
2 engineer, so -- I believe that is right.

3 Q. So to the extent that line sharing has been  
4 discussed in your testimony, is it correct that the  
5 line sharing application is only available for ADSL?

6 A. ADSL is the technology for line sharing.

7 Q. You describe Covad as a facilities-based  
8 provider, stating that Covad's DSL equipment consists  
9 primarily of DSLAMS. Do you recall that testimony?

10 A. Yes.

11 Q. Does Covad have any other facilities that  
12 it owns or does it lease the rest of its facilities  
13 from US West and other carriers?

14 A. It primarily leases its facilities from all  
15 carriers, from US West and other carriers.

16 Q. Mr. Moya, do you know whether or not Covad  
17 has a website?

18 A. Yes, we do.

19 Q. Do you know if a person can obtain a  
20 general description of the Covad service offerings on  
21 that website?

22 A. I'm assuming yes, that they can.

23 Q. Can I ask you to review the  
24 cross-examination exhibits, Exhibits Numbers 223 and  
25 224, that I hope your counsel provided you with.

01116

1 MR. HARLOW: No, I didn't provide him one,  
2 unless Mr. Deanhardt did. Clay, I think I took your  
3 copies for my reference. We didn't have any extra  
4 copies of this, Your Honor, so we have just one copy  
5 of these exhibits.

6 JUDGE MOSS: Well, perhaps between the two  
7 of you, you have two copies, don't you?

8 MR. HARLOW: No, Your Honor, between the  
9 two of us, we have one. I'm looking at it.

10 MS. ANDERL: Your Honor, we'll give the  
11 witness Mr. Wiltsie's copy. Thank you.

12 THE WITNESS: Okay.

13 Q. Mr. Moya, looking at what's been marked as  
14 Exhibit 223 for identification, do you recognize that  
15 document as a printout from the Covad web page, or  
16 home -- Covad website?

17 A. It looks like it would be. I never looked  
18 at it as a printout. I don't really visit it that  
19 often, so -- but it looks familiar.

20 Q. Prior to taking the stand today, your  
21 Counsel did not show you this document and advise you  
22 that it had been identified as a potential  
23 cross-examination exhibit?

24 A. No.

25 Q. What about Exhibit Number 224. Can you

01117

1 take a look at that and tell me if you recognize that  
2 as a seven-page printout?

3 A. I'm sorry, can I correct something?

4 Q. Uh-huh.

5 A. Actually, I did see this last night, but I  
6 didn't really have an opportunity to review it, so --  
7 I got in real late last night, so sorry.

8 Q. Exhibit Number 224, if you could take a  
9 look at that, Mr. Moya. Do you see that as a  
10 seven-page services Q and A?

11 A. Yes.

12 Q. And I actually have three additional pages  
13 that is legal notices. I don't think I identified  
14 that as part of the exhibit. Do you have anything  
15 beyond the seven pages?

16 A. I do not.

17 Q. Okay, good.

18 JUDGE MOSS: I have eight. 224?

19 MS. ANDERL: Yes. Your Honor, it doesn't  
20 say one of seven in the lower left-hand corner?

21 JUDGE MOSS: It says one of eight in the  
22 upper right-hand corner.

23 THE WITNESS: It's eight pages. Mine's not  
24 numbered, but it is eight pages. I just counted it.

25 MS. ANDERL: Printing these things off the

01118

1 Internet is, I guess, a risky business.

2 Q. The either seven or eight-page document, do  
3 you recognize that as the Covad services Q and A off  
4 of the Covad website?

5 A. It looks like our website, but, again, I  
6 don't really spend any time with it, so I'm assuming  
7 that's exactly where it came from.

8 Q. Would you accept, subject to your ability  
9 to check, that that's, in fact, what it is?

10 A. Yes.

11 MS. ANDERL: Your Honor, I would offer  
12 Exhibits 223 and 224.

13 MR. HARLOW: No objection, Your Honor. No  
14 objection.

15 JUDGE MOSS: Thank you. Hearing no  
16 objection --

17 MS. ANDERL: I didn't hear it that way at  
18 first.

19 MR. HARLOW: I was a little low on no.

20 JUDGE MOSS: They will be admitted as  
21 marked.

22 Q. Mr. Moya, let me ask you a couple of  
23 questions to confirm whether your understanding of  
24 Covad's service offerings are consistent with what is  
25 described on that web page. Is it correct that Covad

01119

1 does not offer any of its DSL services directly to  
2 end users?

3 A. That's correct.

4 Q. Is it also correct that Covad sells its  
5 services exclusively through either Internet services  
6 providers or other telecommunications carriers?

7 A. That's correct.

8 Q. Is it also true that Covad is not  
9 responsible for pricing those services to the end  
10 user?

11 A. That's correct, the ISPs give the prices to  
12 the end users.

13 Q. Is it correct -- and this is on my page  
14 four. I don't know if it is on yours, as well. The  
15 question is, Can I trust that my ISP will offer Covad  
16 DSL service as long as I may want it. Do you see  
17 that question?

18 A. I see the question.

19 Q. Okay. And the answer represents that there  
20 are more than 350 Internet services providers  
21 nationwide who deliver Covad DSL with their services.  
22 Do you see that answer?

23 A. I see it.

24 Q. Do you have any reason to believe that that  
25 number is not a correct number?

01120

1 A. If we have it on that there, I'm assuming  
2 it is correct.

3 Q. The Qs and As on that website also indicate  
4 that Covad is working on offering voice service along  
5 with its DSL service offering; is that correct?

6 A. Yes.

7 Q. Do you know whether or not Covad, when and  
8 if it offers voice service along with its DSL  
9 service, will do so through a company that is  
10 separate from the company that currently offers DSL?

11 A. Those are under discussions, all that  
12 information. We haven't concluded on what and/or how  
13 we're going to offer that service.

14 Q. Is a separate voice subsidiary something  
15 that's under discussion?

16 A. All things are under discussion.

17 Q. Have any decisions been made?

18 A. Not as of yesterday, no.

19 Q. Okay. Would you be privy to those  
20 decisions if they had been made?

21 A. Yes.

22 Q. What will Covad consider in making the  
23 decision of whether or not to offer voice and data  
24 through either an integrated company or two separate  
25 companies?

01121

1           A.     Those are all strategic decisions based  
2 upon the strategy of the company, where we intend to  
3 take it, how fast we can get into market, the  
4 reliability of service that we can get from vendors,  
5 such as US West, or the inability. All those things  
6 are considered.

7           Q.     And if Covad did not perceive any economic  
8 or other business advantage in a separate subsidiary,  
9 would that be one reason why Covad would perhaps  
10 decide not to do a separate subsidiary?

11           MR. HARLOW: Your Honor, at this point I'm  
12 going to object. I let this go on for a little  
13 while, but we're clearly well beyond the scope of the  
14 direct and getting into an area of speculation.

15           MS. ANDERL: Your Honor, I did not directly  
16 reference Mr. Moya's recommendation in his testimony  
17 that US West be required to either split its  
18 wholesale and retail operations or offer data  
19 services through a separate subsidiary, but clearly  
20 that's what this line of questions is linked to.

21           JUDGE MOSS: I'll allow it.

22           THE WITNESS: Could you repeat it, please?

23           MS. ANDERL: Not really. May I have it  
24 read back?

25                   (Record read back.)

01122

1 THE WITNESS: I'm not really sure I  
2 understand the question completely, but -- could you  
3 maybe rephrase it so that I make sure that I'm clear  
4 on where you're going?

5 Q. If Covad did not perceive an economic  
6 advantage in offering voice and data in two separate  
7 companies, would that factor -- how would that factor  
8 tend to drive the decision of whether or not to, in  
9 fact, engage in such a separation?

10 A. It would be part of discussions. As a  
11 final conclusion, it could be one, it could -- you  
12 know, we're just not at that point right now. As an  
13 example, we just made an acquisition last week of a  
14 virtualized P company, and right now, they're  
15 operating as a separate sub, but will they continue  
16 to be that? I don't know.

17 Q. Do you know if Covad is competitively  
18 classified by this Commission?

19 A. I assume we were, but I don't know that for  
20 a fact.

21 Q. Do you know, in Washington, what  
22 competitive classification means relative to  
23 traditional regulation?

24 A. I do not. I'm not a regulatory person; I'm  
25 more of a business person. I try to work out

01123

1 business solutions. So sorry, I don't know what all  
2 this is.

3 Q. My last question on that subject, and you  
4 may or may not know, is do you know whether or not  
5 Covad has a price list on file with the Washington  
6 Commission?

7 A. If we're required to have one, I'm assuming  
8 we have it.

9 Q. But you don't know?

10 A. I do not know.

11 Q. On page six of your testimony, you claim  
12 that the merger will hurt Covad because of Covad's  
13 business relationship with Qwest; is that correct?

14 A. That is correct.

15 Q. Is Qwest currently selling Covad's DSL to  
16 any retail end users in Washington?

17 A. I don't know that answer. They had an  
18 agreement to sell -- resell Covad DSL out of -- in  
19 many states. If we have any customers on the network  
20 or not, I don't know.

21 Q. So it's possible that Qwest is not  
22 reselling Covad's DSL to any retail end users in  
23 Washington?

24 A. Right, it could be impossible, because  
25 they're anticipating the merger and they didn't want

01124

1 to sell anything, either.

2 Q. You state that if Qwest no longer resells  
3 Covad's DSL, there will be fewer choices for  
4 Washington consumers. Do you recall that testimony?

5 A. Yes, I do.

6 Q. Are you saying that Covad's DSL will no  
7 longer be available to Washington consumers after the  
8 merger?

9 A. No, that's not the implication. What I'm  
10 saying is is whenever you take competitors out of  
11 space that's competing against a monopolistic  
12 company, you have less choice for your end users.  
13 That's what I'm saying.

14 Q. So it's correct, isn't it, that Covad's DSL  
15 will still be available to Washington consumers  
16 through any other telecommunications company or ISP  
17 who offers or resells that service?

18 A. Yes, we will continue to sell in this  
19 state, but you have to understand the difficulty in  
20 which we have to operate. We are not at parity with  
21 US West.

22 Q. Did you earlier -- do you know how many  
23 resellers of Covad's DSL there are in the state of  
24 Washington?

25 A. No, I have no idea. They change all the

01125

1 time. Some of these ISPs come into the space, we  
2 keep them for a while, and then they get acquired,  
3 they get merged, whatever. They change.

4 Q. Isn't it correct that you earlier agreed  
5 with me that there are 350 ISPs nationwide who resell  
6 Covad services?

7 A. Yes.

8 Q. So if Qwest no longer does that, then  
9 potentially there would be 349?

10 A. It's a potential, but nothing of a scale  
11 and scope that Qwest, with their -- the one thing you  
12 have to understand, Qwest is a huge company.

13 MS. ANDERL: Your Honor, there's no  
14 question pending.

15 THE WITNESS: So I can't --

16 MR. HARLOW: Your Honor, we've allowed the  
17 witnesses to complete their answers. Mr. Moya  
18 clearly had not finished.

19 JUDGE MOSS: It will save time on redirect.  
20 Mr. Moya, if you want to complete that answer, go  
21 ahead.

22 THE WITNESS: My point is is Qwest, because  
23 of its size and scope, its ability to attract  
24 customers because of their large marketing arm,  
25 because of their fiber network, they have a much

01126

1 greater ability to attract customers on a network.  
2 And with the agreement that we had for them to sell  
3 our service and that evaporating, you can have 349  
4 smaller ISPs, which I would assume that, in this  
5 room, there's probably very few people who have heard  
6 of many of them. So that's the intent of my answer.

7 Q. Can you identify any other resellers of  
8 Covad's DSL in Washington State?

9 A. I think FlashCom is one, I don't know the  
10 other big ones, but I think FlashCom's our largest  
11 here.

12 Q. Isn't it true that AT&T also resells  
13 Covad's DSL?

14 A. AT&T is a provider of ours. I don't know  
15 what the volume is, though.

16 Q. At the top of page seven of your testimony,  
17 and I don't know if you need to go there or not, but  
18 you state that reduced competition for fiber  
19 transport will result in higher prices to companies  
20 like Covad. Do you see that?

21 A. I do see it.

22 Q. Do you know how many providers of fiber  
23 transport there are in Washington?

24 A. I have no idea. Even when I worked at US  
25 West, I didn't know.

01127

1 Q. Do you know how many providers of fiber  
2 transport Covad currently uses in Washington?

3 A. No, I would assume we relied heavily on US  
4 West.

5 Q. On page nine of your testimony, Mr. Moya,  
6 you include a table from an FCC report. Do you see  
7 that?

8 A. I see it.

9 Q. And again, there's another one on page 10.  
10 Did you review the entire FCC report that you discuss  
11 in your testimony prior to the filing of that  
12 testimony on February 1st?

13 A. It was in a faxed copy, so yes, I did look  
14 at it. It's kind of hard to read, but --

15 Q. Did you see in your review of that report  
16 another column identifying resold Centrex services?

17 A. Yes.

18 Q. Did you make a decision not to include that  
19 information in your testimony?

20 A. This was just looking at switched access  
21 lines and compared to total resale lines. With  
22 Centrex, you're looking at an element, not  
23 necessarily a switched access line, my understanding.

24 Q. Isn't it true that the column identified  
25 resold Centrex services?

01128

1 A. Yes.

2 Q. And you made a conscious decision not to  
3 include that information in your testimony?

4 A. Yeah, we were just trying to compare what  
5 we thought was relevant to the other RBOCs.

6 Q. Isn't it true that US West has a  
7 significantly higher number of resold Centrex lines  
8 than any of the other RBOCs, or even all of the other  
9 RBOCs combined?

10 A. I think so, in Centrex, primarily because  
11 of McLeod taking a lot of business in Iowa and the  
12 Dakotas.

13 Q. On pages 12 and 13 of your testimony, you  
14 discuss collocation. I believe you've already stated  
15 that you do not know how many central offices in  
16 Washington Covad is collocated in; is that correct?

17 A. We're building out as we speak, so it  
18 changes daily.

19 Q. Do you know if it's more than 10?

20 A. I don't know, but I would assume it would  
21 be. But I mean, our last -- at the end of the year,  
22 we announced we were over a thousand COs across the  
23 country. We're starting here in Washington and in  
24 California, so I would assume it is.

25 Q. Are you aware that the Washington

01129

1 Commission has a rule-making docket open to consider  
2 collocation issues?

3 A. I do not know that.

4 Q. Are you aware of whether or not Covad would  
5 be participating in such a docket?

6 A. I'm not aware.

7 Q. Would Covad's participation in that docket  
8 be through someone who works for you, if such a  
9 docket existed and Covad participated in it?

10 A. Works for the company, but not me directly.

11 Q. Prior to filing your testimony in  
12 Washington, did you inquire within Covad or  
13 externally as to whether or not any dockets were open  
14 at the Washington Commission to address some of the  
15 issues you raised in your testimony?

16 A. I did not inquire.

17 Q. On page 13, you discuss access to unbundled  
18 network elements. Based on your prior answers, is it  
19 safe to assume that you are not aware that the  
20 Washington Commission has an open docket to explore  
21 line sharing, sub-loop unbundling, and other  
22 unbundled network element issues?

23 A. No, I'm not aware of that.

24 Q. If the Commission had such a docket open  
25 with a schedule to commence in May and projected

01130

1 completion in December of this year, is there  
2 anything about a Commission docket to address line  
3 sharing, sub-loop unbundling, and other UNE issues  
4 that you believe would be inadequate to address  
5 Covad's concerns about those issues that you raise in  
6 this merger proceeding?

7 MR. HARLOW: Your Honor, I don't think  
8 there's any foundation for this question. We're  
9 getting into an area of legal opinion and an area  
10 that the witness has testified he lacks knowledge.

11 MS. ANDERL: It was a hypothetical.

12 JUDGE MOSS: I'm going to need the question  
13 back.

14 (Record read back.)

15 JUDGE MOSS: I'm going to overrule the  
16 objection. If the witness knows, he can answer.

17 THE WITNESS: I'm not sure if I understand  
18 it all, but what I'll -- line sharing is supposed to  
19 be, in my understanding, by June 6th. So that's one  
20 thing. And if you're saying we're not going to be  
21 finished until December, yes, I've got concerns.

22 If, on the sub-loop unbundling -- I've had  
23 these conversations with US West many a times. They  
24 flatly refuse to talk to me about it. As it relates  
25 to loops, you know, when I look at comparable MSAs,

01131

1 US West is the worst of all. I get my loops in 23  
2 days, business days, and compared to a Chicago or an  
3 LA or a San Francisco, it's much, much different. So  
4 I think it's going to take me too -- that's too long,  
5 yes.

6 Q. So you don't think that the Washington  
7 Commission docket to address the issues is adequate  
8 to address your concerns?

9 A. For me, in my business strategy, I need  
10 speed to market, and the way US West moves addressing  
11 anything with me is just much too slow. And I know  
12 the Commission is straddled, you have tough jobs, you  
13 have to weigh both sides of these issues. And I need  
14 to get into these markets quickly, and US West  
15 doesn't move that fast, so I need things quicker.

16 Q. So you recommend to the Commission that  
17 they act more quickly in this docket than they would  
18 in the other docket where they would be required to  
19 weigh both sides of the issues and consider the  
20 evidence more fully?

21 A. Again, I don't know specifics about this  
22 docket, but what I tried to articulate is is that's  
23 what I need to be moved quickly. I need line sharing  
24 quickly, I need loops, and the Commission to rule on  
25 something -- if I can get my loops in five days or 10

01132

1 days or three days, that's what I need you to rule on  
2 quickly. And if I can get collocation -- all of the  
3 things that make it relevant and important for me to  
4 do business in this state, that's what I need you to  
5 rule on quickly.

6 Q. Kind of along those lines, Mr. Moya, on  
7 page 14 of your testimony, you state that US West  
8 will not work to provide any more services than a  
9 strictly construed reading of the FCC orders require.  
10 Is that your testimony?

11 A. I'm sorry, where? On 14?

12 Q. Yes, you don't have line numbers, so it's  
13 the middle of the page.

14 A. Under the UNE remand?

15 Q. The sentence starts, To date, US West still  
16 has not proposed.

17 A. Oh, that's what I said before. I've talked  
18 to US West many a times about --

19 Q. Mr. Moya, the question is, is it your  
20 testimony that US West will not work to provide any  
21 more services than a strictly construed reading of  
22 the FCC orders requires?

23 A. I'm not sure, because they won't talk to me  
24 about it.

25 Q. Well, is that your testimony on the last

01133

1 two lines of that paragraph?

2 A. That's what it says, but that's what I'm  
3 telling you, they won't talk to me about it.

4 Q. So is that a criticism?

5 A. Take it however you want. They won't do  
6 it, so -- I'm not trying to be here to criticize US  
7 West or Qwest or anyone else. I just want you to  
8 help me get in business and treat me fairly.

9 Q. Mr. Moya, does Covad have an  
10 interconnection agreement with US West in the state  
11 of Washington?

12 A. Yes.

13 Q. Was that a negotiated agreement or an  
14 arbitrated agreement?

15 A. That happened before I came to the company,  
16 so I'm assuming it's negotiated, but based upon my  
17 knowledge, it's US West negotiated from -- they  
18 basically told us what you needed to sign if you want  
19 to get in the business. So if you want to take it  
20 that way, it's negotiated.

21 Q. That's your assumption, isn't it?

22 A. I have some history with it, also, because  
23 I was on the US West side, so I know a little bit  
24 more about this.

25 Q. Do you know what happened in the state of

01134

1 Washington in regard to either negotiations or  
2 arbitrations with Covad and US West?

3 A. No, I do not know the specifics.

4 Q. Okay. Let's take a look at your Exhibit B,  
5 if you would, which is, I guess, Exhibit 222. These  
6 are the CLEC-proposed competition-related conditions  
7 on merger approval. Do you have that document?

8 A. Yes.

9 Q. Did you draft those conditions?

10 A. With someone internally, yes.

11 Q. With your in-house counsel?

12 A. Correct.

13 Q. Are you aware of whether or not Covad  
14 proposed these same conditions to the FCC in its  
15 comments regarding the merger?

16 A. I'm not aware of what we proposed to the  
17 FCC.

18 Q. With regard to the first proposed condition  
19 approving service quality and reporting, you discuss  
20 liquidated damages. Do you see that on Arabic  
21 numeral one, sub-A, or I'm sorry, sub-C on page two?

22 A. Yes.

23 Q. You're not an attorney are you, Mr. Moya?

24 A. I'm not.

25 Q. Did you perform any research or conduct any

01135

1 analysis on the Commission's authority to award  
2 liquidated damages?

3 A. I did not.

4 Q. Did you perform any research or conduct any  
5 analysis on the Commission's authority to assess  
6 penalties on a prospective basis?

7 MR. HARLOW: Your Honor, I don't see the  
8 point in this line of inquiry, given the witness has  
9 testified he's not an attorney.

10 JUDGE MOSS: I don't think we really need  
11 this line, either, Ms. Anderl.

12 MS. ANDERL: It was my only other question  
13 on that.

14 Q. The firm order confirmation that you  
15 propose within 24 hours, as the first condition of  
16 the merger?

17 A. Yes.

18 Q. Do you see that? Do you know what Covad  
19 has in its interconnection agreement with US West in  
20 terms of when a firm order confirmation will be  
21 delivered?

22 A. In this state?

23 Q. Yes.

24 A. I think it's 48, could be 72. I don't know  
25 the exact number.

01136

1 Q. Do you know if Covad attempted to negotiate  
2 a 24-hour firm order confirmation with US West?

3 A. I've tried to negotiate business to  
4 business.

5 Q. In Washington, Mr. Moya?

6 A. I am talking about Washington.

7 Q. In its interconnection agreement?

8 A. Okay. No, not with the interconnection  
9 agreement.

10 JUDGE MOSS: I'm going to ask you all to  
11 both take a breath, because we can't have two talking  
12 at once and the reporter pick it up.

13 MS. ANDERL: I apologize.

14 JUDGE MOSS: Even though this is lively and  
15 entertaining, let's follow that convention.

16 MS. ANDERL: I apologize, Your Honor.

17 Q. Mr. Moya, in Covad's interconnection  
18 agreement with US West in Washington, are you aware  
19 of whether or not there are intervals for the  
20 delivery of loops?

21 A. I don't know what the specifics are. I  
22 just know that the performance is terrible.

23 Q. You're recommending here three business  
24 days; is that correct?

25 A. That's correct.

01137

1 Q. But you don't know what the provision in  
2 your interconnection agreement is?

3 A. I would assume it's not 32.

4 Q. Mr. Moya, could I please get you to answer  
5 the question?

6 A. No, I just said I'm assuming that it's not  
7 32.

8 Q. Is it three days?

9 A. I just said I don't know what the exact  
10 number is.

11 Q. Do you know what the interval for DS1 and  
12 DS3 circuits is in your interconnection agreement  
13 with US West in Washington?

14 A. No.

15 Q. Do you know what the terms and conditions  
16 are in that interconnection agreement for coordinated  
17 cutovers?

18 A. I do not know all the specifics of the  
19 interconnection agreement in the state of Washington.  
20 I just know the performance.

21 Q. You discuss in this first condition loops  
22 that require conditioning. Are you familiar with  
23 that part of the proposed condition, 1(A)?

24 A. In here?

25 Q. Yes.

01138

1 A. I'm sorry.

2 Q. You talk about loops that require  
3 conditioning or loops that do not.

4 A. Yeah, that we want seven days, I believe it  
5 is.

6 Q. Are you aware that the Washington  
7 Commission has established a price of approximately  
8 \$304 for conditioning a 25-pair binder group or any  
9 subset of loops within that group?

10 A. I didn't know the exact price of that, no.

11 Q. Is Covad willing to pay loop conditioning  
12 charges of that nature?

13 A. When we do a 25-pair complement, I would  
14 assume that we wouldn't get passed on the whole 25  
15 pairs, if we're only using some subset of that  
16 complement. So I mean, I'm willing to negotiate  
17 almost anything.

18 Q. If the Commissions order the price, are you  
19 willing to pay it?

20 A. Of course. If it's legal and binding, of  
21 course I'm going to abide by the law.

22 Q. With regard to the third condition,  
23 improved access to databases and network information,  
24 are you aware of whether or not Covad proposed this  
25 same condition to the FCC?



01140

1 some in some other states that I know have more  
2 favorable terms than we do in some places. Now,  
3 would we opt into parts of it or all of it, I don't  
4 know. That's what the attorneys in the organization  
5 are for, to give me guidance, for us to make business  
6 decisions based on what was best for us as a  
7 business.

8 Q. So there's no particular set of terms or  
9 conditions that exist in another state that you can  
10 identify as we sit here today that you would like to  
11 opt into?

12 A. Nothing I'm going to sit here and tell --  
13 state for the record right now, no.

14 Q. Mr. Moya, have you read the FCC's line  
15 sharing order, or portions of it?

16 A. Yes.

17 Q. Have you read the FCC's UNE remand order or  
18 portions of it?

19 A. Yes, portions of it.

20 Q. Your condition number six, where you  
21 identified UNE combinations, is there anything in  
22 that condition, as you proposed it to the Washington  
23 Commission, that is not addressed in the FCC's UNE  
24 remand order?

25 A. I don't know the specifics. I mean, of the

01141

1 FCC UNE remand in relation to this, what we're trying  
2 to do here is make sure that US West comes to the  
3 table and allows us access to their new network  
4 architecture, which, what I testified to before, they  
5 have refused to discuss with us.

6 Q. Let me see if I understand your testimony.  
7 As we sit here today, to your knowledge, there is  
8 nothing in condition number six that is not already  
9 covered by the UNE remand order?

10 A. To my knowledge, my only concern is is US  
11 West going to allow us access to it. That's my  
12 concern.

13 Q. Are you aware, Mr. Moya, of whether or not  
14 the FCC, in its order of March 10th, considered the  
15 prospect of requiring US West to set up a separate  
16 data subsidiary, US West and Qwest, as a condition of  
17 the merger, to set up a separate data subsidiary?

18 A. I am not aware of that, but I know that's  
19 what we're proposing, structure separation, so --  
20 which I think is beneficial.

21 Q. In your testimony, isn't it correct that  
22 you propose it as a condition of this merger on the  
23 same basis, that you believe it was ordered in the  
24 SBC-Ameritech order, or merger?

25 A. SBC, yes.

01142

1 MS. ANDERL: If I might just have a moment,  
2 Your Honor. I think I'm through. That concludes my  
3 cross of this witness. Thank you, Your Honor.

4 JUDGE MOSS: I'm sorry, Ms. Anderl. I was  
5 momentarily distracted.

6 MS. ANDERL: I'm sorry. That concludes my  
7 cross of this witness.

8 JUDGE MOSS: All right. Mr. Wiltsie, do  
9 you have something for this witness?

10 MR. WILTSIE: We have no questions for this  
11 witness, Your Honor.

12 JUDGE MOSS: All right. Does Public  
13 Counsel?

14 MR. FFITCH: I have a couple questions, I  
15 guess, Your Honor, if I may.

16 JUDGE MOSS: And there are aspects of this  
17 witness' testimony that present facts that are  
18 adverse to your position?

19 MR. FFITCH: Well, I really -- my questions  
20 were prompted by some -- just his statements from the  
21 stand today.

22 JUDGE MOSS: And my concern, of course, is  
23 the problem of friendly cross-examination, so that's  
24 why I asked my question as to whether there are  
25 portions of this witness' testimony that are adverse

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1 to what you're advocating in the proceeding.

2 MR. FFITCH: I haven't identified any such  
3 portions of the testimony, no --

4 JUDGE MOSS: Okay.

5 MR. FFITCH: -- that are adverse, no.

6 JUDGE MOSS: If you think you have some  
7 questions that would lend some clarity to the record  
8 that would be useful to the Commission, given the  
9 special role that Public Counsel plays, I would let  
10 you do that, being cautious not to drift into an area  
11 that would be friendly cross-examination.

12 MR. FFITCH: Well, perhaps I should just  
13 try these questions, and if there appears to be a  
14 problem --

15 JUDGE MOSS: I'm sure it will come to our  
16 attention.

17 MR. FFITCH: -- somebody can say something.

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

19 BY MR. FFITCH:

20 Q. Good afternoon, Mr. Moya.

21 A. Good afternoon.

22 Q. I was interested in hearing you say that  
23 your company was considering entry into the voice  
24 market for telecommunications; is that correct?

25 A. Yes, that's always something we've publicly

01144

1 said for some period of time.

2 Q. And why hasn't the company entered the  
3 voice market previously?

4 A. At this point in time -- you know, we  
5 didn't go public until January of last year.  
6 Therefore, we have to build the market, our  
7 valuation, based upon what we do very well. Right  
8 now it's because we deploy DSLAM technology, DSL  
9 technology, that's what we do. And our core  
10 strategic initiative is to completely build out all  
11 the central offices that we've identified, go in and  
12 secure customers on a network, and then continue to  
13 expand that footprint through other products and  
14 services over the network.

15 Q. So in other words, in your view, the  
16 residential customer has to wait in line behind the  
17 business customer for that business competition to  
18 develop more robustly?

19 A. It's not necessarily that the residential  
20 -- yes and no, but right now the residential  
21 customer, unfortunately, is having to wait in line  
22 for DSL, because we can't afford to get it to them  
23 because, in this state, because it keeps giving us  
24 the answer that, Sorry, we have no plans to build in  
25 some of these areas, which happen to be residential

01145

1 areas in many cases. So unfortunately, it's just  
2 something that we have to deal with on an ongoing  
3 basis.

4 Q. If you were going to offer voice service to  
5 customers in US West's territories, what facilities  
6 would you be purchasing from US West?

7 A. Well, with DSL technology, obviously you  
8 can do voice over the same line, on a line sharing,  
9 so you can do it that way, but then you have to get  
10 back to the switch, obviously, to the switch network,  
11 so you'd have to work with US West to get the voice  
12 over to the switch, because the customer would become  
13 ours.

14 But then there's other different  
15 technologies that we're looking at, as well. You  
16 know, voice over IP. There's just a host of things  
17 that are coming out that we are still studying and  
18 trying to identify what products and service did we  
19 want on the network. So to that answer, short  
20 answer, I guess, we would have to look to US West  
21 again as the facilities, the main facility provider  
22 to have access to the switch, as well as in  
23 transport.

24 Q. Is it your testimony that the difficulty  
25 for you lies in a lack of facilities or is it in

01146

1 corporate behavior or corporate strategy issues?

2 A. Yes.

3 Q. So I asked an either/or question, and --

4 A. I know, but I gave you the answer. It's  
5 all of it. You know, I'll give you an example. In  
6 this state, 42 percent of my orders in the month of  
7 January cancelled. Over and over again, the held  
8 orders are continually rising in this state, time  
9 period over time period, and they keep telling me the  
10 same thing, It's local markets, their terminology,  
11 which means we don't have facilities, we have no plan  
12 on building facilities. Bellevue, Washington. How  
13 can you not build facilities in Bellevue, Washington?  
14 But that's what I'm being told.

15 Q. Based on your experience, do you have any  
16 understanding of why that kind of investment decision  
17 is made or was made? You testified you were with the  
18 company until July of 1999.

19 A. I've got a whole lot of knowledge around  
20 that.

21 MS. ANDERL: I guess I'd object at this  
22 point, Your Honor. This does seem to be eliciting  
23 additional direct testimony from this witness, which  
24 is not adverse to either the settlement agreement or  
25 Mr. ffitch's position in this docket.

01147

1 JUDGE MOSS: I think we're into the area of  
2 the competitive issues, but the testimony that is  
3 being elicited does seem to be adverse to US West and  
4 Qwest, and as I understand it, the Public Counsel's  
5 position is, on those issues, at least, adverse to  
6 the applicants, as well.

7 MR. FFITCH: Well, given that concern, Your  
8 Honor, I guess I would have to -- that would be  
9 difficult for me to go further with this line of  
10 questioning.

11 JUDGE MOSS: Okay, thank you. Ms.  
12 Johnston.

13 MS. JOHNSTON: Nothing, Your Honor.

14 JUDGE MOSS: Okay. The Bench?

15 E X A M I N A T I O N

16 BY COMMISSIONER HEMSTAD:

17 Q. Mr. Moya, on page 14 of your testimony, in  
18 the middle of the page, there's a question and  
19 answer. The question is, What is US West's record on  
20 loop deliveries. And at the very bottom of the page,  
21 you state that US West's performance on this key  
22 metric is the worst of any ILEC. Then, as I  
23 understand it, you go on to say, Unfortunately, US  
24 West's performance in Washington is worse than in any  
25 other state. I take it you're referring to any other

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1 state within the US West territory or in the entire  
2 area where you operate or both?

3 A. It's US West's territory right now. It's  
4 -- Washington is, by far, the worst in all of their  
5 14 states.

6 Q. Well, you go on to cite some data. I  
7 assume that's in support of that. Do you have any  
8 opinion as to why, from your perspective at least, US  
9 West's performance in Washington would be worse than  
10 in other US West states?

11 A. Yes. Some of that's -- some of that  
12 knowledge is from when I worked at US West, so I have  
13 a lot of knowledge about US West and its performance  
14 and loop deliveries. So I don't know what  
15 specifically you want me to say.

16 Q. Well, I'm trying to get at -- I'm puzzled.  
17 I'm not, by asking these questions, accepting the  
18 assertion implied in your answer, but why would  
19 performance be worse in Seattle, say, than in  
20 Portland or Denver or Minneapolis?

21 A. Well, for us specifically, as a Covad  
22 company, we started here, and US West's performance  
23 has continually gotten worse over time. It has not  
24 gotten better. Some of the information I just gave  
25 you is of January. We placed 100 orders, 42 of them

01149

1 cancelled. And many times, a lot of those cancelled  
2 reasons are because customers just get tired of  
3 waiting. We tell them we're waiting for US West to  
4 get a loop, US West continues to tell us they can't  
5 get us a loop for one reason or another, and more  
6 often than not, seemingly lately, they keep coming  
7 back and telling us those are local markets orders.

8 And we struggled with this for some period  
9 of time. And basically, what it is is, Sorry, we  
10 have chosen not to invest in those areas. Therefore,  
11 we do not have facilities to offer you. And that can  
12 take me back into some of the investment things that  
13 I controlled and had very significant knowledge  
14 around when I was at US West. So I know a lot of  
15 these reasons. But that's what we're faced with here  
16 today, from the Covad perspective. And it is  
17 different in this state as compared to some of the  
18 other states.

19 Q. Is any of that performance, in your  
20 opinion, related to the degree or quality of  
21 regulatory oversight?

22 A. As relates to their investment?

23 Q. As relates to their performance?

24 A. I think it's some of that, yes. In  
25 addition to some of that, it's just due to not

01150

1 investing. I mean, US West has a history of poor  
2 performance, it has a history of not investing, and  
3 regulatory oversight makes them -- causes them to  
4 make other decisions.

5 COMMISSIONER HEMSTAD: That's all I have.

6 JUDGE MOSS: Okay. Redirect? I'm sorry.  
7 I'm looking at the wrong counsel.

8 MR. HARLOW: Ms. Anderl could probably do a  
9 pretty good job of it.

10 JUDGE MOSS: She might be interested in  
11 some re-cross, but redirect, Mr. Harlow.

12 MR. HARLOW: Perhaps I'd better do the  
13 redirect, Your Honor.

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

15 BY MR. HARLOW:

16 Q. Mr. Moya, on cross by Ms. Anderl, you noted  
17 that Covad doesn't price the DSL services that its  
18 ISP resellers do. Do you recall that?

19 A. Yes.

20 Q. Does this mean that US West's actions in  
21 pricing with regard to its retail service, Megabit,  
22 still affect Covad's ability to sell DSL services in  
23 Washington?

24 A. Absolutely. Whenever you have -- well,  
25 when you look at that space in its entirety, if you

01151

1 have one provider providing the same service at  
2 something less than what we can provide it at and in  
3 much shorter intervals, so it's there, and they  
4 control the market and everything else associated  
5 with it, yes, it has a huge impact on us.

6 Q. Ms. Anderl then asked you some  
7 hypotheticals regarding plans that are still being  
8 developed or considered, I guess, regarding potential  
9 use of a separate subsidiary or a separate company to  
10 offer voice over DSL service. Do you recall those  
11 questions?

12 A. Yes.

13 Q. And she tied it in, over my objection, to  
14 your recommendation that US West should be required  
15 to offer its advanced services in a separate  
16 subsidiary. Do you recall that?

17 A. Yes.

18 Q. Is part of the basis of your recommendation  
19 for an advanced services subsidiary as a condition of  
20 this merger, does part of that have to do with  
21 potential competitive advantages that US West has as  
22 a bottleneck monopoly holder of local exchange  
23 facilities?

24 A. Absolutely.

25 Q. Does Covad have those advantages?

01152

1 A. No.

2 Q. Please tell us what some of those  
3 advantages are.

4 A. US West owns the facilities, they own the  
5 systems, they own -- I mean, they own everything  
6 there is, and we're tied to all of it. I mean, they  
7 are the supplier, the only supplier. Because of  
8 that, that's why we worked with SBC, and SBC has been  
9 required to spin their data subsidiary into a  
10 separate affiliate. Because of that, they are  
11 required to report on that separately. We don't have  
12 that advantage of building facilities, copper, fiber.  
13 Right now, it's cheaper for all consumers to use the  
14 existing facilities that are in place.

15 Q. Well, US West owns everything, but does  
16 Covad have access to it?

17 MS. ANDERL: Objection, Your Honor. I  
18 think this is beyond the scope of my  
19 cross-examination.

20 MR. HARLOW: This goes to the question of  
21 whether or not US West has competitive advantages,  
22 and Ms. Anderl asked questions about this, over my  
23 objection, based on the issue of the recommendation  
24 of a separate subsidiary. So I think I'm entitled to  
25 redirect on this.

01153

1 JUDGE MOSS: Go ahead. I'll overrule the  
2 objection.

3 THE WITNESS: We have access to some parts  
4 of it. We don't have access to the sub-loop, we  
5 don't have access to remote terminals. There's quite  
6 a few elements we don't have access to. We don't  
7 have access to all the systems. We have access to  
8 loops when they decide to provide them, and then we  
9 have no idea if they would give us the shortest loop  
10 when we ask for it. They may design the circuit that  
11 it takes the longest way to get there. No, we don't  
12 have access.

13 Q. Does US West have access to those elements  
14 that you don't have access to?

15 A. They have access to everything. They own  
16 it.

17 Q. Ms. Anderl asked you hypothetically, I  
18 guess, about a Commission docket, Washington  
19 Commission docket regarding line sharing, sub-loop  
20 unbundling, and you testified that you still would  
21 have problems if line sharing were determined by June  
22 15th, and that sub-loop unbundling, US West refuses  
23 to talk about this, and then finally said US West is  
24 the worst of all in loops. What is the result to  
25 Covad of these delays in getting these things that

01154

1 you've testified you need?

2 A. From a business perspective, it helps -- it  
3 prevents us from scaling the business. But to the  
4 end users in the state of Washington, it hurts them,  
5 as well, because they have less choice. They have to  
6 go to Megabit. If we have the same ability to go  
7 after the network elements that US West does, then  
8 consumers have choice. Whenever you have choice, it  
9 always promotes more technology advancement, it  
10 always promotes more of a downward push on pricing.  
11 It's a historical fact.

12 Q. And why is the timing of this important in  
13 terms of, I guess, building customer base and market  
14 share?

15 A. First mover advantage. That's what it's  
16 all about in the space. Timing is everything.

17 Q. Are you aware of any evidence that  
18 indicates that US West advantages have benefited it  
19 in building market share?

20 A. Last I heard, they owned 80-some percent of  
21 the market share here. Because of our inability to  
22 get loops, it's fairly difficult to compete.

23 Q. With regard to Ms. Anderl's questions about  
24 Covad's position on database, could you please  
25 clarify what it is Covad is asking for in this docket

01155

1 in terms of access to US West databases and what US  
2 West could provide if it were willing to?

3 A. We need access to TIRKS, fiber records,  
4 also design layout records of what the facilities  
5 actually look like, because if we knew what those  
6 things look like, then we could make determinations  
7 of what customers we could put on the network, what  
8 kind of services we could provide them. Customers  
9 would have an expectation of what they could expect  
10 and when they could expect it, so all of that. But  
11 it's more of the integrity of their data is very  
12 poor, but the engineering group knows, in many cases,  
13 what that looks like, but their databases don't  
14 necessarily reflect it.

15 Q. And then, finally, Mr. Moya, you commented  
16 a couple of times in response to questions about your  
17 recommendation of a standard for delivery of loops at  
18 three days. You commented that, in response to  
19 questions about what your interconnection agreement  
20 says, you kept saying, I assume it's not 32. Could  
21 you explain what you meant by that?

22 A. Right now we're experiencing in the state  
23 of -- well, in Seattle specifically, 23 business days  
24 to get a loop delivered, on average, which translates  
25 to 32 calendar days. If you look at it from business

01156

1 days, or if you look at Chicago or Los Angeles or  
2 Boston, on average, those are anywhere from 13 days  
3 to 10, in relative terms to 23.

4 MR. HARLOW: Thank you, Mr. Moya. Your  
5 Honor, that's all the questions I have on redirect.

6 JUDGE MOSS: Re-cross.

7 MS. ANDERL: It prompted a few, I'm sorry.

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

9 BY MS. ANDERL:

10 Q. Mr. Moya, do you know when US West is  
11 required, by the UNE remand order, to offer access  
12 loop qualification data?

13 A. I think it's 120 days, I believe, which may  
14 take us to April, May time frame. I'm not sure of  
15 the exact date.

16 Q. What about sub-loops?

17 A. I think it's all on the same order. Maybe  
18 I'm incorrect.

19 Q. What about line sharing?

20 A. Line sharing is June 6th.

21 Q. Is Covad willing to unbundle the elements  
22 of its network and offer them to its competitor at  
23 TELRIC-based prices?

24 MR. HARLOW: Your Honor, objection. I  
25 don't think this has anything to do with my redirect.

01157

1 JUDGE MOSS: I'll sustain that objection.

2 MS. ANDERL: If I might, Your Honor, the  
3 question went merely to the issue of whether or not  
4 it is a valid criticism that if a party does or does  
5 not do something they are legally obligated to do or  
6 not legally obligated to do.

7 JUDGE MOSS: I sustained the objection.

8 MS. ANDERL: I understand.

9 Q. Mr. Moya, you mentioned 80 percent market  
10 share. Where did you get that figure?

11 A. I think that was discussed earlier this  
12 week.

13 Q. Were you here?

14 A. I was not.

15 Q. Where did you get the 80 percent market  
16 share figure?

17 A. From my counsel, internal counsel.

18 Q. And what did he tell you?

19 MR. HARLOW: Objection, Your Honor.

20 JUDGE MOSS: Are you going to make a  
21 hearsay objection, Mr. Harlow?

22 MR. HARLOW: That might be a good one, but  
23 attorney-client privilege.

24 MS. ANDERL: Attorneys doing math.

25 JUDGE MOSS: I think your point is made.

01158

1 Go ahead.

2 Q. Mr. Moya, you didn't calculate the 80  
3 percent market share yourself, did you?

4 A. No, I didn't.

5 Q. And do you know what elements went into  
6 that 80 percent market share calculation, what the  
7 numerator and the denominator were?

8 A. No, I do not.

9 MS. ANDERL: Thank you. I have no other  
10 questions.

11 MR. HARLOW: Nothing further, Your Honor.

12 JUDGE MOSS: I believe that completes your  
13 examination, Mr. Moya, and I'd like to thank you very  
14 much for being here and providing your testimony.

15 THE WITNESS: Thank you.

16 JUDGE MOSS: I think we could use a break  
17 about this point in time, so we'll take a 15-minute  
18 recess.

19 (Recess taken.)

20 JUDGE MOSS: Back on the record. Mr.  
21 Trincherro, your witness, I believe.

22 MR. TRINCHERO: Yes, thank you.

23 JUDGE MOSS: Dr. Mitchell.

24 Whereupon,

25 DR. BRIDGER MITCHELL,

01159

1 having been first duly sworn, was called as a witness  
2 herein and was examined and testified as follows:

3 JUDGE MOSS: Thank you. Please be seated.

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

5 BY MR. TRINCHERO:

6 Q. Good afternoon, Dr. Mitchell.

7 A. Good afternoon.

8 Q. Could you please state your name and  
9 business address for the record?

10 A. Bridger, B-r-i-d-g-e-r, M. Mitchell, 285  
11 Hamilton Avenue, Suite 370, Palo Alto, California,  
12 94301.

13 Q. And do you have in front of you what has  
14 been marked for identification as Exhibit 200-T?

15 A. Yes.

16 Q. And that is the direct testimony that you  
17 had filed in this case?

18 A. Yes.

19 Q. And was that testimony produced at your  
20 direction?

21 A. Yes, it was.

22 Q. Do you have any corrections to that  
23 testimony?

24 A. No.

25 Q. And if you were asked these same questions

01160

1 today, would the answers be substantially similar?

2 A. Yes, they would.

3 Q. And they are true and correct, to the best  
4 of your knowledge?

5 A. Yes.

6 MR. TRINCHERO: Thank you. Your Honor, I  
7 would move the admission of Exhibit 200-T.

8 MR. WILTSIE: No objection, Your Honor.

9 JUDGE MOSS: Hearing no objection, that  
10 exhibit will be entered as marked.

11 MR. TRINCHERO: Thank you, Your Honor. Dr.  
12 Mitchell is tendered for cross.

13 JUDGE MOSS: And who will be initiating the  
14 honors?

15 MR. WILTSIE: I will, Your Honor.

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

17 BY MR. WILTSIE:

18 Q. Good afternoon, Dr. Mitchell.

19 A. Good afternoon, Mr. Wiltsie.

20 Q. Dr. Mitchell, you're appearing in this  
21 docket on behalf of McLeod?

22 A. Yes.

23 Q. And you're appearing on behalf of McLeod in  
24 a number of states in the merger between Qwest and US  
25 West?

01161

1 A. Yes.

2 Q. Could you tell us which states?

3 A. Colorado, Iowa, Minnesota, Montana, Utah,  
4 Washington. We will be filing testimony in Wyoming  
5 and Arizona. You're testing my memory.

6 Q. By my count, I think that's it, but there  
7 may be one other. Now, the testimony that you filed  
8 here is substantially similar to the testimony you  
9 filed in Iowa and Montana; is that correct?

10 A. Substantially similar. There are, of  
11 course, details that vary by state, but the basic  
12 analysis is substantially similar.

13 Q. And did you file testimony in Colorado, or  
14 did you just testify there?

15 A. I filed testimony.

16 Q. Filed testimony. So it would also be  
17 substantially similar to the testimony you filed  
18 here?

19 A. I would give the same answer to that, yes.

20 Q. And did you also file testimony in the FCC  
21 docket regarding the Qwest-US West merger?

22 A. I believe that was filed as a report,  
23 entered as an ex parte submission.

24 Q. And it was substantially similar to the  
25 testimony you filed here, also?

01162

1           A.    Well, there were substantial elements of  
2 the analysis that have close parallels here in  
3 Washington.

4           Q.    Were you present yesterday when Mr. Stewart  
5 -- do you know who Stacey Stewart is?

6           A.    Yes, I do.

7           Q.    Were you present when Mr. Stewart testified  
8 he wasn't sure whether McLeod was actually serving  
9 local customers in Washington yet?

10          A.    Yes.

11          Q.    Do you have any further knowledge of Mr.  
12 Stewart as to that?

13          A.    No, I'm sure the company's much better  
14 informed than I am.

15          Q.    I notice that your testimony doesn't  
16 address the number of CLECs in Washington.  When you  
17 drafted your testimony, did you know that number?

18          A.    No.

19          Q.    Did you know the number of interconnection  
20 agreements in Washington?

21          A.    No.

22          Q.    Did you know the number of resellers in  
23 Washington?

24          A.    No.

25          Q.    If those numbers or those items of

01163

1 information were important to your testimony, you  
2 could have found those out?

3 A. Yes.

4 Q. I believe, turning to pages five and six of  
5 your testimony here in Washington, you mentioned two  
6 reports, or perhaps compilations of data. Do you  
7 have that testimony in front of you?

8 A. I have pages five and six.

9 Q. On page five, I'm referring to lines 12  
10 through 20, where you're referring to McLeod USA  
11 compiles monthly performance indicators?

12 A. Yes.

13 Q. And on page six, I'm referring to line  
14 five, where AT&T has reported -- has used a uniform  
15 set of direct measures of quality?

16 A. Yes.

17 Q. You did not participate in the compilation  
18 of those -- if I could use the word reports, did you?

19 A. No, I did not.

20 Q. You don't know how the methodology -- what  
21 methodology was used to create them?

22 A. Not beyond what was reported in the sources  
23 that I cited for my testimony.

24 Q. Did you actually see those compilations of  
25 data?

01164

1           A.    In the case of the McLeod statistics, I  
2 believe I have seen some of the details, but I  
3 believe that is in greater detail in Mr. Stewart's  
4 testimony.

5           Q.    But you didn't analyze any of the data  
6 yourself?

7           A.    No, I didn't.

8           Q.    You're aware that, in Washington, that the  
9 Commission has established some service quality  
10 standards for the ILEC?

11          A.    Yes.

12          Q.    And you're aware that the Commission and  
13 its Staff monitored US West's performance of those  
14 standards?

15          A.    Yes.

16          Q.    And as pages five and six demonstrate,  
17 certain CLECs or IXCs measure service quality in  
18 various ways?

19          A.    Yes.

20          Q.    Part of your testimony concerns the  
21 possible diversion of resources by the merged company  
22 away from the US West region?

23          A.    Yes.

24          Q.    And one of the things you say is that that  
25 diversion could likely come in areas that affect

01165

1 service quality; is that fair?

2 A. The divergent resources could affect the  
3 service quality that US West provides in its ILEC  
4 services.

5 Q. Now, if they do divert resources from  
6 service quality type projects, it would be safe to  
7 assume that service quality would degrade?

8 A. Would degrade or would not be improved when  
9 it was on track to be improved, yes.

10 Q. And assuming it did degrade, it's safe to  
11 say that the CLECs would detect that?

12 A. If it is service provided directly to  
13 CLECs, at least some of that service degradation,  
14 yes, would be observed by CLECs. If it was service  
15 to US West's retail customers, I don't know that  
16 CLECs would necessarily observe that. Might hear  
17 reports of it.

18 Q. But the retail customers would detect that,  
19 that latter case?

20 A. Some retail customers who are directly  
21 affected would no doubt detect it.

22 Q. So if there is this degradation, it would  
23 be safe to say it won't go unnoticed?

24 A. I would say there would be some awareness  
25 of it.

01166

1 Q. And so the diversion that caused it would  
2 not go unnoticed either, the diversion of resources?

3 A. Well, that's more problematic, to determine  
4 whether a particular degradation of service was  
5 connected to a diversion of resources.

6 Q. But at least there'd be some symptom of the  
7 diversion?

8 A. There would be a symptom of the diversion.

9 Q. Another concern, I gather, from your  
10 testimony is the new size of the merged company.  
11 You're aware that several years ago US West was  
12 merged with Media One?

13 A. Yes.

14 Q. And with Continental Cable?

15 A. Yes.

16 Q. And at that time, it was subject to  
17 regulation by this Commission?

18 A. The merged company was, yes.

19 Q. Well, the regulated company was, USWC?

20 A. Yes.

21 Q. Your testimony does not mention any  
22 problems that the merged -- that the Commission had  
23 at that time monitoring that larger company?

24 A. No, my testimony is taking today's company  
25 as the baseline and examining whether the proposed

01167

1 merger with Qwest would increase the scope and size,  
2 and my argument is the complexity that the regulators  
3 in this state and others would face moving from today  
4 forward.

5 Q. You've not made a study of the resources of  
6 this Commission's Staff to monitor the regulated  
7 company?

8 A. No.

9 Q. And you've made no study as to the  
10 expertise of the Commission or its Staff?

11 A. No, I haven't.

12 MR. WILTSIE: Your Honor, I have no further  
13 questions for this witness.

14 JUDGE MOSS: Mr. Van Nostrand, do you have  
15 anything for this witness?

16 MR. VAN NOSTRAND: No, Your Honor.

17 JUDGE MOSS: Mr. ffitch.

18 MR. FFITCH: Just one or two questions,  
19 Your Honor.

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

21 BY MR. FFITCH:

22 Q. Dr. Mitchell, you were in the room earlier  
23 when a previous witness, I think, testified about the  
24 sequence of entry for competition for business versus  
25 residential customers?

01168

1 A. Mr. Moya's testimony?

2 Q. Yes.

3 A. Yes, I was.

4 Q. And he indicated, for Covad, at least, that  
5 that was -- that the residential competition would  
6 follow the development of business competition; isn't  
7 that correct?

8 A. Well, I heard his explanation to be that  
9 his company was experiencing difficulties expanding  
10 in areas where loops were not readily available, and  
11 that that tended to be areas that were predominantly  
12 residential.

13 Q. In your testimony, you address the question  
14 -- pardon me for a minute while I find the phrase --  
15 of whether the potential merger would reduce actual  
16 or potential competition, and I'm referring to line  
17 four on page three of your testimony.

18 A. Yes, I have it.

19 Q. And I guess just a question. In looking at  
20 your testimony, I didn't see you addressing the  
21 question of residential local exchange competition;  
22 is that correct? Did you address that in your  
23 testimony?

24 A. I didn't get into subdivisions of the local  
25 exchange market or individual services within the

01169

1 market, no.

2 Q. Does your testimony apply to competition in  
3 the residential market at all?

4 A. Well, yes, to the extent that the merger  
5 will remove an actual or potential competitor by  
6 removing Qwest as a separate supplier of service and  
7 that Qwest is or would be a competitor for  
8 residential service, it does apply.

9 Q. Do you have an opinion about the  
10 relationship between business competition and  
11 residential competition in this market, the local  
12 exchange market?

13 A. Well, Mr. ffitch, my analysis, as I said,  
14 did not inquire into components of the overall local  
15 exchange market, so I have to say today I don't have  
16 an opinion.

17 MR. FFITCH: Okay. Thank you.

18 MS. JOHNSTON: No questions, Your Honor.

19 MR. WILTSIE: No follow-up.

20 E X A M I N A T I O N

21 BY COMMISSIONER HEMSTAD:

22 Q. Dr. Mitchell, I assume you've read the  
23 testimony of Dr. Taylor?

24 A. The rebuttal testimony, yes.

25 Q. Were you here when he was cross-examined?

01170

1 A. I was here this morning.

2 Q. It's a pretty broad question, but he,  
3 point-by-point, accepts the issues that you raised,  
4 and seeks to refute or disprove or dismiss them.  
5 Without getting into an all day presentation, do you  
6 have any either general or specific responses to his  
7 testimony, and as he, point-by-point, takes up the  
8 issues that there is no ability for discrimination or  
9 price squeezing or non-price discrimination and the  
10 like?

11 A. Yes, I certainly have a number of thoughts  
12 that I could respond to. And I also appreciate that  
13 the week has been fairly long and you would probably  
14 like to conclude this without undue length. Would  
15 you like to proceed by asking on specific points or  
16 would you --

17 Q. I leave it up to you as to how to address  
18 it.

19 A. Okay. Well, perhaps I'll just mention  
20 several points. First, the applicants characterize  
21 this as a vertical merger, one that is unlike other  
22 mergers that have been recently before regulators in  
23 the United States, and I think that observation  
24 points to important differences, but is not very  
25 nuanced about the situation.

01171

1           This is a merger between a nationwide  
2 company that offers interLATA services, advanced  
3 services, and other services throughout the U.S and a  
4 14-state ILEC that operates predominantly regulated  
5 local exchange in intraLATA service. There is a  
6 degree of horizontal overlap. It's not extensive,  
7 but I think there is a horizontal element within the  
8 region. And to the extent that the rest of the  
9 relationship is one of vertical, it's one between a  
10 company that is largely operating in one region and a  
11 company that is largely operating in the rest of the  
12 United States.

13           So it's not exactly what we think of as a  
14 vertical relationship in the normal merger situation,  
15 either. But I would agree that the focus needs to be  
16 on the analysis, predominantly, of potential  
17 competitive effects and changes in resource  
18 allocation in the vertical chain of production. And  
19 it's my firm opinion that this merger would provide  
20 additional incentives and additional opportunity for  
21 the merged company to engage in shifting of resources  
22 away from the regulated division and into other  
23 services, many of them out of this region, and  
24 additional opportunity to engage and incenting to  
25 engage in anticompetitive behavior towards its

01172

1 competitors. And that forms much of the analysis in  
2 my prefiled testimony.

3           We could go through what the nature of  
4 those incentives are, but just to call it -- I think  
5 we've already had the discussion about the potential  
6 for a very substantial revenue diversion with the  
7 effective elimination of the dividend. This is  
8 something that the managers of US West could have  
9 undertaken absent the merger, they could have  
10 invested in Qwest or Qwest-like projects if they had  
11 found them advantageous and in the best interests of  
12 the firm, but they have not done so.

13           So something must change with the merger to  
14 create this additional incentive or opportunity.

15           Q.    Taking it -- why should we care what the  
16 dividend policy of the company is?

17           A.    Well, those resources, revenues, are  
18 potentially available for investment within the  
19 region and to improve service quality and to provide  
20 --

21           Q.    That's true, but at the present time, of  
22 course, they're paid out as dividends, so to that  
23 extent, they're not available for reinvestment.

24           A.    Right, but I see this as a signal that the  
25 merged firm is looking to find additional revenue

01173

1 sources to invest in these other types of projects.  
2 And in terms of the private analysis of the owners of  
3 the merged firm, that may indeed be the highest  
4 return activity, but it's not necessarily in the  
5 public interest of the Washington consumers.

6 Q. But how do we know that in advance? I  
7 think Dr. Taylor's response was, to my question to  
8 him in that regard, well, of course, the merged  
9 company could decide to commit substantially  
10 additional dollars to the local network, rather than  
11 elsewhere.

12 A. Yes, and even the unmerged company could do  
13 that, but it has not found it advantageous. The  
14 other part of the argument here is that the merged  
15 company will have new incentives to make life more  
16 difficult for its competitors, both its competitive  
17 local exchange carriers and interexchange carriers,  
18 because now the new -- the merged company will be an  
19 IXC, nationwide, and it will be to its commercial  
20 advantage to make life more difficult for other IXCs.

21 One way it could do that is to raise their  
22 cost of terminating calls in region. That's  
23 something that US West today has no interest in  
24 doing, because it has no interLATA business.

25 CHAIRWOMAN SHOWALTER: Don't they need our

01174

1 authority to do that?

2 THE WITNESS: I'm sorry?

3 CHAIRWOMAN SHOWALTER: Don't they need our  
4 approval to do that?

5 THE WITNESS: To discriminate against --

6 CHAIRWOMAN SHOWALTER: No, to raise their

7 --

8 THE WITNESS: Well, I'm focusing, Madam  
9 Chairwoman, on primarily the incentives to degrade  
10 the quality of interconnection services, individual  
11 services that they make available to IXCs and other  
12 wholesale customers.

13 CHAIRWOMAN SHOWALTER: I thought the  
14 example you had just given was that they have an  
15 incentive to raise the fees that they charge others?

16 THE WITNESS: Yeah, the term I used is to  
17 raise cost. And this is an economist's shorthand.

18 CHAIRWOMAN SHOWALTER: I see.

19 THE WITNESS: One way, of course, is to  
20 raise prices, which IXCs pay, but another is to make  
21 it more costly for them to obtain the same quality of  
22 service.

23 Q. Well, what is your response to his response  
24 on why isn't the 271 application process or the  
25 incentives for that sufficient to deal with the

01175

1 wholesale issues?

2       A. Well, I think the argument the applicants  
3 have put forward is that the incentive to get relief  
4 from 271 restriction, no interLATA traffic  
5 restriction, is something that will lead the merged  
6 company to improve conditions for local competition  
7 in order to get this checklist satisfied and get into  
8 that service. That is one possible outcome, and I  
9 think we recognize that there are incentives in that  
10 direction.

11       But there are also incentives that will  
12 come from improving competitive conditions to -- let  
13 me try to say that more clearly. There are  
14 incentives on the other side to make conditions for  
15 competitors more difficult to raise those  
16 competitors' costs, reduce their quality of service,  
17 that result from being a nationwide interexchange  
18 carrier, incentives that US West does not have today.

19       And those incentives will operate as soon  
20 as the merger is completed, before any effort to  
21 satisfy 271 occurs. The merged company could, in  
22 evaluating the private benefits of investing what  
23 Bell Atlantic reported to be over a billion dollars  
24 in getting 271 clearance and the benefits of  
25 maintaining its market share in local business, and

01176

1 decided that it's better off not seeking 271  
2 approval.

3 Q. I believe your testimony addressed the  
4 issue of requiring a wholesale/retail division of the  
5 company's activities. Did you address that?

6 A. I briefly addressed, as a possible  
7 condition, the separation of the ILEC activities in  
8 the wholesale and retail subsidiaries.

9 Q. I assume you'd agree we have the authority  
10 to do that only within the state of Washington?

11 A. I would assume that that's right, yes.

12 Q. Do you think it is practical for a single  
13 state in the 14-state company to require such an  
14 arrangement?

15 A. Well, I think the 14-state ILEC could  
16 operate a separate subsidiary in that single state or  
17 in several, but not all states. So as a business  
18 proposition, it would be practical. You and your  
19 counsel would have to speak to the legal  
20 practicalities, of course.

21 Q. Well, I'm thinking of the operational  
22 practicalities on behalf of the merged company.

23 A. Mm-hmm.

24 Q. And I'm really not asking skeptically, I'm  
25 really just asking it as an inquiry.

01177

1           A.    Well, one might imagine many different ways  
2 of dividing the current integrated company into  
3 different components, and of those, I think the  
4 division between wholesale and resale is probably the  
5 least complicated retail relationships, I believe.  
6 And operational responsibilities are quite different  
7 from what's needed at the wholesale and the network  
8 level.

9           Q.    Okay. And do you think that is an  
10 important condition that should be imposed by this  
11 Commission or, as Staff have proposed, that it be  
12 looked at at some point in the future?

13          A.    Well, it would be a helpful condition. The  
14 FCC, in its order released on Friday, recognized, for  
15 example, that a separate advanced services subsidiary  
16 would be helpful in monitoring, getting information  
17 about potential competitive abuses in the advanced  
18 service area and the nexus between supplying network  
19 services and supplying advanced services. So yes, I  
20 think there would be benefits from that. They would  
21 not solve all the problems of potential  
22 anticompetitive activity by the merged company.

23                COMMISSIONER HEMSTAD: I think that's all I  
24 have. Thank you.

25

E X A M I N A T I O N

01178

1 BY COMMISSIONER GILLIS:

2 Q. As I understand, one of your observations  
3 of why a merged company may have more potential to  
4 have a diversion of resources from a region is due to  
5 some asymmetry of information between the regulators  
6 and the regulated company; is that right?

7 A. Well, yes, the asymmetry of information is  
8 there from day one that regulators or people outside  
9 of a business operation almost necessarily will know  
10 less about that, and proceedings such as this are  
11 necessary in order to begin to redress that balance.  
12 In my opinion, the merger will exacerbate that  
13 problem because of the considerably greater scale and  
14 scope of the merged firm, and that the kinds of  
15 activities that are being added to US West, if you  
16 think of the merger as bringing these additional  
17 components into the firm, are ones that have close  
18 cost and technical relationships in many cases, and  
19 so the separation between the regulated or the state  
20 versus interstate activities will become more  
21 difficult than it is today.

22 Q. But does that boil down to a greater  
23 difficulty in a practical sense of tracking the flows  
24 and also some jurisdictional implications? Is that  
25 essentially what you're saying, why it would be more

01179

1 difficult, or --

2 A. Yes, I certainly think both those factors  
3 would operate.

4 Q. Are you generally familiar with the retail  
5 settlement that's before the Commission at this time?

6 A. Generally, yes.

7 Q. Just in general terms?

8 A. Yes, Commissioner Gillis.

9 Q. I'm wondering about your opinion on a  
10 couple of implications of that if the Commission were  
11 to accept that. One is a part of the settlement  
12 establishes performance outcome measures, both on  
13 service quality and some required investment  
14 measures. To the extent that the Commission would  
15 accept that, and to the extent whether those are  
16 binding, does that reduce any of your concerns about  
17 the potential of a merged company to divert resources  
18 to other applications that would not essentially  
19 benefit the regional customers?

20 A. Well, my understanding of the proposed  
21 settlement is that its focus is almost exclusively on  
22 conditions and investment that will benefit retail  
23 customers of US West. To the extent that it improves  
24 service quality and increases investment for services  
25 at the retail level, I think the answer to your

01180

1 question is yes. But it doesn't appear to me, as I  
2 remember it, to go very far -- except perhaps for  
3 access services, to a very limited extent -- to  
4 addressing the service quality and potentially  
5 investment issues for competitive suppliers, either  
6 local exchange or interexchange carriers.

7           And I believe, in Dr. Goodfriend's prefiled  
8 testimony, there was proposal for a number of  
9 conditions or recommended conditions and remedies  
10 that would address somewhat comparable types of  
11 issues that affect competitive carriers at a  
12 wholesale level.

13           Q. I don't recall if it was in your testimony  
14 or in Dr. Goodfriend's testimony that I think one of  
15 you made the argument that there's an incentive for  
16 the merged company to reduce service for the CLECs as  
17 essentially a -- as a business strategy to compensate  
18 for reduced service quality at the retail level. Was  
19 that you or --

20           A. It may have been I.

21           Q. Maybe I didn't capsulize it right, but --

22           A. Well, the line of analysis is -- basically  
23 is in capsule form. The merged company will have  
24 incentive to make -- to raise the costs of  
25 interexchange carriers who terminate traffic in the

01181

1 territory. Those carriers might, among other things,  
2 look to competitive exchange carriers as alternatives  
3 for getting their terminated service, and US West and  
4 other subscribers might increasingly look to  
5 competitors to get their service.

6 Well, one further strategy that the  
7 incumbent has, then, is to degrade quality of service  
8 to its local competitors to make them less attractive  
9 alternatives. And so, yes, there is a nexus there.

10 Q. That was the piece of testimony I was  
11 trying to recall. I didn't recall the whole context  
12 of it. But the question I had for you, again,  
13 relates to the proposed retail settlement and to the  
14 extent that it's successful, does that reduce that  
15 concern? In other words, wouldn't that raise the bar  
16 effectively in that the merged company would not be  
17 able to degrade its retail level services below the  
18 standards set by the agreement and, consequently,  
19 wouldn't there be less reason for them to also take  
20 action to -- that strategic action that you just  
21 described against the CLECs?

22 A. I think you may have a point there,  
23 Commissioner. That's one of several ways and  
24 incentives that the merged company would have to act  
25 anticompetitively in terms of degrading service

01182

1 quality. And it doesn't, in my view, remove the  
2 others that would continue to be there.

3 Q. So I mean, I don't mean to put words in  
4 your mouth, as I understand it, your basic testimony  
5 is that in dealing with the retail service quality by  
6 itself, even if we can establish enforceable  
7 standards, is not adequate by itself to deal with the  
8 service quality problems that may occur on the  
9 wholesale side of the market?

10 A. If the Commission were to adopt the retail  
11 settlement and not take other steps to address the  
12 potential anticompetitive abuses at the wholesale  
13 level and directly at competing carriers, I think you  
14 would not have solved all of the potential problems  
15 that the merger creates.

16 Q. But it may help some on the wholesale side,  
17 as well, on the competitive side?

18 A. To a limited degree, but that's not the  
19 major piece of it, as I analyze it.

20 COMMISSIONER GILLIS: Thank you.

21 CHAIRWOMAN SHOWALTER: I have a couple  
22 questions, and I apologize for coming in late, but I  
23 will read your testimony here.

24 E X A M I N A T I O N

25 BY CHAIRWOMAN SHOWALTER:

01183

1 Q. On page nine of your testimony, lines seven  
2 and eight, you've been asked a couple of questions  
3 about this. This is about the risk that a merger  
4 would increase the extent of informational  
5 asymmetries between regulators and the ILEC. I think  
6 Dr. -- is it Wilson? Taylor, I'm sorry, pointed out,  
7 Well, if this is a problem, then why don't we see it  
8 in Sprint-United that this merger is analogous to,  
9 the Sprint-United merger, and doesn't seem to be such  
10 a big problem there. Do you have any response to  
11 that point?

12 A. Well, I think the response I would make  
13 here is that Qwest's type of activities, interLATA,  
14 long distance service, advanced services, video and  
15 others, quite substantially expand and abruptly  
16 expand the scope and the size of US West as we see it  
17 today. That will occur effectively the moment the  
18 merger is consummated. And so that is a sort of a  
19 step function increase in complexity that you and  
20 your colleagues in other states will be confronted  
21 with.

22 The Sprint local long distance relationship  
23 is one that exists, and regulators in those states,  
24 yes, do have some additional factors to take into  
25 account, but they have had the time to adjust to

01184

1 that.

2 Q. And as I read, after only skimming the FCC  
3 opinion, they seem to think that the incentive of a  
4 merged company to gain 271 approval was sufficiently  
5 -- will be sufficiently great that they don't need to  
6 worry about the incentive to abusively frustrate  
7 competitors, at least that's what I took it to say,  
8 so that they didn't need to go take the steps that  
9 we're being asked to take here.

10 Do you agree at least that those are two  
11 incentives pointing in two different directions, or  
12 that are on two sides of the scale, but maybe  
13 disagree on the weight that we would apply to it?

14 A. I'm not sure what's on the other side of  
15 the scale.

16 Q. Well, on one side that would be pro-merger,  
17 an incentive of the merged company to gain 271  
18 approval, thereby doing the things that you need to  
19 do to gain that approval. On the other side, the  
20 incentives you've laid out here, that is, the  
21 incentive to frustrate competitors in various abusive  
22 ways are increased by the merger?

23 A. Yes, I would agree there's a direct tension  
24 and that, for the management of the merged company,  
25 there rationally would be a balancing of the gains to

01185

1 be had from complete -- from satisfying 271, making  
2 what reportedly by, for example, Bell Atlantic, has  
3 been an over one billion dollar investment to get  
4 that type of approval, and the loss of market share  
5 and competitive returns from maintaining a dominant  
6 position in a local exchange area. That's something  
7 that you all have to weigh, as well, but in my view,  
8 it's not clear how that calculation comes out. And  
9 the firm, until it gets -- makes those investments  
10 and succeeds in getting 271 clearance, will be unable  
11 to get any of the benefits on that side of the scale.  
12 It can get benefits of continuing to frustrate  
13 competition and keep quality low by continuing to  
14 engage in those practices.

15 Q. But doesn't the behavior that is required  
16 to gain 271 approval, isn't that behavior the  
17 opposite of the behavior of lowering service quality?

18 A. Yes.

19 Q. So that the guess is which way is the  
20 merged company going to go. But they really can't go  
21 both directions at once, can they? I mean, isn't --  
22 one theory is they'll just sit, the monopoly will sit  
23 there, they won't do what they need to do to get 271,  
24 it will be difficult for competitors to get in, and  
25 the merged company won't get 271.

01186

1           But the other answer or view, which I guess  
2 is what the FCC adopted, is we think on the whole  
3 this merged company has more incentive to gain 271  
4 than not, and so we think that's the direction it's  
5 going to go. Is it possible to go two directions at  
6 once? Or I suppose you could get the approval and  
7 then backslide, but that has its own consequences.

8           A. Yes. Well, I think I'm basically in  
9 agreement with you. If the company puts 271 actions  
10 in place to really satisfy those standards, it will  
11 take a loss in the local exchange markets. And  
12 that's an opportunity cost that it has to face.

13           Now, you and other commissions effectively  
14 have the opportunity, if you judge it prudent, to  
15 limit the risk of the anticompetitive side, and in  
16 that sense, increase the one opportunity that remains  
17 for the company to move ahead with getting its 271  
18 clearance.

19           Q. That's what Mr. Ward calls the insurance  
20 plan, in essence, that maybe the incentive is there  
21 to get 271, but just in case, have some conditions  
22 that keep it from going the other way?

23           A. Yes, and at least some of the argument that  
24 the applicants have put forward is that the  
25 justification, business justification for the merger

01187

1 is to get into the full set of services that 271  
2 approval would allow them to do. And if that's the  
3 case, then it would seem to me you could reach the  
4 conclusion that these conditions would not constrain  
5 the firm; it would be doing them anyway. And so  
6 there's essentially little or no risk in requiring  
7 them to do what a procompetitive position would  
8 entail.

9 CHAIRWOMAN SHOWALTER: Thanks.

10 JUDGE MOSS: Nothing further from the  
11 Bench. Mr. Trincherro, redirect?

12 MR. TRINCHERO: Just one or two quick  
13 questions.

14 R E D I R E C T E X A M I N A T I O N  
15 BY MR. TRINCHERO:

16 Q. Dr. Mitchell, you were asked some questions  
17 by Commissioner Gillis about the potential impact of  
18 the retail settlement on competitive issues, and in  
19 particular, whether or not the service quality  
20 standards and investment requirements that are  
21 entailed in that settlement agreement might not  
22 eliminate or reduce some of your concerns on the  
23 competitive side.

24 Is it possible that the performance  
25 standards and investment requirements in that retail

01188

1 settlement could actually provide additional  
2 incentives to the company to discriminate against  
3 CLECs?

4 A. Well, I have to say first that I have not  
5 analyzed this, this agreement, the settlement,  
6 because it is largely focused on the retail side.  
7 But a close analysis could well reveal that there are  
8 incentives in both directions. I think the  
9 Commissioner's question was directed at a fairly  
10 specific component of the analysis for  
11 antidiscriminatory behavior toward competitive local  
12 exchange carriers, and my response was that the  
13 merged company would have a number of ways and  
14 incentives to degrade quality and increase the cost  
15 of its rivals by lower quality service, so yes, I  
16 would agree that there's the potential here, but  
17 since I haven't analyzed it, I would be cautious in  
18 drawing that conclusion.

19 MR. TRINCHERO: Thank you, Your Honor. I  
20 have nothing further.

21 JUDGE MOSS: Okay.

22 MR. WILTSIE: Briefly, Your Honor.

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

24 BY MR. WILTSIE:

25 Q. Dr. Mitchell, you mentioned the FCC order

01189

1 that came out last week in this merger, and you  
2 specifically referenced advanced services subs. The  
3 FCC did not order Qwest or US West to form an  
4 advanced services subsidiary, did it?

5 A. No.

6 Q. You also mentioned several times, with  
7 respect to this merger, that it's a merger between a  
8 nationwide IXC and an ILEC. However, immediately  
9 post-merger, Qwest will have to divest its in-region  
10 interLATA assets; isn't that right?

11 A. Yes, in fact, the FCC has a condition of  
12 getting -- the central component of its order was set  
13 for Qwest-specific requirements for reporting and  
14 auditing of how this divestiture would occur.

15 Q. So in that sense, post-merger, Qwest will  
16 no longer be a nationwide IXC until it achieves 271  
17 compliance?

18 A. Yes, that's correct. In fact, I was  
19 pointing out that it's a little bit of a stretch to  
20 call this vertical when the merged company will not  
21 have any of its interexchange services in the  
22 geographic region in which it is a local exchange  
23 carrier and will have its vertical services in  
24 noncontiguous or nonoverlapping regions.

25 Q. And it's safe to say that if the merged

01190

1 company views the opportunity to offer interLATA  
2 traffic in this region as greater than the  
3 opportunity cost, as you put it, of having to open  
4 its market to competition, that a rational economic  
5 actor would do so?

6 A. Rational economic -- I'm sorry, rational  
7 actor would do what?

8 Q. If the merged company viewed the  
9 opportunity to provide interLATA service in this  
10 region post-merger as greater than the opportunity  
11 cost of having to open its market to competition, its  
12 local market to competition, it would do so?

13 A. Could you maybe rephrase it? It would do  
14 so is what -- I'm not understanding what the it is.

15 Q. Let's put it simply. If there's more  
16 profit to be made from offering interLATA here than  
17 from opening your market to allow people to compete,  
18 a rational corporation's going to do that?

19 A. I think that would be the private  
20 calculation for the firm.

21 Q. And you're aware of Section 251 and 252 of  
22 the Telecommunications Act?

23 A. Yes.

24 Q. That requires the ILECs to open their  
25 markets to local competition?

01191

1           A.     There are requirements for opening markets.  
2 They're not the same requirements as in 271.

3           Q.     True.  But local competition, to some  
4 extent, will occur whether or not 271 compliance is  
5 sought or not?

6           MR. TRINCHERO:  Your Honor, I'm going to  
7 interpose an objection here because, while I'm not  
8 exactly sure where Mr. Wiltsie is going with this, I  
9 do not believe that it is either re-cross of my  
10 redirect or really follow up to the Commissioners'  
11 questions.

12          JUDGE MOSS:  I'm inclined to agree, Mr.  
13 Wiltsie.  You seem to be getting beyond the range  
14 that we normally allow for re-cross.

15          MR. WILTSIE:  Well, Your Honor, I believe  
16 some of the Commissioners asked about the incentives  
17 to open the market.  Specifically, I believe  
18 Chairwoman Showalter was talking about 271 costs or  
19 the opportunity to degrade.  This goes to that point  
20 which is we have to open the market anyways.  There's  
21 not much we can do.  So the answer is 271 is the  
22 solution.

23          JUDGE MOSS:  All right.  I'll allow one or  
24 two more questions along this line.

25          MR. WILTSIE:  Thank you.

01192

1 Q. The question is, Doctor, to some extent,  
2 the ILEC has to open its market under 251 and 252?

3 A. Well, the company is under the obligations  
4 of 251 and 252 today, and we've had testimony in this  
5 proceeding about the incompleteness of the conditions  
6 for full and effective competition, so while I could  
7 agree that, yes, to an extent it is required to do  
8 that, I think the analysis is quite clear that there  
9 remain incentives and there will be increased  
10 incentives to act against the interests of more  
11 effective competition.

12 Q. Well, we can argue about the pace, Doctor,  
13 but the advocacy of the intervenors here indicates  
14 that ultimately 251 and 252 will be complied with,  
15 whether it's within a view of US West as to how it  
16 should have to comply or the intervenors?

17 MR. TRINCHERO: Your Honor, I'm going to  
18 object. I believe that's a mischaracterization of  
19 the advocacy of the intervenors in this proceeding.

20 JUDGE MOSS: It was also argumentative.  
21 And I didn't hear a question in there, Mr. Wiltsie.  
22 So if you have a question, go ahead and pose it.

23 MR. WILTSIE: I apologize, Your Honor.  
24 I'll stop there.

25 JUDGE MOSS: All right. I believe that

01193

1 will complete our examination of Dr. Mitchell, and we  
2 appreciate your testimony very much.

3 THE WITNESS: Thank you.

4 JUDGE MOSS: And let's see. I believe this  
5 then brings us -- we're going to take up all the  
6 witnesses as to whom cross-examination has been  
7 waived and so forth at the very end. There's no need  
8 for the Commissioners to sit up here through all  
9 that. But let's do take up Dr. Blackmon at this  
10 point.

11 Whereupon,

12 DR. GLENN BLACKMON,  
13 having been first duly sworn, was called as a witness  
14 herein and was examined and testified as follows:

15 JUDGE MOSS: I guess that was superfluous.  
16 We had you do that the other day, didn't we? Thank  
17 you, though. Your witness.

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

19 BY MS. JOHNSTON:

20 Q. Dr. Blackmon, would you state your full  
21 name for the record, please?

22 A. Glenn Blackmon.

23 Q. What is your business address?

24 A. 1300 South Evergreen Park Drive S.W.,  
25 Olympia, Washington.

01194

1 Q. In preparation for your testimony here  
2 today, did you prefile testimony and an exhibit in  
3 this docket?

4 A. Yes.

5 Q. Those exhibits have been marked for  
6 identification as Exhibits 260-T and 261. Was your  
7 testimony prepared by you or at your direction or  
8 under your control?

9 A. Yes.

10 Q. Do you have your testimony and exhibit  
11 before you?

12 A. Yes.

13 Q. If I were to ask you the same questions  
14 that are set forth in your prefiled testimony, would  
15 your answers be the same?

16 A. For the most part, yes, though I think one  
17 of the recommendations that I made when it was  
18 prefiled I would change, based on circumstances that  
19 have changed since then.

20 Q. Could you describe what the circumstances  
21 that you're referring to are?

22 A. Yes, I will. Let me start by saying which  
23 recommendation it is. It's one that's on page five  
24 of my testimony, starting at line 15. Staff has been  
25 recommending that should US West fail to get 271

01195

1 approval by March of next year, that this Commission  
2 take up the question of whether to split US West into  
3 retail and wholesale operations.

4 Last week, the Commission adopted a  
5 schedule for review of a 271 application that makes  
6 that particular date not feasible. And based on  
7 that, I think that -- well, Staff is instead  
8 recommending that the Commission adopt a set of  
9 conditions similar to what the competitive local  
10 exchange carriers have recommended in this proceeding  
11 in place of this recommendation.

12 Q. And the schedule that you're referring to  
13 was set forth as part of the Commission's order  
14 adopting supplemental interpretive and policy  
15 statement on process and evidentiary requirements in  
16 Docket Number UT-970300?

17 A. Yes, that's correct. Also, on page two of  
18 my testimony, where I go through the publications, if  
19 I were doing this testimony today, I would point out  
20 that, on one of those articles, Kip Viscusi was a  
21 co-author.

22 MS. JOHNSTON: Thank you for that  
23 correction. Okay. With that, I move for admission  
24 of Exhibits 260-T, I believe most specifically pages  
25 three through 15 of Dr. Blackmon's testimony, and

01196

1 Exhibit 261.

2 MR. VAN NOSTRAND: No objection, Your  
3 Honor.

4 JUDGE MOSS: There being no objection,  
5 those will be admitted as marked.

6 MS. JOHNSTON: Thank you. Dr. Blackmon's  
7 available for cross-examination.

8 JUDGE MOSS: Go ahead.

9 MR. VAN NOSTRAND: Thank you, Your Honor.

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

11 BY MR. VAN NOSTRAND:

12 Q. Good afternoon, Dr. Blackmon.

13 A. Good afternoon.

14 Q. If we could start with that change that you  
15 just talked about making on page five of your  
16 testimony. As I understand it, the original proposal  
17 was that the merged company would be required to  
18 obtain FCC approval by March 31, 2001; is that  
19 correct?

20 A. Yes, and then, if it failed to do that,  
21 that the Commission would take up the issue of  
22 separation into wholesale and retail.

23 Q. And the other action the Commission took  
24 that you talked about, I take it that establishes an  
25 18-month process commencing when US West files its

01197

1 271 application?

2 A. It's a process of up to 18 months.

3 Q. And it contemplates a filing date of  
4 something like September 1, 2001?

5 A. I don't recall the date, but that sounds  
6 about right.

7 Q. Is it another approach to just change the  
8 date that you have in your testimony and stick with  
9 your original recommendation?

10 A. That would be another approach, but not a  
11 good approach.

12 Q. Why is that?

13 A. Because the customers in the state of  
14 Washington deserve to have access to competitive  
15 services as soon as possible, not in September of  
16 2001 or at some point after that. We were concerned  
17 that even the March 31st date of next year was too  
18 far out for it to affect competitive choices now, but  
19 given the change in that 271 schedule, it's, for us,  
20 beyond consideration.

21 Q. If you could turn to the other portion of  
22 your testimony concerning the advanced services  
23 subsidiary, which you discuss on page four. Lines 15  
24 to 19, you would require that an advanced service  
25 subsidiary be created into -- be required to operate

01198

1 separately from the operating company; is that  
2 correct?

3 A. That's correct.

4 Q. And this subsidiary would have to be  
5 created prior to closing the merger; is that right?

6 A. Yes.

7 Q. And does that basically require that the  
8 subsidiary be set up and running prior to closing of  
9 the merger or is there a date by which the operating  
10 company would be precluded from providing advanced  
11 services?

12 A. I believe that it would be the latter,  
13 though I can't give you a specific date of which it  
14 would no longer be able to, but the process would  
15 involve a phase-in of these requirements so that on  
16 day one, the operating company would not be  
17 prohibited from serving existing customers of  
18 advanced services.

19 Q. Now, in Data Request 16, which is  
20 Cross-examination Exhibit 262, the company asked you  
21 if you had any documents or evidence or analyses that  
22 would support or relate to your proposal to require  
23 the creation of advanced services subsidiary. Do you  
24 have that response in front of you?

25 A. I do.

01199

1 Q. The indication was, other than the  
2 documents which were provided as an exhibit to your  
3 testimony, there are no other documents responsive to  
4 the request?

5 A. That's the response, yes.

6 Q. And the documents you're referring to is  
7 your Exhibit 261, which is the SBC-Ameritech order  
8 from the FCC?

9 A. Yes.

10 Q. I guess I'd like to give you an opportunity  
11 to describe in what way the SBC-Ameritech decision  
12 supports a requirement of an advanced service  
13 subsidiary in the case of this merger?

14 A. Well, I was not suggesting that that  
15 document is Exhibit A in support of an advanced  
16 services subsidiary, but the company's request was  
17 that we produce documents that do support it. And so  
18 it is one piece of support for that proposition.

19 I think that, within the text of the order,  
20 the FCC goes through and explains why an affiliate  
21 relationship such as this will help to promote and  
22 protect competition in the advanced services market,  
23 but there's a lot of additional evidence and analysis  
24 about why this is a good idea and good for the state  
25 of Washington. It's just that we're not in the

01200

1 business of producing research reports or studies.

2 Q. Is it fair to say that in the SBC-Ameritech  
3 decision from the FCC, there was a considerable  
4 discussion about the public interest harms that would  
5 flow from that merger?

6 A. That would flow from the merger itself,  
7 yes, there is. That's really not the part of that  
8 document that I was referring to, though. The  
9 circumstances that face SBC and Ameritech are quite  
10 different than ones that face US West and Qwest.

11 Q. Isn't it relevant, in considering the  
12 conditions that are necessary in response to a  
13 merger, to consider the harms you're trying to  
14 address by those conditions?

15 JUDGE MOSS: Dr. Blackmon, could you pull  
16 the microphone up? We're having a little trouble  
17 hearing you.

18 THE WITNESS: I'm sorry, could you ask that  
19 question again?

20 Q. Yeah, isn't it important, when you're  
21 considering the conditions that you would propose to  
22 attach to merger approval, that you consider the  
23 harms that that merger creates, which are addressed  
24 by the conditions?

25 A. Yes, it's definitely important that you do

01201

1 that. But just because a particular remedy was good  
2 in one circumstance doesn't mean that it can't also  
3 be a good remedy in a different circumstance.

4 Q. Would you agree -- is it your testimony  
5 that the circumstances in SBC-Ameritech are similar  
6 to what we have with the US West-Qwest merger?

7 A. I believe I just said exactly the opposite  
8 of that, that no, they are not the same  
9 circumstances. We have, in that one, two regional  
10 bell operating companies that were merging what, in  
11 shorthand terms, we've referred to in this case as a  
12 horizontal merger. And we don't have that here. At  
13 least that's not Staff's testimony that we have that  
14 here.

15 Q. Well, with respect to the impact of that  
16 merger on the advanced services issue, wasn't it an  
17 important consideration to the FCC whether or not the  
18 merged company would have control over a larger area?

19 A. That was important to the FCC. There are  
20 lots of things that were important to the FCC about  
21 SBC that are not relevant to this case that's before  
22 the Commission here.

23 Q. Is it your testimony that the US West-Qwest  
24 merger will give the incumbent local exchange carrier  
25 control over a larger area?

01202

1           A.    Not in the same way that the SBC-Ameritech  
2 merger gave those two companies control over a larger  
3 area.

4           Q.    Is that an important difference to be  
5 considered in evaluating the circumstances that were  
6 in that merger versus the ones that were in this  
7 merger?

8           A.    I'm sorry, I didn't understand the  
9 question.

10          Q.    Is the difference in whether or not there's  
11 control -- a greater control over a local area  
12 different between the SBC-Ameritech merger versus  
13 this one, is that an important difference?

14          A.    No, it's an irrelevant difference.

15          Q.    But, in fact, wasn't that one of the  
16 reasons the FCC cited in requiring an advanced  
17 service subsidiary, was the fact that the merged  
18 company would have control over a larger area?

19               MS. JOHNSTON: Your Honor, I'm going to  
20 interpose an objection here. It seems that we're  
21 spending a lot of time on the same ground. I believe  
22 Dr. Blackmon has already asked and answered this  
23 question several times. That is that the merger of  
24 two RBOCs, namely, SBC and Ameritech, is vastly  
25 different than the merger before this Commission.

01203

1 JUDGE MOSS: Well, I don't think we've  
2 spent such an excessive amount of time on it that  
3 I'll cut Mr. Van Nostrand off just yet.

4 MS. JOHNSTON: And it's 4:35.

5 JUDGE MOSS: Well, lateness of the hour has  
6 less to do with my concerns than duration. Let's  
7 give Mr. Van Nostrand a bit more of an opportunity  
8 here.

9 MR. VAN NOSTRAND: We have a question  
10 pending, don't we?

11 JUDGE MOSS: There is a question pending.

12 (Record read back.)

13 THE WITNESS: The FCC required the separate  
14 affiliate for advanced services because of the harmed  
15 competition that that merger would create and the  
16 expansion of its footprint was one manifestation of  
17 that harmed competition.

18 Q. Is it fair to say that the lack of  
19 expansion of that footprint in the case of the US  
20 West-Qwest merger was a consideration by the FCC in  
21 not imposing a similar requirement in this merger?

22 A. Yes, I think that is fair to say.

23 Q. In looking at the portion of your testimony  
24 that discusses the possible competitive impacts of  
25 the merger --

01204

1 JUDGE MOSS: While you're pausing, Mr. Van  
2 Nostrand, I know we're all getting tired, so voices  
3 are tending to drop a little bit, and although I have  
4 pretty sharp ears, I'm beginning to have a little  
5 trouble hearing, too. So I'll ask that everybody  
6 make an effort to speak into the microphone and speak  
7 up. Thanks.

8 Q. I think -- let's turn to the part of your  
9 testimony where you're discussing the other  
10 conditions in connection with the advanced services  
11 subsidiary. On page four, lines 20 and 21, you  
12 mentioned that you would require, prior to closing,  
13 that there be a surrogate line sharing discount; is  
14 that correct?

15 A. That's correct.

16 Q. And on the next page, I guess you mentioned  
17 the words that it should be a substantial discount;  
18 is that right?

19 A. That's correct.

20 Q. What do you mean by substantial discount?

21 A. I mean the discount that was established in  
22 the SBC-Ameritech merger. It's laid out in  
23 considerable detail in the exhibit. It's a discount  
24 on the nonrecurring charges, I believe, and perhaps  
25 the recurring charges, as well.

01205

1 Q. So the circumstances in that proceeding  
2 which led them to conclude that a 50 percent discount  
3 is appropriate, the circumstances are present here,  
4 as well?

5 A. Oh, yes, definitely.

6 Q. There aren't any state-specific factors  
7 that you think are necessary to be considered in  
8 determining the proper level of discount?

9 A. None come to mind.

10 Q. And there's a sufficient record in this  
11 proceeding as it stands now to support the  
12 requirement of a discount?

13 A. I think that the reasons in favor of such a  
14 discount are laid out in the exhibit, which is the  
15 FCC order and the conditions.

16 Q. And those reasons have been shown to be  
17 applicable to US West and Qwest, as well?

18 A. I'm testifying right here, right now, that  
19 the need for some sort of remedy to address the fact  
20 that US West has given itself preferential access to  
21 the local loop as it's being used for voice grade  
22 service, that that condition exists here in this  
23 state and that it is a harmed competition and that  
24 there should be a remedy.

25 Q. And what process would you propose be put

01206

1 in place to allow the level of that discount to be  
2 determined prior to merger closing?

3 A. The level of the discount?

4 Q. Right.

5 A. I believe that's a tariff filing process.  
6 It's stated on page four, line 20.

7 Q. And the evidence to support a particular  
8 level of discount would have to be offered in support  
9 of that tariff filing?

10 A. It had been my belief that the company  
11 should file the discount equal to what's set out in  
12 the SBC-Ameritech merger. If the company wishes,  
13 with its tariff filing, to supply evidence that it  
14 believes would support some other level of discount,  
15 I don't know that it harms anything to permit it to  
16 do that.

17 Q. But there would be a finding here that a  
18 discount must be substantial, based on the record in  
19 this case?

20 A. Yes.

21 Q. Similarly, on the OSS interfaces, you're  
22 proposing a 25 percent discount; is that correct?

23 A. That's correct.

24 Q. Again, that's the same 25 percent discount  
25 that the FCC approved in SBC-Ameritech?

01207

1 A. Yes.

2 Q. And again, the circumstances there are  
3 exactly the same here, therefore justifying that  
4 level of a discount here?

5 A. I don't remember saying that they're  
6 exactly the same in the two areas, but the  
7 circumstances are similar enough that it's a good  
8 remedy here, too.

9 Q. There's sufficient record for the  
10 Commission on this record to approve a 25 percent  
11 discount for OSS interface?

12 A. Yes.

13 Q. And the fourth condition you proposed talks  
14 about the target deployment to include low income  
15 groups?

16 A. That's correct.

17 Q. So are you picking up the same condition in  
18 the SBC-Ameritech regarding low-income rural and  
19 low-income urban wire centers?

20 A. Correct.

21 Q. Based, again, on the same analysis that  
22 apparently was done in that case?

23 A. That's correct.

24 Q. Regarding the separation in the wholesale  
25 and retail, would you please identify what, in

01208

1 particular, of the CLEC-proposed conditions, you are  
2 now proposing to be adopted?

3 A. Certainly. In general, my recommendations  
4 would be based on what are called the CLEC-proposed  
5 merger conditions. I think they're in the record as  
6 Exhibit 184, Exhibit 212, and Exhibit 222. It's the  
7 same document in three times.

8 The changes that I would recommend to those  
9 are where the term "liquidated damages" is used, I  
10 would still use the word "credits."

11 On page two of this exhibit, under small  
12 Roman numeral VI, which speaks to collocation, I  
13 would add a condition there that US West be required  
14 to comply with the FCC collocation rules, as they  
15 have been adopted by the FCC, even though they've  
16 been overturned, in part, since then.

17 And then, under paragraph D, in the middle  
18 of that page, where it refers to the general fund, I  
19 would change that to the public service revolving  
20 fund.

21 In that same paragraph where it says the  
22 word "UNE," I think the word "UNE" should be removed,  
23 because some of the orders that are referred to above  
24 are not actually unbundled network elements.

25 I also would make it clear that the

01209

1 penalties referred to in D, the 250,000 amount,  
2 applies separately for each of the six items listed  
3 above in paragraph A.

4         And then, also, there's another separate  
5 amount in paragraph C, under Section Two. This  
6 appears on page three. That adds up to a total  
7 amount at risk by the company of about \$21 million,  
8 which I believe is a reasonable amount to have at  
9 risk on the wholesale or competitive side, because  
10 it's quite comparable to what's been agreed to on the  
11 retail side.

12         And then, on page four, Item Number Seven,  
13 I would recommend that the Commission not adopt that  
14 condition at this time. That's the structural  
15 separation into wholesale and retail services.

16         Then, finally, on page five, I would  
17 recommend that the Commission not adopt Condition  
18 Number Eight. I don't think it's necessary for this  
19 Commission to verify compliance with the interLATA  
20 restrictions.

21         MR. VAN NOSTRAND: Your Honor, Applicants  
22 request that the entire last answer be stricken and  
23 the changes which Dr. Blackmon is now proposing to  
24 his testimony at this late date, which basically  
25 abandons the recommendations set forth on page five

01210

1 and substitutes an entirely different set of  
2 conditions, based on circumstances of which Dr.  
3 Blackmon was aware last Friday, and that was the date  
4 of the Commission decision setting forth the revised  
5 schedule, the purported connection which requires the  
6 change in testimony was the adoption of the schedule  
7 in the 271 proceeding, which extends to September of  
8 2001.

9           And based on that, we now have a complete  
10 different set of testimony and the fact that we now  
11 are hearing about it for the first time when the  
12 witness is on the stand is substantially prejudicial  
13 to the joint applicants.

14           We request that either Dr. Blackmon stand  
15 by his original testimony or give us an ability to  
16 respond by filing rebuttal testimony.

17           JUDGE MOSS: Ms. Johnston, let's hear from  
18 you on this.

19           MS. JOHNSTON: I think it's perfectly  
20 legitimate for Dr. Blackmon to make reference to an  
21 exhibit which has been admitted into the record not  
22 once, but three times. The CLEC-proposed  
23 competition-related conditions on merger approval  
24 certainly are not or should not be new to Counsel for  
25 US West or Qwest.

01211

1           And I also might point out that the changes  
2 that Dr. Blackmon has made to this document are  
3 rather minor and insignificant. And also, at the  
4 outset of Dr. Blackmon's testimony, he explained that  
5 certain of his recommendations had to be amended  
6 because they were overtaken by events over which he  
7 had no control.

8           So I think it's perfectly legitimate, and I  
9 don't believe that the companies are prejudiced in  
10 any way by this testimony.

11           JUDGE MOSS: Let me ask you, Ms. Johnston,  
12 when the decision was made by the Staff to make this  
13 shift in proposal. Was that something that was  
14 decided in the last hour or two?

15           MS. JOHNSTON: I don't know, Your Honor.

16           JUDGE MOSS: Well, I'm just wondering at  
17 what point in time -- is this the first time that the  
18 Applicants have heard about this, when Mr. Blackmon  
19 took the stand just now?

20           MS. JOHNSTON: I'm not certain.

21           JUDGE MOSS: Then I'll ask the Applicants.  
22 Is this the first time you heard of it?

23           MR. VAN NOSTRAND: Yes, and we -- my point  
24 was that this schedule issue was a Commission agenda  
25 item on Friday, the 10th, so the recommendation which

01212

1 Staff made suggesting the September 1, 2001, approval  
2 date presumably was well in advance of March 10th.  
3 There was sufficient time to advise us if Dr.  
4 Blackmon is going to be proposing substantial  
5 revisions of his position.

6 JUDGE MOSS: I think this is a matter of  
7 sufficient significance that I'm going to call us  
8 into recess so that the Bench can discuss this matter  
9 privately and have some opportunity to deliberate  
10 about the question that has been raised.

11 I think it's a rather serious point when we  
12 have a witness appear on the stand and essentially  
13 change the recommendation that has been prefiled in  
14 what I consider to be a rather fundamental way, and I  
15 wish to have an opportunity to confer with the Bench.  
16 So we're in recess approximately 10 minutes.

17 (Recess taken.)

18 JUDGE MOSS: Let's come back to order.  
19 We're on the record. While we were off the record,  
20 the Bench has had an opportunity to consider the  
21 motion to strike portions of Dr. Blackmon's  
22 testimony, particularly in reference to the adoption  
23 of a new recommendation relative to what was in the  
24 prefiled material that is, while not something that  
25 is entirely new in the record, in that it is

01213

1 predicated upon the CLECs -- or I should say the  
2 intervenors' proposal, and that exhibit, of course,  
3 has been in the record for some time, it nevertheless  
4 represents a rather fundamental change with respect  
5 to the prefiled testimony as to which the applicant's  
6 counsel, of course, has prepared cross-examination  
7 for today.

8           And in light of that, the circumstances,  
9 and noting also that during the course of  
10 administrative proceedings, things do change, in  
11 terms of recommendations from the Staff or from other  
12 parties, the decision is to deny the motion to  
13 strike, but to recess our proceedings at this point  
14 in time to give the applicants a reasonable  
15 opportunity, until next Tuesday morning, to prepare  
16 adequately to cross-examine the witness with respect  
17 to the full body of testimony that is now being  
18 sponsored, including this revised proposal.

19           Are there any questions on our process from  
20 this point forward, since we will be recessing for  
21 the weekend?

22           MR. WILTSIE: Your Honor, I do have one  
23 point of clarification. I'm not sure we know what  
24 all the changes are.

25           JUDGE MOSS: Well, I'll just ask the

01214

1 witness. Dr. Blackmon, you've had an opportunity, in  
2 response to a question from Mr. Van Nostrand, to  
3 explain the dimensions of what you are now proposing  
4 in lieu of the prior recommendation for separation,  
5 the separation plan that was in your earlier  
6 testimony. Have you fully elucidated the dimensions  
7 of your alternative proposal?

8 THE WITNESS: Yes, I have.

9 JUDGE MOSS: Okay. So I think we have our  
10 clarification on that.

11 CHAIRWOMAN SHOWALTER: Judge Moss, I'm  
12 wondering if it would be helpful to have Dr. Blackmon  
13 mark up an exhibit in the way that he testified, just  
14 so that we all aren't relying on our own notes. Is  
15 that possible? Just to take the document in the way  
16 that he just testified and mark it in such a way that  
17 it's -- that we're all working off the same page  
18 instead of our own separate notes?

19 JUDGE MOSS: Is that something you could  
20 accomplish conveniently in a few minutes or would it  
21 require more time?

22 THE WITNESS: I could provide at this  
23 moment the marked-up copy by hand or we could produce  
24 it, you know, in a word processed version, if you'd  
25 prefer that.

01215

1 JUDGE MOSS: The mark-up by hand would be  
2 adequate. And if it's available, then maybe we can  
3 have copies made. Counsel, you have somebody  
4 available who could get us some copies?

5 MS. JOHNSTON: Certainly.

6 JUDGE MOSS: I was thinking now, while we  
7 finish up.

8 MS. JOHNSTON: I'll do it.

9 MR. TRINCHERO: Your Honor.

10 JUDGE MOSS: Mr. Trincherro.

11 MR. TRINCHERO: Thank you, Your Honor.

12 Perhaps while we're waiting for these copies to be  
13 made, I know you wanted to take up at the end of the  
14 proceeding the admission of stipulated documents.  
15 However, I will be in another proceeding next  
16 Tuesday, so if I could just move the admission of  
17 Exhibits 210-T, 211 and 212, which is the prefiled  
18 direct testimony of Dr. Goodfriend and the two  
19 exhibits attached to that testimony, I believe that  
20 there would be no objection to that motion.

21 JUDGE MOSS: Yeah, I understand that  
22 cross-examination was waived as to Witness  
23 Goodfriend, and so I assume there is no objection.  
24 And hearing none, they will be admitted as marked.

25 MR. TRINCHERO: Thank you, Your Honor.

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1 JUDGE MOSS: Okay. So the copies are being  
2 made. Are there any other points anyone wishes to  
3 make with respect to this particular matter?

4 MR. FFITCH: Your Honor, just an inquiry  
5 about the timing. I'm assuming at this point you're  
6 talking about starting on Tuesday morning?

7 JUDGE MOSS: At 9:30.

8 COMMISSIONER HEMSTAD: How about 9:00?

9 JUDGE MOSS: I thought we had a conflict.

10 MR. FFITCH: Well, the reason I'm bringing  
11 this up, Your Honor, is that my office had scheduled  
12 an important meeting with -- in fact, with US West  
13 for 10:00 on Tuesday morning, so I was going to  
14 inquire whether we might begin this in the afternoon.  
15 I don't know how much time the company needs to  
16 conduct their examination of Dr. Blackmon, but in  
17 other words, we have a possible conflict in the  
18 morning. We could reschedule that if we have to, but  
19 --

20 COMMISSIONER HEMSTAD: I have problems in  
21 the afternoon. I have to catch a plane.

22 COMMISSIONER GILLIS: Me, too.

23 MR. FFITCH: Sounds like we'll need to try  
24 to reschedule our other matter.

25 JUDGE MOSS: I'm happy to start at the

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1 earliest possible hour, but --

2 CHAIRWOMAN SHOWALTER: Perhaps we could say  
3 9:00, and if we haven't quite finished up on  
4 something, it might run a little over, but if we're  
5 all waiting, we could come on at 9:00.

6 JUDGE MOSS: We'll schedule, then, our  
7 recess this afternoon, when we take it, it will be  
8 until 9:00 on Tuesday.

9 COMMISSIONER HEMSTAD: There may be some  
10 preliminaries, too, at 9:00. I don't know if there  
11 are any left at this point.

12 JUDGE MOSS: There's always something to  
13 fill the time, I'm sure. So yes, okay, we'll do  
14 that. And I have a few housekeeping matters that I  
15 want to take up with the parties before we recess  
16 today, but I don't see any reason for the  
17 Commissioners to remain on the bench for that if they  
18 do not wish to do so.

19 MR. BUTLER: Your Honor, may I ask if we'll  
20 be generating a final revised exhibit list showing  
21 which ones were admitted into evidence?

22 JUDGE MOSS: Yes. And I'm going to touch  
23 on that in more detail. I'm going to raise a number  
24 of housekeeping points now and we'll, of course,  
25 revisit these at a later point. These are the sorts

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1 of things we take up at the end, but given the hiatus  
2 that we're going to experience here, I just want to  
3 mention these now.

4 MS. JOHNSTON: Excuse me. May Dr. Blackmon  
5 leave?

6 JUDGE MOSS: Oh, yeah, I'm sorry, Dr.  
7 Blackmon. You're certainly released from the stand.  
8 I apologize to you.

9 THE WITNESS: That's all right.

10 JUDGE MOSS: The Commission, early on, of  
11 course, elected to carry the motion to continue that  
12 was put forth by some of the intervenor parties, and  
13 to the extent anyone wishes to reurge that motion,  
14 we'll have that argument on Tuesday, when the  
15 Commissioners are available to hear it.

16 I will be -- I suppose, under the  
17 circumstances, I can wait to do it until Monday, so  
18 what I will do on Monday is I will update the exhibit  
19 list and make that available to the parties -- let's  
20 come back to that subject off the record in a moment.  
21 I did a little, very cursory read --

22 MR. HARLOW: We're off the record.

23 JUDGE MOSS: No, we're still on the record.

24 MR. HARLOW: I'm sorry. I thought you said  
25 you were.

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1 JUDGE MOSS: No, I'll be off the record  
2 momentarily. For now, I'm still remaining on it. I  
3 did some review -- and I can't find my notebook right  
4 now, but in any event, the Commission's rules  
5 respecting the treatment of its own files and  
6 documents, and I wish I had my notebook here, because  
7 I didn't write the rule cites down. I think it's  
8 750. Do you have a set of the WACs here?

9 MS. ANDERL: I do.

10 JUDGE MOSS: Thanks. Is it 745, 750, rules  
11 on evidence?

12 MS. JOHNSTON: Yes, exhibits and  
13 documentary evidence, 480-09-745. Rules of evidence,  
14 750.

15 JUDGE MOSS: Yeah, I want to commend those  
16 rules to the parties' attention. And of course,  
17 there's some reference in these rules also to the  
18 rules of civil evidence in Washington State, and you  
19 may want to look at the relevant portions of those,  
20 but the significant point is that while these rules,  
21 in particular, 745 and 750, provide some convenient  
22 means by which we can have in our records transcripts  
23 from other proceedings, official documents and what  
24 have you, none of those rules speaks to the question  
25 of objections, other than to preserve the parties'

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1 rights to make them.

2           And so to the extent some of my earlier  
3 comments that I made off the top of my head  
4 respecting the Commission's treatment of official  
5 documents are concerned, I think the parties will  
6 want to review that material, as I will do in more  
7 detail, but I don't think -- they did not allow any  
8 sort of, if you will, automatic ability to refer to  
9 such documents, and so we're going to want to take  
10 that up with respect to anything that you all had  
11 mentioned. I think interconnection agreements came  
12 up and there were a couple of other things, and so  
13 we'll need to take that up and discuss that, so you  
14 all be prepared to do that and I will, also.

15           We're going to have as a Bench exhibit, and  
16 my copy has disappeared, though I'm sure someone will  
17 be able to furnish me a clean one, but the FCC order  
18 of March 10 with respect to the US West-Qwest merger  
19 has been mentioned so frequently that we feel it  
20 should be an exhibit. Even though, of course, an  
21 order need not be made an exhibit, we're going to do  
22 that for convenience of the record. I'll do that on  
23 Tuesday, as well.

24           As far as briefs are concerned, I have  
25 conferred with the Commissioners on this subject, and

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1 we are in accord that this proceeding is one that  
2 should include simultaneous initial and simultaneous  
3 reply briefs. So as you're thinking about a briefing  
4 schedule, which we have not set in this case, be  
5 thinking of that process.

6 I had in mind earlier that we would have  
7 simultaneous initial briefs on or about April 21st,  
8 which would be about a 30-day period, but I'll remain  
9 open to your ideas on that, so be thinking about  
10 that. And then probably about two weeks for the  
11 replies, something in that range.

12 Might also consider a page limitation,  
13 particularly on the replies. I think our Commission  
14 rules provide for 60-page briefs, which I would  
15 regard as excessive in all but the most extraordinary  
16 of cases. And while this is a very significant case,  
17 it might warrant some allowance on initial briefs, I  
18 certainly don't want to get 60-page reply briefs,  
19 too.

20 And just a word on that subject. This came  
21 up in another case recently, but the principle that I  
22 follow and have always followed throughout my career  
23 and have seen followed throughout my career is that  
24 reply briefs are limited to the subject matter of the  
25 initial. So there was at least one recent case

01222

1 where some parties took liberties with that  
2 principle, and to be blunt about it, we just won't  
3 allow it.

4 So that's about all I had to cover. Was  
5 there anything anybody else wanted to have on the  
6 record? There's just a couple of comments I have  
7 that I want to make off the record. Mr. Harlow.

8 MR. HARLOW: I suppose we ought to set some  
9 dates for filing of the Metronet memorandum regarding  
10 admission of certain exhibits and the US West  
11 response.

12 JUDGE MOSS: And how many exhibits are  
13 implicated there?

14 MR. HARLOW: One moment, and I'll give you  
15 their numbers. It's a total of seven. Would you  
16 like the exhibit numbers?

17 JUDGE MOSS: No, that's all right. I  
18 wanted to have some sense of the magnitude of what  
19 we're dealing with here.

20 MR. HARLOW: I believe US West has agreed  
21 to the admission of Number 45, so there would be six  
22 in dispute.

23 JUDGE MOSS: Six in dispute. Okay. And  
24 how do we want to work this? Let's deal with this  
25 off the record. Let's go off the record.

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1 (Discussion off the record.)

2 JUDGE MOSS: We've had some off-the-record  
3 discussion regarding the process and procedures that  
4 we'll follow from here and talked about various  
5 matters of business and what I would call  
6 housekeeping matters that will be taken up on  
7 Tuesday, along with some substantive matters that we  
8 would take up, as well.

9 I'm going to stay on the Bench here for a  
10 few minutes to chat with the parties on any informal  
11 matters they may wish to discuss about our  
12 proceeding, but for today, I'm going to put us into  
13 recess until 9:00 on Tuesday morning, and we are off  
14 the record.

15 (Proceedings adjourned at 5:27 p.m.)

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