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BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

In re Application of US WEST,) Docket No. UT-991358
INC., and QWEST COMMUNICATIONS) Volume XI
INTERNATIONAL, INC. for an) Pages 1224-1356
Order Disclaiming Jurisdiction,)
or in the Alternative,)
Approving the US WEST, INC. -)
QWEST COMMUNICATIONS)
INTERNATIONAL, INC. Merger.)

9

10 A hearing in the above matter was
11 held on March 21, 2000, at 9:35 a.m., at 1300
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge DENNIS MOSS and
14 CHAIRWOMAN MARILYN SHOWALTER, COMMISSIONER RICHARD
15 HEMSTAD and COMMISSIONER WILLIAM R. GILLIS.

16

17 The parties were present as
18 follows:

19

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

22

US WEST COMMUNICATIONS, INC., by
Lisa A. Anderl, Attorney at Law, 1600 Seventh Avenue,
23 Room 3206, Seattle, Washington 98191, and James M.
Van Nostrand, Attorney at Law, Stoel Rives, 600
24 University Street, Suite 3600, Seattle, Washington
98101.

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

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

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

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

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

Barbara L. Spurbeck, CSR
Court Reporter

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1 JUDGE MOSS: We're on the record in Docket
2 Number UT-991358, and Mr. Van Nostrand has something
3 he would like to bring to the Bench's attention.

4 MR. VAN NOSTRAND: Do you want to do the
5 drill and enter our appearances first?

6 JUDGE MOSS: Well, I think we only have one
7 new face at Counsel table today, and that would be
8 Ms. Spade, who's representing Qwest, and she's
9 previously entered her appearance.

10 MR. VAN NOSTRAND: Your Honor, the joint
11 applicants would like to renew their request to be
12 allowed to put on a limited amount of rebuttal
13 testimony, if necessary, depending upon the responses
14 of Dr. Blackmon to cross-examination this morning.

15 As we indicated on Friday, when we first
16 made this motion, there's been a fundamental shift in
17 the position taken by Dr. Blackmon's testimony. The
18 joint applicants have the burden of proof in this
19 case to demonstrate that the transaction's in the
20 public interest, and along with that burden, it gives
21 joint applicants the right to have the final say.

22 And we prepared our rebuttal testimony
23 based on the prefiled testimony of Dr. Blackmon, and
24 in fact, the strategy of the case was geared towards
25 prefiled testimony as submitted by Dr. Blackmon, and

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1 there's now been a substantial departure from that
2 prefiled testimony.

3 And while we appreciate the opportunity to
4 do additional cross-examination, which was what the
5 Commission allowed in response to our motion on
6 Friday, it does not really provide the full
7 opportunity to give the company the last say,
8 consistent with the burden that it has in this case.

9 So we'd ask at the end that -- we reserve
10 the right at the end of Dr. Blackmon's
11 cross-examination to request that we be allowed to
12 put on a limited amount of live rebuttal to address
13 any points that we feel need to be addressed that Dr.
14 Blackmon is making that was not in his prefiled
15 testimony and could not be anticipated to have been
16 included in his prefiled testimony.

17 JUDGE MOSS: Do you have a witness
18 available today whom you propose to put on the stand?

19 MR. VAN NOSTRAND: Yes, we would call
20 Theresa Jensen.

21 JUDGE MOSS: Why don't we take that up in
22 conjunction with some of our other motions practice
23 after we have the cross-examination, and we can
24 consider that at the same time we consider the other
25 matters.

01230

1 MR. VAN NOSTRAND: Fine.

2 JUDGE MOSS: All right. With that, then, I
3 believe we are ready to resume the cross-examination.
4 And of course, Dr. Blackmon remains under oath. Go
5 ahead, Mr. Van Nostrand.

6 MR. VAN NOSTRAND: Thank you.

7 Whereupon,

8 DR. GLENN BLACKMON,
9 having been previously duly sworn, was recalled as a
10 witness herein and was examined and testified as
11 follows:

12 C R O S S - E X A M I N A T I O N (CONTINUING)

13 BY MR. VAN NOSTRAND:

14 Q. Good morning, Dr. Blackmon.

15 A. Good morning.

16 Q. I hope you've had as restful and relaxing a
17 weekend as I have.

18 A. I played volleyball on Saturday, and it
19 took a little out of me.

20 Q. Thank you for sharing that. If we could
21 turn to this document that was distributed on Friday,
22 which is the CLEC-proposed competition-related
23 conditions on merger approval. Do you have that
24 before you?

25 A. I do.

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1 JUDGE MOSS: Would this be the marked-up
2 copy?

3 MR. VAN NOSTRAND: Yes.

4 JUDGE MOSS: I have that as Exhibit 453.

5 Q. The first item, Improve service quality and
6 reporting, subpart A indicates that the proposal is
7 that US West will adopt the following standards
8 pending completion of the Commission's
9 carrier-to-carrier service quality rule-making. Do
10 you see that?

11 A. I do.

12 Q. And you therefore understand that these
13 standards that are included in this proposal would
14 only apply until the completion of that rule-making?

15 A. Yes, I do.

16 Q. And I guess the question is why aren't
17 these proposals more appropriate for consideration as
18 part of that carrier-to-carrier service quality
19 rule-making?

20 A. The Commission has not determined yet
21 whether carrier-to-carrier rules on an industry-wide
22 basis are appropriate. Depending on what decision it
23 reaches in that rule-making, it may well take a lot
24 more work before there are any industry-wide carrier
25 rules. And in the meantime, it's very important that

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1 customers have access to the services being provided
2 by US West competitors, so we need something during
3 that interim period.

4 Q. Aren't there a number of participants in
5 the rule-making proceeding who are not parties to
6 this merger docket?

7 A. A rule-making doesn't have formal parties.
8 So I think at any point you could have people who are
9 not parties to this case come in and add some
10 comments in the rule-making. I haven't
11 cross-referenced the two -- you know, who's commented
12 so far to see whether there's anyone who's not a
13 party, though, actually, I know GTE's not a party
14 here, so I guess the answer is yes.

15 Q. And MCI WorldCom?

16 A. If they filed comments, I don't recall
17 their comments.

18 Q. How about Sprint?

19 A. Are you asking me if they filed comments?

20 Q. Yes.

21 A. I don't recall.

22 Q. Isn't it preferable to have all of the
23 participants in the industry be present in the
24 investigation of a generic issue such as
25 carrier-to-carrier service quality?

01233

1 A. It is preferable when the question is
2 adoption of permanent industry-wide carrier service
3 quality standards, but that's not the question here
4 today.

5 Q. But the standards which are proposed here
6 would cease upon completion of that rule-making,
7 wouldn't they?

8 A. Yes.

9 Q. And is there anything that would prevent
10 the timeline for that rule-making to be such that
11 that rule-making would be completed before merger
12 closing in this case?

13 A. Yes.

14 Q. What's that?

15 A. The same factors that have led us to be
16 working off-and-on on carrier-to-carrier service
17 quality standards since our first arbitrations in
18 1996 and 1997. It's a very complex area. It's a
19 level of regulation that we have never gone to before
20 in the history of this Commission, that operating
21 systems of the incumbents differ from each other and
22 coming up with a single set of standards that will
23 apply to each incumbent, all incumbents, is a
24 complicated, complex task. It's taken us a long time
25 so far, and we are not on the verge of adopting a

01234

1 rule.

2 And I might add that we, also, even if we
3 did adopt a rule, the industry, particularly the
4 incumbent companies, such as US West, have already
5 challenged our legal authority to adopt -- to use
6 rules to govern the behavior of companies. I'm
7 thinking in particular the access charge reform case.
8 So that even if we did adopt a rule before the merger
9 closed, we have absolutely no assurance that the
10 company, US West, will not sue us once again over our
11 use of rule-making as a procedural mechanism.

12 Q. But there's nothing about the opposition of
13 one party which would prevent the Commission from
14 going ahead and adopting rules, is there?

15 A. Yes, there's something about the opposition
16 of one party that would stop the Commission from
17 going about the adopting of rules.

18 Q. So if there's one party in a proceeding
19 that opposes it, the Commission would not proceed
20 with the rule-making?

21 A. No, that's not what I said. I said the
22 Commission does and should consider the views of each
23 party who files comments in a rule-making. The range
24 of positions is extremely broad within a rule-making,
25 as is the case with the carrier-to-carrier area,

01235

1 where US West is saying that there should be no rules
2 at all and other parties are saying that there should
3 be particular rules. In a circumstance like that,
4 the Commission tends to move cautiously, carefully,
5 and deliberately, which means that I don't think
6 they're about to propose a rule that could take
7 effect before this merger closes.

8 Q. On the other side of the coin, is it being
9 proposed that the requirements that are imposed on US
10 West that are being offered here, would they apply to
11 all other incumbent local exchange carriers?

12 A. These particular requirements would not,
13 no.

14 Q. Why not?

15 A. They're not merging with Qwest.

16 Q. Have you looked at the comments that have
17 been submitted by the CLECs in that rule-making
18 docket?

19 A. Yes, I have.

20 Q. And are they -- how are the proposals
21 different in that docket than what they're offering
22 in this proceeding?

23 A. This is a more modest set of proposals. It
24 really is an interim set of measures. It doesn't
25 have the scope or detail that is being proposed in

01236

1 the rule-making.

2 Q. Were there carrier-to-carrier service
3 quality requirements imposed in connection with the
4 GTE-Bell Atlantic merger?

5 A. Not by this Commission.

6 Q. Was that an issue that was not raised by
7 Staff in that case?

8 A. We did raise that as an issue in that case.

9 Q. There was no need to impose
10 carrier-to-carrier service quality requirements?

11 A. The Commission decided not to impose
12 requirements other than -- I think there's a
13 requirement in the order that the company, you know,
14 provide carrier-to-carrier service in compliance with
15 the law, or something like that.

16 Q. That was sufficient?

17 A. Apparently so. That's what the Commission
18 approved.

19 Q. If we look at the changes which you've
20 written in here on Exhibit 453, one of the things
21 you've done on item one was to take out liquidated
22 damages and substitute credits; is that right?

23 A. That's correct.

24 Q. Is that a material difference, that you
25 changed that to credit?

01237

1 A. It's -- I don't have a clear understanding
2 of what liquidated damages are. I know what credits
3 are. And my understanding of what's being proposed
4 by the CLECs is that the customer, the CLEC, get a
5 credit where it doesn't receive the timely provision
6 of service. I think it's more appropriate to call it
7 a credit, because that's what it is.

8 Q. And if the amount of the credit exceeds the
9 amount that would have been billed to the customer,
10 does it -- is it still called a credit?

11 A. I think so, yes. In the same way that on
12 the retail side, there's a \$50 credit for a missed
13 appointment or a missed commitment. There's no --
14 it's not like that's a -- that there had been \$50
15 appointment charge that was being credited. It's a
16 credit for which there is no corresponding charge to
17 begin with.

18 Q. So you would agree that the credit amounts
19 which are contemplated in (D) may exceed the level of
20 recurring charges?

21 A. Yes, I would.

22 Q. Okay. On Friday, you testified that the
23 total exposure which --

24 A. Excuse me. Just to correct my last answer,
25 I think the credits are in (C), rather than (D).

01238

1 Q. But then the amount of the competitive
2 incentive penalties to be paid to the revolving fund
3 is \$250,000; is that right?

4 A. Yes.

5 Q. And that's not a credit?

6 A. No, that's not. That money would not go
7 back to the individual carrier.

8 Q. That is a penalty?

9 A. Yes.

10 Q. Now, on Friday you testified that the
11 exposure the company would face under this scheme is
12 about \$21 million. Do you recall that testimony?

13 A. I do.

14 Q. And you said this amount was comparable to
15 the \$20 million in annual exposure that the company
16 faced under the settlement agreement. Do you recall
17 that?

18 A. I do.

19 Q. And I believe you said it's a reasonable
20 amount to have at risk on wholesale or competitive
21 side because it's quite comparable to what's been
22 agreed to on the retail side. Do you recall that?

23 A. I do.

24 Q. Do you know how many access lines US West
25 has in place in Washington that serves retail

01239

1 customers?

2 A. Not exactly. It's in the two and a half
3 million range.

4 Q. And approximately how many unbundled loops
5 does US West provide to serve wholesale customers?

6 A. I don't know.

7 Q. Is it fair to say it's substantially less
8 than two and a half million?

9 A. Yes, it is.

10 Q. Something less than 100,000, perhaps?

11 A. I don't know.

12 Q. So when you say the amounts are comparable,
13 it really isn't comparable exposure given the
14 difference in the numbers of customers affected, is
15 it?

16 A. Well, I think every -- yes, it is
17 comparable, because I think that every retail
18 customer of US West is affected by any inability of
19 that customer to choose service from some other
20 provider, local service. It just -- it would be
21 incorrect to look at the number of access lines that
22 the CLECs are serving today and consider that to be
23 the scope of their presence in the market. In fact,
24 my sense is that there is demand for their service
25 that is not being met today and if we had a better

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1 functioning carrier-to-carrier operating system, in
2 fact, there would be more lines being provisioned by
3 the CLECs.

4 Q. And when you say a better
5 carrier-to-carrier system, you're just referring to
6 US West; is that correct?

7 A. Well, I'm referring to the system that US
8 West and the CLECs use to handle customer orders that
9 involve facilities above companies.

10 Q. But you're not referring to a system
11 generally that would apply to all ILECs, which would
12 be done through a rule-making?

13 A. As I said a few minutes ago, there is no
14 single system that applies to all ILECs. I'm aware
15 of no proposal made by anybody that we should have a
16 single operating system that US West, GTE, and the
17 other incumbents would be required to use. So I
18 mean, there are comparable difficulties in getting
19 access to GTE customers, as well, but they operate
20 using different systems than does US West.

21 Q. If we look at how you calculated the \$21
22 million, it would appear from the calculations done
23 in the margin on page two that you calculated there
24 could be \$18 million collected under 1(D), or
25 \$250,000 per month times 12 months for each of the

01241

1 six standards; is that correct?

2 A. That's correct.

3 Q. And it appears as though you calculated
4 that for -- under 2(C), there could be another \$3
5 million, based on the \$250,000 per month times 12
6 months; is that right?

7 A. That's correct.

8 Q. And that total reaches \$21 million?

9 A. That's the way I did the math, yeah.

10 Q. Now, when you calculated \$21 million, where
11 did you take 2(B) into account, which requires a
12 \$250,000 penalty every six months for each
13 noncompliant cable?

14 A. I think I missed that one.

15 Q. Now, if we spend some time looking at
16 number two, doesn't that condition impose two
17 separate investment requirements, one that there must
18 be investment necessary for interconnection
19 sufficient to ensure that no CLEC is denied or
20 delayed; is that correct?

21 A. Yes, that's the first sentence.

22 Q. And then there's a second aspect that there
23 must be sufficient investment outside plant to ensure
24 that no feeder distribution interface has a greater
25 than average 85 percent fill rate?

01242

1 A. That's correct.

2 Q. And then the remedy under (B) is that for
3 each noncompliant cable, there would be a \$250,000
4 credit every six months?

5 A. Right.

6 Q. Do you have any idea how many cables this
7 provision applies to?

8 A. You mean how many are in excess of 85
9 percent already?

10 Q. How many is in the universe that the 85
11 percent standard would apply to?

12 A. No, I don't. I'm sure it would be a lot.

13 Q. Well, if there's 118 wire centers in
14 Washington, do you have any idea how many FDIs there
15 are for each individual wire center?

16 A. I do not.

17 Q. Would you accept, subject to check, that
18 there's basically one in each direction, north,
19 south, east and west?

20 A. If you'll help me know where to check that,
21 yes, I would.

22 Q. Actually, will you accept, subject to
23 check, that the figure is much higher than the
24 minimum of four? It's actually a minimum of 20
25 cables from each central office connecting to FDIs?

01243

1 A. Again, if there's a document that -- at
2 this moment, I don't know how I will check that.

3 Q. If the company can provide you with a
4 document to check that, will you accept it subject to
5 check?

6 MS. JOHNSTON: Your Honor, I'm going to
7 object here. I'm not understanding what it is Mr.
8 Van Nostrand is asking. Is he suggesting that the
9 company can provide Dr. Blackmon with something
10 representing what he wants Dr. Blackmon to agree to?
11 I just don't know that Dr. Blackmon can accept these
12 subject to check.

13 JUDGE MOSS: I think Dr. Blackmon can judge
14 whether he's willing to accept, subject to check,
15 based on whatever the company might provide him, or
16 whether the question needs to be simply stated as a
17 hypothetical?

18 MR. VAN NOSTRAND: My problem is, Your
19 Honor, there's a feeder distribution interface that
20 is relatively easy to define, as defined in the
21 proposed condition. It's a known number. It's the
22 number of feeder distribution interfaces that US West
23 has.

24 JUDGE MOSS: I would think there would be
25 some record of that in the possession of US West that

01244

1 could be provided. Is that the case?

2 MR. VAN NOSTRAND: Yes.

3 JUDGE MOSS: So Dr. Blackmon, the question
4 to you is whether you're willing to accept, subject
5 to check, the idea that there are 20-some cables or
6 feeder lines or whatever the appropriate term of art
7 is at each of these facilities, assuming that US West
8 can provide you with a record that demonstrates that,
9 as an engineering fact?

10 THE WITNESS: I don't at all contest the
11 notion that there are a lot of cables at issue here.
12 But I don't have much confidence that, even if US
13 West presents some sort of an engineering diagram to
14 me, that I have the expertise to figure out how many
15 FDI's are on that diagram or not. So I'm reluctant to
16 say that I'm going to check that and be able to say,
17 yeah, that's how many FDI's there are in the state of
18 Washington.

19 JUDGE MOSS: If I sense correctly where
20 you're going with this, Mr. Van Nostrand, I don't see
21 any reason why the figure can't simply be posed as a
22 hypothetical figure from which you can develop your
23 figures that I think you want to have the witness
24 work with.

25 Q. Dr. Blackmon, if we assume there are 20

01245

1 cables from each central office connecting to FDI's
2 and there are 118 central offices, aren't there
3 potentially 2,360 cables that would have to satisfy
4 the 85 percent fill rate standard under this
5 condition?

6 A. Let's see, we've got 20 cables. Sorry,
7 what was the next number?

8 Q. One-hundred-eleven central offices in
9 Washington. Sorry, 118 central offices.

10 A. One hundred and eighteen?

11 Q. Yes.

12 A. So it's 20 cables per central office times
13 118.

14 Q. Correct, to an FDI?

15 A. Two-thousand-three-hundred-and-sixty.

16 Q. Yes.

17 A. That's what I get.

18 Q. Do you have any idea which of those,
19 assuming there are 2,360, which currently comply with
20 the 85 percent fill rate standard being proposed by
21 the CLECs?

22 A. I don't have a specific number in mind, but
23 my belief, based on testimony in the generic cost
24 case and other cases, basically every time forward
25 looking economic costs have ever come up, is that,

01246

1 for the most part, those feeder cables are well below
2 85 percent. It's been one of the touchstones of US
3 West's advocacy over the last few years that the
4 Commission would be wrong to assume some high fill
5 rate in calculating forward-looking costs, because in
6 fact, its actual use of its existing cable plant is
7 more in the 50 to 60 percent range.

8 Q. When you considered whether or not to
9 support this proposed condition, did you evaluate the
10 company's ability to -- exposure the company might
11 face under this particular condition?

12 A. No, I didn't. I mean, I was looking for a
13 number that was approximately equal to the \$20
14 million that had been agreed to on the retail side.
15 And I agree that with this (B) provision, we're above
16 that, and I would be -- I think it would be
17 reasonable to scale this back in some way so that we
18 do end up with an overall amount on the competitive
19 side that's in that \$20 million range.

20 Q. If you look at the exposure that's possible
21 just under this 2(B), wouldn't the math be that we
22 would take \$500,000, which is 250,000 per month or
23 per six months times each of the 2,360 cables
24 connecting to FDI's?

25 A. That's just the pure math, yeah, at a very

01247

1 hypothetical level. I don't think it's at all
2 realistic to expect that the company would have every
3 feeder cable in the state above 85 percent capacity.

4 Q. But the maximum exposure is something on
5 the order of 1.6 billion dollars, isn't it?

6 A. I came up with 1.18 billion.

7 Q. 1.18 billion. Anyway, it's in excess of a
8 billion dollars?

9 A. Yes.

10 Q. And you have no idea, I believe you
11 testified, as to what number actually -- what number
12 of cables actually fails to satisfy the 85 percent
13 standard?

14 A. I think I'll rest on what I said before,
15 and not agree with that statement.

16 Q. If we go back to the specific six standards
17 which are being proposed in item A, the first item is
18 the firm order confirmation; is that correct?

19 A. That's correct.

20 Q. Do you know whether or not this is an item
21 which was addressed in interconnection agreements
22 that the company may have with competitive local
23 exchange carriers?

24 A. It typically is, yes.

25 Q. Are you aware that Covad or Rhythms, for

01248

1 example, have a 48-hour standard for firm order
2 confirmations?

3 A. I've heard that said many times by US West.
4 I've never independently checked it myself.

5 Q. And to the extent that statement is true,
6 is it not correct that this provision would
7 unilaterally shorten that period to 24 hours?

8 A. It would -- I don't know that it would
9 change the interconnection agreement. US West would
10 -- this an incentive mechanism. I think it would be
11 in US West's best interest to provide those FOCs to
12 Covad and Rhythms within 24 hours, because they would
13 count against the company in the calculation of the
14 amounts in paragraph C and D. I don't know that it
15 changes the interconnection agreement itself one way
16 or the other.

17 Q. But the essence is it doesn't matter what
18 was negotiated in the interconnection agreement, this
19 proposal would impose a different standard?

20 A. That is definitely the essence of it,
21 right, because what we're trying to do here, this
22 Commission has thus far shied away from trying to do
23 carrier service standards sort of within the context
24 of interconnection agreements, and this would be the
25 Commission's first effort to come up with a

01249

1 consistent set of performance measures that would be
2 applied to all of US West's relationships with the
3 CLECs.

4 Q. And if an interconnection agreement
5 resulted from an arbitration, it's acceptable for the
6 Commission to impose a requirement now that it did
7 not impose when it decided the arbitration?

8 A. Seems okay to me, yes.

9 Q. Do you know what the various
10 interconnection agreements provide on these issues
11 that are -- on these standards that are set forth in
12 one through six?

13 A. No, I don't.

14 Q. Is that completely irrelevant, in your
15 analysis, as to whether these standards are
16 appropriate for consideration here?

17 A. No, it's not irrelevant. I think it's, you
18 know, what we're trying to do here is come up with a
19 set of standards that are reasonable. And looking at
20 what the company's already doing for various CLECs is
21 a reasonable approach to look at -- to try to answer
22 that question.

23 Q. Is it fair to say there may be particular
24 circumstances in the arrangements between US West and
25 a CLEC that has caused a different term to appear in

01250

1 that document than what is being proposed here?

2 A. I'm not aware of any examples like that,
3 but my sense is that they vary because different
4 CLECs were more willing to take the quick road, do
5 the negotiations the way US West wanted it, so that
6 they didn't get as much as other CLECs that bargained
7 harder and took longer to get to a final outcome.

8 Q. But to the extent there are different terms
9 and conditions due to specific circumstances, those
10 differences would be swept aside under this proposal,
11 wouldn't they?

12 A. To the extent there are, which I just said
13 I'm not aware of any such circumstances, they would
14 be swept aside, yes.

15 Q. And you also indicated you didn't really do
16 any thorough review of interconnection agreements on
17 file with the Commission; isn't that correct?

18 A. I don't remember you asking me whether I
19 did a thorough review of the interconnection
20 agreements.

21 Q. Did you indicate whether or not you had
22 taken into account what the interconnection
23 agreements provide when you adopted this condition?

24 A. I don't -- I don't believe you've asked me
25 that yet. You asked me whether I knew what the terms

01251

1 are of each of the interconnection agreements, and I
2 answered no to that.

3 Q. If we look at the second standard regarding
4 subloops within three business days, do you see that?

5 A. Yes.

6 Q. Are you aware that three days is a much
7 shorter period than what's required under the current
8 interconnection agreements?

9 A. I believe it's shorter, yes.

10 Q. Do you know if the company is capable of
11 complying with this requirement?

12 A. I don't know if they're capable of
13 complying with it today or not. I know that if we're
14 going to provide service to retail customers within
15 five business days, that the CLECs need to have
16 access to loops on shorter than five days so that
17 they can meet that retail five-day standard.

18 Q. Did you consider at all what steps the
19 company may have to take in order to modify its
20 procedures to meet this requirement?

21 A. I didn't consider anything specific. I
22 mean, I've generally tried to rely on my experience
23 over the last few years in terms of the efforts that
24 the company is undertaking to bring its systems up to
25 a level where it can comply with Section 271 and

01252

1 otherwise open up its network to local competition.

2 Q. Do you think it's likely that changing
3 these provisions by shortening the timelines will
4 result in the company incurring additional cost to
5 meet these requirements?

6 A. I think it's likely that the company will
7 incur additional cost to bring its systems up to
8 whatever standards in whatever setting the Commission
9 comes up with standards, whether that's done in this
10 agreement -- this merger case, I should say, in a 271
11 case or in a generic rule-making.

12 Q. Consideration of those costs, I take it,
13 was not part of your analysis in deciding whether to
14 recommend adoption of this condition?

15 A. Not to recommend this condition
16 specifically, because I believe that those costs will
17 be incurred by US West eventually, whether they are
18 imposed as a condition here or not. It's a question
19 of timing, and that the opportunity for US West to
20 delay this cost for a year or two and wait for a 271
21 case or rule-making is -- that opportunity to delay
22 expenditure is certainly more than offset by the fact
23 that we would be keeping retail customers waiting for
24 competition.

25 Q. You mentioned the 271 process. Is that the

01253

1 same process where Staff is recommending an
2 18-month-long timeline for approval?

3 A. That's the same process where the
4 Commission has adopted a schedule that will take up
5 to 18 months.

6 Q. Still staying in subpart two, UNE loops --
7 actually, let's move on to number three, DS1, DS3.
8 Doesn't the company's existing tariff already provide
9 for service credits for missed commitments for
10 nonrecurring service charges?

11 A. Are we talking about a specific provision
12 in the exhibit or --

13 Q. Yeah, number three for DS1 and DS3
14 circuits.

15 JUDGE MOSS: To be more specific, we're in
16 1(A)(3).

17 THE WITNESS: There is a \$50 credit for
18 missed appointments and commitments. I don't know
19 that it applies to orders by CLECs for DS1 and DS3
20 circuits.

21 Q. Do you know how this proposal compares to
22 the retail tariff for DS1 and DS3 circuits?

23 A. No, I don't.

24 Q. Did you take the tariff provisions into
25 account when you adopted this as your proposal?

01254

1 A. No, I don't. I did not. The retail
2 provision of DS1 and DS3 circuits to end-use
3 customers is really quite a different part of US
4 West's business and its obligations than is the
5 provision of DS1s and DS3s to CLECs.

6 Q. That's through the private line tariff?

7 A. Yes.

8 Q. Well, doesn't the private line tariff for
9 retail customers provide that the timeline for
10 installation of facilities only apply where
11 facilities are available?

12 A. Yes, and that's exactly what I meant when I
13 said that it's a different mindset, it's a different
14 attitude, a different set of obligations.

15 Q. And the effect of this proposal is to give
16 the wholesale customers a superior standard than is
17 in effect for retail customers under the tariff,
18 isn't it?

19 A. If US West chooses not to beef up its
20 retail standard, yes, that's true. I think that's
21 the inevitable outcome of the fact that federal law
22 gave CLECs the right to obtain access to customers
23 through US West's network.

24 Q. If you look at the held order requirement
25 in the retail tariff, US West is required to clear 90

01255

1 percent in five days and 99 percent in 90 days; is
2 that right?

3 A. That's correct.

4 Q. And this provision, on the other hand, does
5 not allow for any held orders whatsoever, does it?

6 A. The company gets -- there's a 10 percent
7 allowance there in paragraph D before any sort of
8 penalties kick in. The credit to the individual
9 CLEC, I think, applies every time it misses an order
10 -- misses a due date, I should say.

11 JUDGE MOSS: Would that be subparagraph C,
12 Dr. Blackmon?

13 THE WITNESS: (C) for that second part,
14 yes, about the credits to the individual CLECs.

15 Q. You talked about the credit under (C) for
16 each additional late business day?

17 A. I was really talking about the first
18 sentence in (C), credit for each missed interval
19 would be the nonrecurring charges for that element or
20 service.

21 Q. How is that responsive to the question as
22 to whether or not there is any allowance for any held
23 order whatsoever?

24 A. Well, I agreed with you that there's no
25 allowance in terms of whether or not the company has

01256

1 to pay a credit to the CLEC that didn't get service,
2 but I also pointed out that in (D), there is an
3 allowance of 10 percent before the thousand dollars
4 or 250,000 amounts start to apply.

5 Q. So the distinction is between the credit
6 for nonrecurring charges versus the penalty that
7 would apply, the penalty of \$250,000?

8 A. That's correct.

9 Q. You would agree there is no exception as to
10 the nonrecurring charge, but there is a buffer for
11 the penalty?

12 A. I would agree with that.

13 Q. If we move on to 1(A)(4), the cutovers for
14 facilities, are you aware that in most of the
15 interconnection agreements, the requirement is 30
16 minutes, rather than 15 minutes?

17 A. I wasn't specifically aware of that, no.

18 Q. But you would accept that there are
19 different times specified in the interconnection
20 agreements for this particular service?

21 A. Yes, I would.

22 Q. You expect that it might be more costly for
23 US West to meet the 15-minute standard rather than a
24 30-minute standard in the interconnection agreement?

25 A. Well, I'm having trouble figuring out how

01257

1 the company saves money by keeping a customer with no
2 dial tone for 30 minutes, as opposed to 15. I can
3 easily see the cost to the customer of the longer
4 period, but I'm having trouble seeing a savings to
5 the company.

6 Q. So you think the company's indifferent as
7 to costs in terms of complying with a 15-minute
8 standard versus a 30-minute standard? The cost is
9 the same?

10 A. I think that it wasn't cost that prompted
11 the company to hold out for a 30-minute interval.

12 Q. Could you answer the question, please?
13 Would the costs be the same to comply with a
14 30-minute requirement versus a 15-minute requirement?

15 A. I'm not aware of any difference in cost
16 between those two requirements.

17 Q. If we could go back to 1(C) for a moment,
18 I'm trying to clarify how that credit provision
19 works. For each additional late business day,
20 there's an additional 10 percent of the nonrecurring
21 charge; is that right?

22 A. Or one month's recurring charge, whichever
23 is greater.

24 Q. So if the company is two weeks late, for
25 example, the CLEC would get a credit of over one year

01258

1 of free service?

2 A. If it's two weeks late? I think that would
3 be 10 business days, so that would be a little less
4 than one year's monthly recurring charges, or it
5 might be 100 percent, an additional 100 percent of
6 the nonrecurring charge. It would depend on how big
7 those two are.

8 Q. If you look at number five on the top of
9 page two of the interconnection trunks, this
10 installation also is much quicker than what US West's
11 interval service guide currently provides, isn't it?

12 A. I'm not sure.

13 Q. Are you aware that the US West service
14 interval guide currently provides for a
15 22-business-day installation guideline?

16 A. I'm not aware of that one way or the other.
17 I don't disagree with it.

18 Q. But a five-to-eight-business-day
19 installation for interconnection trunks would be
20 substantially quicker than that 22-day figure; is
21 that correct?

22 A. Based on what you said, yes, it would be.

23 Q. And turning to number six, the central
24 office collocation must be provided within 45 days;
25 is that right?

01259

1 A. That's correct.

2 Q. And are you aware that most, if not all of
3 the interconnection agreements, currently provide for
4 90 days, rather than 45 days?

5 A. I am aware of that, yes.

6 Q. And again, that difference is of no
7 consequence in terms of your decision to adopt this
8 condition?

9 A. No, I wouldn't say that it's of no
10 consequence. I recognize that, on several of these,
11 the intervals are tighter than what US West is
12 providing today, but for a couple of reasons, I think
13 this is a reasonable approach. One is that I think
14 customers deserve better than what they're getting
15 today from US West, and if -- you know, when a
16 company proposes a merger like this, it's right for
17 the Commission to look and see whether that company
18 should be held to a higher standard as it goes
19 forward in the merger.

20 The other factor is that I didn't write
21 this from scratch. What I really tried to do, once
22 our initial proposal no longer seemed feasible, was
23 to look at what was available to the Commission and
24 try to find the most reasonable set of competitive
25 conditions that was already being proposed. I saw

01260

1 essentially nothing coming from US West and Qwest,
2 and I did see proposals from AT&T and from the CLECs,
3 and I'm not recommending that the Commission adopt
4 the AT&T proposals. I don't think that they are as
5 reasonable as these CLEC conditions. But I'm not
6 testifying that these CLEC conditions are perfect.
7 They seem to me to be the most reasonable among those
8 proposals that have been put before the Commission.

9 Q. You've mentioned that it's an issue of
10 whether or not the company should be held to a higher
11 standard as it goes forth in the merger. What is it
12 about the merger that would cause the central office
13 collocation remote terminal access to be accelerated
14 from 90 days to 45 days?

15 A. The applicants have testified about how
16 their merger will enable them to be a bigger,
17 stronger company, able to provide more services to
18 customers. I think one of those services that they
19 will be capable of providing and ought to provide is
20 faster collocation so that competitors can -- so that
21 customers can get to competitors.

22 Q. Well, you're going beyond what they should
23 provide; you're actually requiring them to provide
24 that as part of this proposal, right?

25 A. Yes.

01261

1 Q. Is it your testimony that requiring
2 improvements in service is a necessary showing for
3 merger approval?

4 A. I think that it's not necessary as a
5 general matter. I think the Commission needs to look
6 at the circumstances in each merger as it comes up
7 and decide what's appropriate.

8 Q. And are there circumstances about the
9 merger of US West and Qwest which makes the central
10 office collocation and remote terminal access a
11 unique issue in connection with the merger?

12 A. No, it's not unique. In fact, it's number
13 six on the list. By definition, it's not unique.

14 Q. What is it about the merger which caused
15 this issue to arise?

16 A. The merger raises the possibility that US
17 West will further leverage its hold on a captive
18 customer base and it's appropriate and reasonable
19 that the Commission would require as an offset to
20 that possibility that the company take specific steps
21 to ensure that customers have access to competitive
22 services.

23 Q. If you'd go to item number three on page
24 three of the document.

25 A. Did you say page three?

01262

1 Q. Yes, item three. The 25 percent discount
2 indicated there under (D), is that the same 25
3 percent discount that was mentioned in the
4 SBC-Ameritech order?

5 A. I believe that this -- it's the same
6 percentage, but it applies more broadly.

7 Q. Are you aware that US West has already been
8 providing the CLECs with access to loop qualification
9 information?

10 A. I've heard that claim made, yes.

11 Q. Do you know what kind of access is being
12 provided?

13 A. No, I don't.

14 Q. Do you know how this requirement compares
15 with the FCC's requirements?

16 A. I'm sorry, which requirement?

17 Q. The requirements in item three, complete
18 access to databases and network information?

19 A. I don't know specifically. I think that,
20 in general, if the Commission complies with the FCC
21 requirements and if neither US West -- I'm sorry, if
22 the company does, and if the company or one of the
23 other incumbents doesn't get those FCC rules
24 overturned by a court, then complying with those will
25 probably go a very long way toward complying with the

01263

1 provisions in item number three.

2 JUDGE MOSS: Mr. Van Nostrand, let me ask
3 you to pull the mike up just a little bit. We're
4 having some hearing problems in the back of the room.

5 MR. VAN NOSTRAND: All right.

6 Q. Do you have any idea what the costs are
7 that US West would incur in implementing this item
8 number three?

9 A. No, I don't, but they wouldn't be specific
10 to this particular requirement. Again, it's a
11 question of timing. If US West and Qwest were
12 serious about 271 approval, they're going to need to
13 do these things anyway, and they'll probably have to
14 do them to comply with the FCC requirements, even if
15 they choose not to pursue 271.

16 Q. Do you have any reason to believe that US
17 West and Qwest are not serious about pursuing 271
18 approval?

19 A. Oh, I think that's a hard question to
20 answer yes or no to, because what do we mean by
21 serious about it? I know that US West and Qwest
22 would like to have it, all other things being equal,
23 but I also know that Bell Atlantic had to work pretty
24 hard, had to do some things they didn't really want
25 to do to get there, and I don't know that US West and

01264

1 Qwest have really faced that decision and figured out
2 yet which way they're going to go.

3 Q. But from all you know, they do intend to
4 proceed with the 271 application in this state, don't
5 they?

6 A. They intend to file an application, do some
7 workshops, and I really look forward to seeing
8 whether, once we go through each of those workshops
9 and identify problems in US West's systems, whether
10 the company's then going to go back to Denver and fix
11 those problems, even if it's expensive and difficult
12 to do.

13 Q. If we could go to number four, which is
14 entitled Future Network Access. Could you explain
15 your understanding of exactly what this provision
16 requires the company to do?

17 A. My understanding is that it requires that
18 US West work with the CLECs, for instance, if it's
19 deciding to construct a remote terminal, that US West
20 should check with the CLECs and see whether a larger
21 space should be constructed there in order to permit
22 collocation of the equipment by the CLECs.

23 If there's no interest by any of the CLECs
24 in collocating at a remote terminal, then US West
25 could go with the smaller size, but if there is an

01265

1 interest in collocation space, US West would
2 incorporate that in its construction decision.
3 Similarly, with the types of equipment used, that US
4 West would choose equipment that is more compatible
5 with a multi-competitor environment than it might
6 otherwise have done.

7 Q. Number six on page four is entitled UNE
8 Combinations. Is it your understanding that this
9 provision goes beyond the FCC's UNE remand order?

10 A. I'm not sure that it does. I'm not -- I
11 don't know one way or the other.

12 Q. That aspect of it was not part of your
13 consideration in deciding whether or not to recommend
14 adoption of this proposed condition?

15 A. The aspect of whether it's greater or
16 lesser or equal to what the FCC has required?

17 Q. Yes.

18 A. No, it wasn't.

19 Q. Now, do I understand your testimony on
20 number seven? Where are you today with respect to
21 the issue of structural separation of retail and
22 wholesale services?

23 A. That I don't think the Commission should
24 order that at this time.

25 Q. So you would not include number seven in

01266

1 your proposed conditions?

2 A. That's correct.

3 Q. And is the same true, then, with number
4 eight?

5 A. Yes, that's correct.

6 Q. Okay. If we could turn back to your
7 testimony, Exhibit 260, I think we established on --
8 we discussed on Friday on page four the requirement
9 to form an advanced services subsidiary; is that
10 right?

11 A. That's correct.

12 Q. And I think we already covered your
13 response to Data Request 16, which is Exhibit 262,
14 as indicating that your Exhibit 261 was a document
15 which was responsive to the request to support the
16 requirement of an advanced services subsidiary in
17 this case?

18 A. I'm sorry, was that a question?

19 Q. Yes.

20 A. I didn't get the question.

21 Q. Did we already cover that your response to
22 Data Request 16, which is included as Exhibit 262,
23 that that response shows -- answers that the FCC
24 order in SBC-Ameritech supports or relates to
25 imposing an advanced services subsidiary in this

01267

1 docket?

2 A. I guess I'm confused. I'm sorry. 261 is
3 the SBC order and the conditions.

4 Q. Right.

5 A. Okay. And 262 is Staff's response to Data
6 Request Number 16; is that correct?

7 Q. Right. Where we asked you for any
8 documents which supports or relates to imposing an
9 advanced services affiliate in this docket, and you
10 indicated that, other than the documents attached to
11 your testimony, which is the FCC decision in
12 SBC-Ameritech, there are no other documents
13 responsive to this request?

14 A. Okay. Yes.

15 Q. So to the extent there's any support for
16 imposing an advanced services subsidiary in this
17 docket, it can be found in the SBC-Ameritech order?

18 A. And in my testimony.

19 Q. And that's all?

20 A. Well, I think also the testimony of other
21 witnesses in this case.

22 Q. That's not what you said in response to
23 this data request.

24 A. I believe that this data request was asking
25 for documents that were in the possession of the

01268

1 Staff. We certainly didn't take that request to mean
2 that we should send you copies of other companies'
3 testimony being filed in this case.

4 Q. Another data request that we asked you was
5 for a timeline that would establish the procedures
6 that would be followed for creation of the separate
7 affiliate. Do you recall that?

8 A. I do.

9 Q. Data Request Number 18, which was provided
10 as Exhibit 33 to Mr. Inouye's testimony?

11 A. Yes.

12 Q. And the response was that that timeline
13 could be found in Exhibit 261, which is the FCC order
14 in SBC-Ameritech?

15 A. Yes.

16 Q. And another data request was number 22,
17 which asked for requirements that would apply for
18 transferring to the advanced services subsidiary the
19 pertinent personnel and other items necessary, and
20 your response, again, referred to the SBC-Ameritech
21 order; is that correct?

22 A. I don't have that one in front of me, I'm
23 sorry.

24 MR. VAN NOSTRAND: Again, that was Number
25 33, Exhibit 33 to Mr. Inouye's testimony. May I

01269

1 approach the witness, Your Honor?

2 JUDGE MOSS: Yes.

3 THE WITNESS: Which one should I be looking
4 at?

5 Q. Number 22.

6 A. As this response indicates, to some extent,
7 the question of approvals is addressed in the SBC
8 order and the conditions. There also would be sort
9 of state-specific issues that are not set out there,
10 nor are they set out in any other document that we
11 have.

12 Q. Okay. The second proposal you make in your
13 testimony at the bottom of page four and the top of
14 page five is the surrogate line sharing discount; is
15 that right?

16 A. Yes, that's correct.

17 Q. I think we established on Friday that this
18 requirement was also from the SBC-Ameritech order?

19 A. Yes, it's part of their advanced services
20 set of conditions.

21 Q. And you used the same 50 percent discount
22 as adopted by the FCC in SBC-Ameritech; is that
23 right?

24 A. That's correct.

25 Q. The third proposal had to do with the OSS

01270

1 interface, I think we established Friday, was also
2 from SBC-Ameritech?

3 A. That's correct.

4 Q. And the 25 percent figure is also from the
5 SBC-Ameritech order; is that correct?

6 A. Yes.

7 Q. And this is the same 25 percent that
8 appears in that line of proposed conditions proposed
9 by the CLECs, item 3(D)?

10 A. No, it's a different 25 percent.

11 Q. So we're not talking about a discount on
12 nonrecurring charges until the interfaces are
13 provided?

14 A. We're talking about a discount on the
15 nonrecurring charges in both instances, but in the
16 provision that appears on page five of my testimony,
17 we're talking about loops that are used to provide
18 advanced services. And the 25 percent that's
19 referred to on page three of Exhibit 453 would apply
20 to any loop that's used for local exchange and
21 advanced services.

22 Q. The fourth requirement that you have on
23 page five of your testimony regarding the targeted
24 deployment of advanced service offerings, do you
25 recall our discussion of that on Friday?

01271

1 A. Yes, I do.

2 Q. I believe we established that you're
3 proposing by that something along the lines of the
4 condition in the SBC-Ameritech regarding deployment
5 in low-income urban and low-income rural wire
6 centers?

7 A. I'm proposing exactly the same approach to
8 measuring that targeting effort that the SBC order
9 adopts.

10 Q. Looking at other conditions that came from
11 the SBC-Ameritech order, isn't it true that there was
12 also a region-wide MFN that was imposed as a
13 condition in SBC-Ameritech?

14 A. With respect to advanced services
15 specifically, or more generally?

16 Q. More generally.

17 A. Where?

18 Q. If we look at page 46 and 47 of Appendix C
19 to the SBC-Ameritech decision.

20 A. Right, that's a -- they are both most
21 favored nation provisions. The one that the SBC
22 order uses, SBC has to operate under is actually
23 broader than what the CLECs have proposed for US
24 West. The SBC actually has to offer CLECs within its
25 area any provision that SBC is able to negotiate as a

01272

1 CLEC in some other area. And the CLEC provision
2 that's proposed in Exhibit 453 doesn't require that
3 US West go that far, in terms of a most favored
4 nation approach.

5 Q. But it does allow the CLEC to pick and
6 choose from the terms of any interconnection
7 agreement entered into by US West within the 14-state
8 region; is that correct?

9 A. That's correct.

10 Q. So in that respect, it is similar to what's
11 in the SBC-Ameritech, in terms of the ability to pick
12 and choose from other interconnection agreements?

13 A. It's similar, but US West is getting off a
14 little easier than SBC did.

15 Q. If we look at the availability of UNE
16 combinations in item number six of Exhibit 453, is
17 that the same concept as the availability of UNE
18 combinations in the SBC-Ameritech order, taking a
19 look at page 54 of Appendix C.

20 A. I guess I wouldn't rely just on page 54,
21 but in general, it's a similar concept. The SBC
22 order, I believe, predated the FCC's UNE remand
23 order, but in general, there's a consistent
24 requirement there that, in this case, US West be
25 required to provide unbundled network elements in

01273

1 combinations that make it more feasible for CLECs to
2 actually offer service to residential and small
3 business customers.

4 MS. JOHNSTON: Excuse me, Your Honor.
5 Would this be a good time for a morning recess?

6 JUDGE MOSS: No, we're going to press ahead
7 this morning, because we have time constraints.

8 (Discussion off the record.)

9 JUDGE MOSS: All right. While we're
10 interrupted, let's go ahead and take 15 minutes. Do
11 be back at promptly 10 after by the wall clock. No
12 lingering today.

13 (Recess taken.)

14 JUDGE MOSS: We're on the record. Go
15 ahead, Mr. Van Nostrand.

16 MR. VAN NOSTRAND: Thank you, Your Honor.

17 Q. Mr. Blackmon, I wonder if item number one
18 in the CLEC proposed conditions to improve service
19 quality and reporting, is this similar in many
20 respects to the carrier-to-carrier performance plan
21 adopted by the FCC in SBC-Ameritech?

22 A. It covers the same subject area, though
23 much less thoroughly than does the SBC performance
24 plan.

25 Q. But both involve measurement categories

01274

1 with voluntary payments in the event the carrier
2 fails to meet the standard performance goal?

3 A. Right, where there are -- within the areas
4 that there are the same -- say, for instance, firm
5 order commitments that appears in both plans, in both
6 plans there are payments where performance is less
7 than the standard, and I think in both plans, one
8 would use the word voluntary in the sort of ironic
9 way that you did in your question.

10 Q. With the quotes around it?

11 A. With the quotes around it.

12 Q. And basically, they both involved timelines
13 in the provisioning of services; is that what you're
14 saying?

15 A. Yes.

16 MR. VAN NOSTRAND: Your Honor, I'd like to
17 use a demonstrative exhibit.

18 JUDGE MOSS: Proceed.

19 Q. Dr. Blackmon is familiar with this process.
20 We've used it in the past together. Dr. Blackmon, I
21 think you've already stepped through some --

22 MR. HARLOW: Excuse me. Do you have copies
23 for Counsel? I can barely -- I'm not sure I can read
24 that entire thing.

25 MS. JOHNSTON: I can't see it, either.

01275

1 Q. Dr. Blackmon, we've already discussed --
2 we've been stepping through the similarities in the
3 conditions that were adopted by the FCC in
4 SBC-Ameritech versus those that have been proposed in
5 US West and Qwest; is that right?

6 CHAIRWOMAN SHOWALTER: Can you propose by
7 whom?

8 MR. VAN NOSTRAND: Basically, Dr. Blackmon.

9 CHAIRWOMAN SHOWALTER: Okay.

10 Q. We've already discussed page four of your
11 testimony. Separate affiliate for advanced services.
12 You're taking that directly from the SBC-Ameritech
13 order; is that right?

14 A. Yes.

15 Q. And the same with discounted surrogate line
16 sharing charges?

17 A. Yes, that's -- there's a one-to-one
18 correspondence on that item between what I proposed
19 and what the FCC ordered for SBC.

20 Q. And the OSS including the 25 percent
21 discount?

22 A. Yes, though in your right-hand column, as I
23 pointed out before, having the OSS interface listed
24 there with the improved access to databases and
25 network information, it does not capture the fact

01276

1 that those are different areas in the company's
2 business. It's a similar type of requirement, but it
3 applies to different types of orders.

4 Q. If we just look at your testimony, you
5 would agree, when you refer in your subrecommendation
6 three to OSS interfaces, that's the same as what came
7 from SBC-Ameritech?

8 A. Yes, for the four areas having to do with
9 advanced services, I'm proposing exactly what the FCC
10 has required for SBC and what is now in the process
11 of being required for Bell Atlantic and GTE.

12 Q. And the fourth one you just mentioned is
13 the nondiscriminatory roll-out of xDSL services?

14 A. Yes, and I don't know why you would use
15 different words in the left and right-hand column on
16 those. Those two are the same.

17 Q. All right. I'm just using -- would you
18 accept, subject to check, this is the heading given
19 to that discussion in the FCC order?

20 A. Yes.

21 Q. And then we've discussed just most recently
22 the similarity in the carrier-to-carrier performance
23 plan with item number one in the CLEC proposal?

24 A. Yes, so again, it's the same subject,
25 though the treatment of that subject within the two

01277

1 is very different.

2 Q. And we talked about the region-wide MFN
3 provision?

4 A. And again, you know, if I were doing that
5 on the left-hand column, I would use, I think, what
6 they call the super MFN, and the idea that SBC has to
7 bring back to its incumbent area any provision that
8 it's able to obtain as a CLEC in some other part of
9 the country, and that does not carry over into the US
10 West proposal -- proposal for US West and Qwest.

11 Q. I think, Dr. Blackmon, you made that clear
12 when we stepped through this before. I think the
13 record speaks for itself in terms of the distinctions
14 you would make on these provisions. Do you agree
15 with that?

16 A. Obviously, I was not comfortable with you
17 having what looks like the identical provision being
18 listed in both columns.

19 Q. How about UNE combinations? We just talked
20 earlier about that and discussed the similarity
21 between the provision in SBC-Ameritech and Qwest --

22 A. Yes.

23 Q. Finally, there is no companion provision in
24 SBC-Ameritech for the CLEC proposed condition item
25 two regarding increase in plant investment; is that

01278

1 right?

2 A. I have not -- yeah, there's so many
3 conditions in the SBC order that I would be reluctant
4 without at least giving a quick look-through to see
5 whether there's any investment requirement there or
6 not. I don't know one way or the other off the top
7 of my head.

8 JUDGE MOSS: Mr. Van Nostrand, if you're
9 going to remain on your feet, I'm going to have to
10 ask you to try to take that mike, because we do have
11 some participants via the conference bridge line.

12 MR. VAN NOSTRAND: I think I'll be able to
13 put my next chart up and sit down.

14 JUDGE MOSS: Okay.

15 Q. Is it fair to say, Dr. Blackmon, that the
16 conditions adopted in SBC-Ameritech were in response
17 to the competitive harms from that merger identified
18 by the FCC?

19 A. I think competitive harm was one of the
20 reasons that the FCC imposed those requirements on
21 SBC and Ameritech.

22 Q. And if we look at the competitive impacts
23 of that merger, isn't it fair to say there was a
24 substantial discussion in the FCC order, which is
25 your Exhibit 261, about the public interest harms

01279

1 that flowed from the merger?

2 A. Yes, there was.

3 Q. Eighty-eight pages, for example, from page
4 31 to 119 of the order, does that sound about right?

5 A. That sounds about right.

6 Q. Isn't it true, if you look on page 151 of
7 the order in particular, that the FCC found that
8 there were three significant harms to the public
9 interest from that merger?

10 A. Yes, they're at paragraph 348.

11 Q. All right. And the first was the removing
12 of one of the most significant potential participants
13 in local communications mass markets both within and
14 outside each company's region; is that right?

15 A. Yes.

16 Q. And basically the context was that
17 proceeding involved an ILEC operating in five states
18 combining with an ILEC operating in eight states?

19 A. I know it's two ILECs. I never had their
20 state counts in my head.

21 Q. But didn't the FCC find that each of these
22 companies were significant potential participants in
23 the market for local exchange and exchange access
24 services in each other's regions?

25 A. Yes.

01280

1 Q. And in fact, Ameritech was expanding --
2 planning on expanding into St. Louis, in SBC's
3 territory, and SBC was planning on expanding into
4 Chicago, in Ameritech's territory; is that right?

5 A. I don't recall those specific facts.

6 Q. Now, the second condition was that the
7 competitive harm that the FCC cites on paragraph 348
8 is the elimination of an independent source for
9 effective minimally intrusive comparative practices
10 analysis. Do you see that?

11 A. Yes.

12 Q. And doesn't this factor have to do with the
13 elimination of one of the few remaining major
14 incumbent ILECs, which limits the ability of
15 regulators to use a comparative practices analysis?

16 A. Yes, it does.

17 Q. In other words, is it fair to say that
18 regulators compare the practices of the large ILECs
19 and use them as benchmarks against which to measure
20 ILEC actions?

21 A. Yes, that's fair to say.

22 Q. And is it true that the FCC indicated that
23 by eliminating this benchmark, that more intrusive
24 regulation would have to be substituted? In
25 particular, I'm looking at page 88, paragraph 184.

01281

1 The very last sentence on the first paragraph on page
2 88.

3 A. It would be the second to the last
4 sentence?

5 Q. Yes.

6 A. Yes, I see that.

7 Q. So in other words, the substitute would not
8 be as minimally intrusive as the benchmarking
9 process; is that a fair summary?

10 A. I think that's true, yes.

11 Q. Okay. Finally, if you look at the third
12 competitive harm, back on paragraph 348, the FCC
13 found that the merger would increase the incentive
14 and ability of the merged entity to discriminate
15 against rivals, particularly with respect to advanced
16 services; is that right?

17 A. Yes.

18 Q. And was this finding due primarily because
19 the number of local areas where the new company would
20 be a dominant ILEC would increase?

21 MS. JOHNSTON: Your Honor, I'm going to
22 object. I think that the order speaks for itself. I
23 mean, to cross-examine Dr. Blackmon on the basis of
24 and the rationale behind the determinations made in
25 the order makes no sense.

01282

1 JUDGE MOSS: Well, the FCC order need not
2 have been made an exhibit by this witness in his
3 prefiled testimony, but he did, and it's the basis
4 upon which much of his testimony apparently rests.
5 So I think Mr. Van Nostrand's inquiry into the
6 exhibit is entirely appropriate, and I will allow it.
7 The objection is overruled.

8 THE WITNESS: I'm sorry, was there a
9 question?

10 Q. Yes, there was. This finding that there
11 was an increase in the incentive ability, wasn't that
12 related primarily to the number of local areas that
13 the new company would be the dominant ILEC, the
14 number of local areas would increase?

15 A. I believe that that's how the FCC analyzed
16 that issue in this merger, yes.

17 Q. And starting with this last competitive
18 harm first, this incentive and ability to
19 discriminate, isn't it fair to say that the
20 requirement of an advanced services affiliate was
21 intended to address this harm?

22 A. Yes, I think that's fair to say, that the
23 -- on advanced services in particular, there was a
24 real danger with SBC that they would give their own
25 services preferential access to the legacy network.

01283

1 Q. And that danger arises because the
2 footprint is larger with the combined company; is
3 that not right?

4 A. It may be that that danger arises in SBC's
5 instance because of that, but it certainly is not the
6 only way in which such a danger might arise.

7 Q. Let's go back to page 33 of the order,
8 then, which discusses the potential public interest
9 harm, in particular the ability to discriminate
10 against rivals.

11 In paragraph 60, does it not say that the
12 increase in the number of local areas controlled by
13 SBC as a result of the merger will increase its
14 incentive and ability to discriminate against
15 carriers competing in retail markets that depend on
16 access to SBC's inputs in order to provide services?

17 A. It definitely says that, yes.

18 Q. Did that not suggest that the increase in
19 the local area controlled by the ILEC was a major
20 consideration?

21 A. I believe that's what I -- yes, that's what
22 I said a minute ago, that in the FCC, analyzing the
23 SBC merger, that factor appears to have greatly
24 motivated their decision to require the advanced
25 services affiliate. But I don't see on page 33 where

01284

1 it says and that's the only possible reason why an
2 advanced services affiliate might be a reasonable
3 condition to apply to a big merging incumbent local
4 exchange company.

5 Q. We'll get to that. I'm looking on pages
6 188 and 189 of the SBC-Ameritech order, where the
7 Commission is explaining the relationship between the
8 competitive harm which is identified and the
9 conditions which it is adopting. I guess I'd direct
10 your attention in particular to Section 13 there, on
11 the discussion of ability to discriminate?

12 A. Yes.

13 Q. Do you see on that page that another
14 condition intended to address this harm was the
15 commitment to establish other OSS interfaces, reading
16 from paragraph 431?

17 A. Yes.

18 Q. And another condition is collocation
19 compliance and line sharing discounts? Again, from
20 paragraph 431.

21 A. Yes.

22 Q. And on page 189, paragraph 433, the order
23 also mentions the carrier-to-carrier performance plan
24 as another condition which helps to address this
25 competitive harm?

01285

1 A. Yes.

2 Q. So is it fair to say that we have these
3 five conditions, which were imposed in response to
4 the competitive harm associated with increasing the
5 incentive and ability of the merged entity to
6 discriminate against rivals, particularly with
7 respect to advanced services?

8 A. Yes, that's fair to say.

9 Q. Again, for purposes of the record, those
10 five conditions are separate affiliate for advanced
11 services, OSS interfaces, collocation compliance,
12 surrogate line sharing discounts, and the
13 carrier-to-carrier service performance program.

14 Now, turning to the preceding two pages,
15 186 and 187, the FCC discusses the condition which it
16 adopted related to the second alleged harm from loss
17 of benchmarks. Do you see that?

18 A. Yes, I do.

19 Q. And would you agree that the FCC mentioned
20 the region-wide most favored nation provision as a
21 condition which addresses that harm in paragraph 424?

22 A. Yes.

23 Q. And they also mention the uniform OSS
24 interfaces in paragraph 424?

25 A. Yes.

01286

1 Q. And the carrier-to-carrier performance
2 program in paragraph 428 on the next page?

3 A. Right.

4 Q. So is it fair to say that, in response to
5 the competitive harm of eliminating independent
6 source for comparative practices, the FCC adopted the
7 conditions of region-wide MFN, OSS interfaces and
8 systems, and the carrier-to-carrier service
9 performance program?

10 A. Yes, that's fair to say.

11 Q. And finally, for the first competitive
12 harm, the loss of potential competition, which is
13 discussed on page 185 and 186, looking in particular
14 at paragraph 422 at the top of page 186, isn't it
15 true the order mentions as the conditions in response
16 to this competitive harm, the carrier-to-carrier
17 performance plan?

18 A. Yes.

19 Q. And the region-wide MFN?

20 A. Yes.

21 Q. And the OSS provisions and collocation
22 provisions?

23 A. Yes.

24 Q. So is it fair to say that in response to
25 the competitive harm identified by the FCC in

01287

1 SBC-Ameritech, the conditions of the
2 carrier-to-carrier service performance program, the
3 region-wide MFN, the OSS provisions and the
4 collocation provisions were adopted?

5 A. Yes, as long as we're clear that those
6 weren't the only conditions that were intended to
7 address that particular harm.

8 Q. Okay. Now, if we compare the competitive
9 harms identified by the FCC in SBC-Ameritech with the
10 circumstances in the US West-Qwest merger, it's fair
11 to say that the same competitive harms do not exist
12 here, do they?

13 A. That would be unfair to say.

14 Q. Well, if we could step down through the
15 three competitive harms found by the FCC in
16 SBC-Ameritech, the first has to do with the loss of
17 potential competition; is that correct?

18 MS. JOHNSTON: Excuse me, Your Honor. I'm
19 going to renew my objection. I think this is more
20 appropriate for brief. Comparing language and
21 pulling out selectively language from various orders,
22 that's more appropriate for briefing. I don't think
23 it's fair to ask him these -- ask him this line of
24 questioning.

25 JUDGE MOSS: Okay. Well on the basis that

01288

1 I ruled before, I will again overrule your objection.

2 THE WITNESS: I forget the question when
3 that happens. I'm sorry, it's so exciting.

4 Q. Turning first to the first competitive harm
5 found by the FCC in SBC-Ameritech, the removal of one
6 of the most significant potential participants in
7 local telecommunications mass market. That
8 competitive harm is not present in the US West-Qwest
9 merger, is it?

10 A. It's certainly not present to the scale
11 that it was between SBC and Ameritech. I believe
12 that Qwest was a potential competitor to US West, but
13 they certainly didn't have the off-the-shelf
14 capabilities that Ameritech did.

15 Q. Isn't it -- didn't the FCC, in fact, find
16 that Qwest didn't possess any unique assets or
17 capabilities that would make it one of a limited
18 number of most significant market participants?
19 Would you accept, subject to check, that that's what
20 the FCC stated on page 19 of the order?

21 A. Yes, I'll accept that.

22 Q. Your testimony, on page four, lines one and
23 two, mentions that customers should not be deprived
24 of the choice of telecommunications providers they'd
25 otherwise expect without the merger. Is it your

01289

1 testimony that Qwest was a significant potential
2 participant in US West's local exchange market?

3 A. No, that's not my testimony, and that
4 wasn't what I meant at that particular point in my
5 testimony. I didn't mean that we were going to lose
6 Qwest as a competitor. I meant that if US West
7 buddies up with Qwest, that they are more likely, as
8 a team, to deprive customers of choice than had that
9 merger not occurred.

10 Q. If we'd go back to the second competitive
11 effect harm found by the FCC in SBC-Ameritech, the
12 elimination of an independent source for comparative
13 practices, this merger does not involve the
14 elimination of a major incumbent ILEC, does it?

15 A. Only US West, but it will still be a major
16 incumbent. They'll just have different management
17 and ownership.

18 Q. Well, for purposes of the comparative
19 practices that the FCC was talking about, those
20 comparisons will still be available with US West
21 after the merger, won't they?

22 A. They'll be different. We'll have a
23 different ILEC, but we won't have any fewer ILECs.

24 Q. Finally, if you turn to the third
25 competitive harm, the ability to discriminate against

01290

1 rivals in advanced services, this merger does not
2 result in the ILEC acquiring a larger control area,
3 does it?

4 A. Not a geographic -- larger geographic
5 control area, no. It certainly increases the scope
6 of the business over which US West might reasonably
7 be expected to try to maintain and increase its
8 control.

9 Q. Well, is it fair to say that the -- it's an
10 accurate statement that the FCC specifically rejected
11 the proposed condition that an advanced services
12 subsidiary be required in connection with the US
13 West-Qwest merger?

14 A. That's definitely a fair statement.

15 Q. And is it fair to say that a reason cited
16 by the FCC was that the footprint for US West would
17 not increase as a result of the merger?

18 A. Yes, that statement appears in the FCC's
19 order.

20 Q. I'd like to turn briefly to the
21 identification of competitive harms which --
22 statements that you make in your testimony. You
23 state on page six, lines seven and eight, that the
24 alternate providers of advanced services operate at a
25 disadvantage relative to US West; is that correct?

01291

1 A. Yes, it is.

2 Q. And when you were asked a data request to
3 identify these advantages, your response was not to
4 provide any specific advantages; is that correct?
5 Looking at a response to Data Request 23?

6 A. This, again, was a request for documents,
7 of which Commission Staff had none. We also pointed
8 out that the fundamental reason for an advanced
9 services affiliate is that we don't believe that it's
10 possible to detect the sort of preferential treatment
11 that an advanced services affiliate would guard
12 against. So we wouldn't expect to be able to see
13 these. If we could, maybe we wouldn't even need a
14 separate affiliate.

15 Q. So we're left to rely upon, as a record
16 basis, the summary statement of your testimony on
17 page six, lines six to eight?

18 A. I think the Commission would rely on the
19 entire record in this proceeding.

20 Q. On page seven of your testimony, you talked
21 about the combined company being permitted to
22 monopolize the advanced services market. Do you
23 recall that?

24 A. I do.

25 Q. And again, in response to number 24, there

01292

1 was no additional evidence provided to support that
2 statement; is that correct?

3 A. The response to the data request says that
4 we have not performed a study of the type that the
5 company requested, and that's accurate.

6 Q. And the request was that we were asking for
7 any information which supports or relates to the
8 ability and likelihood of a combined US West-Qwest
9 monopolizing the advanced services market; is that
10 correct?

11 A. You asked for studies, analyses, reports
12 and documents.

13 Q. And on page seven, again, on your
14 testimony, you made a reference to US West being
15 permitted to stifle advanced services competition.
16 And again, the company asked for any evidence to
17 support that statement. Is it fair to say that your
18 response to Data Request 25, included in Exhibit 33,
19 indicates there is no additional evidence on that
20 point?

21 A. That there are no studies, analyses,
22 reports or documents, it would be fair to say, yes.
23 And that particular statement is a forward-looking
24 statement in any event, so we wouldn't be likely to
25 have any sort of a study that would be able to know

01293

1 what the future holds for US West.

2 Q. And finally, page 10 of your testimony, you
3 made the reference to an unfair and unreasonable
4 advantage, which we asked you to expand upon in Data
5 Request 42, and there was no additional response
6 provided, other than what was indicated in Number 23;
7 is that correct?

8 A. That's correct.

9 Q. And on page 12 of your testimony, where you
10 made the reference to US West being permitted to
11 leverage its market power into the advanced services
12 market, we asked for any evidence that you might have
13 to support the allegation that US West is leveraging
14 its market power. And again, there was no response,
15 other than what was provided in response to Number
16 23?

17 A. Correct. Once again, we don't have any
18 studies, analyses, reports.

19 Q. Your testimony at page nine mentions GTE
20 implementing a similar advanced services condition.
21 Was this requirement of an advanced services
22 subsidiary imposed by this Commission in connection
23 with the GTE-Bell Atlantic merger?

24 A. No, that requirement arose at the FCC in
25 its review of the GTE-Bell Atlantic merger.

01294

1 Q. Did you have similar concerns in that
2 proceeding about an incumbent local exchange company
3 leveraging its market power into an advanced services
4 market?

5 A. I think that we had that concern. It was
6 not as well-formulated a concern as we do here. We
7 did not have experience with GTE that we did -- that
8 we have with US West in terms of the problems in the
9 roll-out of DSL service and the attempt to steer
10 business toward US West's own service providers. It
11 didn't really come up as a specific concern with GTE
12 the way it did with US West.

13 Q. Let's step back and look at the
14 relationship between the competitive harms and the
15 conditions. Is it fair to say, in SBC-Ameritech, for
16 each condition which was imposed by the FCC in that
17 decision, was adopted by the FCC, there was a
18 competitive harm which was identified as being
19 addressed by that condition?

20 A. Yes.

21 Q. And then finally, in this case we have the
22 proposed conditions, which you are recommending now
23 be imposed in connection with this merger, the
24 separate affiliate, discounted surrogate line sharing
25 charges, OSS interfaces, targeted deployment of

01295

1 advanced service offerings, standards for service
2 quality reporting, region-wide MFN, UNE combinations,
3 increase central office and outside plant investment.
4 Is that a listing of your current proposed
5 conditions?

6 A. I believe it is, yes.

7 Q. Is it your testimony that the record
8 supports identification of a competitive harm
9 associated with each of those conditions?

10 A. I would state it a little more broadly,
11 that there's a harm to the public interest that
12 should be remedied and that each of those conditions
13 it goes at harms to the public interest.

14 MR. VAN NOSTRAND: I have no further
15 questions, Your Honor. I'd like to move the
16 admission of the cross-examination exhibits
17 associated with Dr. Blackmon.

18 JUDGE MOSS: That would be numbers 262
19 through 272, according to my exhibit list, and those
20 are data request responses, I believe, exclusively.
21 Do I have the numbers right?

22 MR. VAN NOSTRAND: Yes.

23 JUDGE MOSS: Any objection?

24 MS. JOHNSTON: No.

25 JUDGE MOSS: Those will be admitted as

01296

1 marked.

2 MR. VAN NOSTRAND: For clarity on the
3 record, would it be appropriate, as well, to enter
4 this document into the record, Your Honor?

5 JUDGE MOSS: We have it as an illustrative
6 exhibit, as I recall it. I think you called it
7 demonstrative; I sometimes refer to it as
8 demonstrative. I think it may assist, as we're
9 reading the transcript, to have it available to us.
10 So we will give it a number, with the understanding
11 that it is being admitted for illustrative purposes,
12 273-I.

13 MR. VAN NOSTRAND: Thank you, Your Honor.

14 JUDGE MOSS: Do we have questions from the
15 Bench? And I will mention at this juncture, too,
16 that I think the Bench needs to take two or three
17 minutes to discuss some scheduling issues that we
18 face in terms of our proceedings. So we could either
19 have your questions now or we could have that
20 off-the-record discussion now, but I know that there
21 may be some need to break at 12:00.

22 CHAIRWOMAN SHOWALTER: Why don't we discuss
23 our schedule right now.

24 (Discussion off the record.)

25 JUDGE MOSS: Okay. The Bench has conferred

01297

1 with regard to how we're going to proceed this
2 afternoon, given some time constraints and one thing
3 and another. We're going to press ahead for now,
4 finish with Dr. Blackmon, and the decision has been
5 made to allow the rebuttal testimony by Ms. Jensen.
6 We'll take that up next.

7 And we'll hear argument. I understand
8 there is some interest in further argument on the
9 pending motion for continuance, et cetera. We'll
10 hear that and the Commission can deliberate over the
11 luncheon hour on that. And one member of the Bench,
12 at least, has a question about the proposed revised
13 settlement language. We'll need to take that up at
14 the appropriate time.

15 So at this time, we have come to the
16 juncture of soliciting questions from the Bench. It
17 seems I've lost two-thirds, but Commissioner Hemstad,
18 did you have anything for this witness before we go
19 to redirect?

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

21 BY COMMISSIONER HEMSTAD:

22 Q. Well, I'll try to press this. I believe
23 you, in response to a question from Counsel,
24 responded to the effect that the initial Staff
25 proposal no longer seemed feasible. Would you

01298

1 elaborate on that?

2 A. I'd be glad to. At the time we made our
3 proposal, US West had a 271 schedule that was before
4 this Commission, they were asking the Commission to
5 approve a 271 schedule that would have completed the
6 process, I thought, if the company really made an
7 all-out effort by March 31st of next year. That, to
8 me, seemed longer than I would have liked to have
9 waited for US West to do more to open up its local
10 markets, but it seemed very convenient, if that was
11 possible, to wrap all of these competitive conditions
12 up in a 271 approval.

13 Once the schedule slipped on that process
14 and it then became apparent that March 31st was not
15 reasonable, Staff no longer felt that we could wait
16 for 271, and that we needed to take the components of
17 a 271 approval, identify the ones that were most
18 important, focus on those now as an interim measure,
19 and then go forward with the merger separately from
20 the 271 approval.

21 Q. With respect to the Staff proposal to
22 require an advanced services affiliate, do you have
23 an opinion as to whether that is a practical
24 condition to impose upon a company for a single
25 state?

01299

1 A. We think it is practical to do, but US West
2 Communications, Incorporated, their operating
3 company, would not be permitted to offer advanced
4 services within this state. They could still provide
5 advanced services. US West Communications could in
6 another state, but not in the state of Washington.
7 And within the state of Washington, they could
8 provide advanced services through an affiliate, such
9 as Interprise America, a company that already exists
10 and is already providing service in other states.

11 COMMISSIONER HEMSTAD: That's all I have.

12 JUDGE MOSS: Anything else from the Bench?

13 COMMISSIONER GILLIS: Not from me.

14 CHAIRWOMAN SHOWALTER: I just have one
15 quick one.

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

17 BY CHAIRWOMAN SHOWALTER:

18 Q. I think you said at one point that with
19 respect to the proposed condition of a penalty if
20 wholesale facilities weren't provided within three
21 days, you said, Well, if they have to provide it
22 within five days for retail, it's going to have to be
23 less than five days for wholesale. What provision,
24 what five-day provision were you talking about at
25 that point?

01300

1 A. Our rules require that telephone companies
2 offering local service to end-use customers need to
3 have a five-day turnaround on orders. They only have
4 to have 90 percent within those days, though we're
5 moving more and more toward the policy that, for
6 those other up to 10 percent, they should be
7 compensated for the slowness of their service if it
8 goes beyond five days.

9 So what I was saying was that where an
10 unbundled loop is a component of some CLEC's retail
11 offering, it's going to be very hard for them to meet
12 that five-day interval if they don't get a loop
13 within five days.

14 CHAIRWOMAN SHOWALTER: Okay, thanks.
15 That's the one question I had.

16 JUDGE MOSS: Redirect.

17 MS. JOHNSTON: None.

18 JUDGE MOSS: Okay.

19 MR. HARLOW: I have a few questions, Your
20 Honor.

21 JUDGE MOSS: On what basis would you
22 inquire, Mr. Harlow?

23 MR. HARLOW: On the basis that Mr.
24 Blackmon's been crossed for roughly two and a half
25 hours on his support and the Staff's support for the

01301

1 conditions we proposed.

2 JUDGE MOSS: That's right, which would make
3 your cross-examination of him friendly.

4 MR. HARLOW: It would make it, I think, in
5 the nature of redirect, Your Honor.

6 JUDGE MOSS: Well, I'm not going to allow
7 that. Dr. Blackmon, I believe that will conclude
8 your time with us on the stand, subject to recall, as
9 all witnesses have been in this case, and we thank
10 you very much.

11 THE WITNESS: You're welcome.

12 JUDGE MOSS: What sort of time do we
13 anticipate for the rebuttal?

14 MR. VAN NOSTRAND: Your Honor, we had
15 reserved the right to do that. Based on what Dr.
16 Blackmon testified, we don't believe a rebuttal
17 witness is actually necessary. We just wanted to
18 reserve the right to request that.

19 JUDGE MOSS: All right, fine. That will
20 save us some time, for which we're all eternally
21 grateful. Then that, I believe, will bring us to the
22 opportunity to hear any further argument -- well, no,
23 let me amend what I was going to say.

24 I do understand that there's at least one
25 member of the Bench who has a question regarding the

01302

1 proposed revised settlement language, and so I think
2 we should have the opportunity for that at this point
3 in time.

4 CHAIRWOMAN SHOWALTER: Mr. Blackmon might
5 want to sit down. I don't know who's going to be
6 able to answer my questions. It might be you.

7 DR. BLACKMON: If so, I'll come back.

8 CHAIRWOMAN SHOWALTER: Okay. Shall I just
9 state my question to the general audience?

10 JUDGE MOSS: Sure. We'll find the
11 appropriate person to respond, or persons.

12 CHAIRWOMAN SHOWALTER: Okay. I'm looking
13 at the revised agreement, and it's -- well, it's page
14 10 of the version that uses underlining to add new
15 language. And it says at the bottom of page 10,
16 Except as provided in 4(B)(1) and 4(B)(2) above,
17 prior to January 1, 2004, the Commission may not take
18 any action that would change the retail prices or
19 access charges of the company. This limitation shall
20 not apply to voluntary rate reductions filed by the
21 company.

22 And then here's my question: This has to
23 do with -- next sentence. This limitation does not
24 preclude the Commission from approving an alternate
25 form of regulation, or AFOR, for the company that is

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1 consistent with this agreement. And this seems sort
2 of circular to me. I thought it might stop before
3 the words "that is consistent with this agreement."
4 But the way I read this, and tell me if I'm right or
5 wrong, is that we could do an AFOR, but it would be
6 subject to all of the conditions in this agreement.

7 That is, Dr. Blackmon identified a type of
8 AFOR that would be consistent with this agreement,
9 but as I read it, the type that is not, that would
10 not be consistent, otherwise -- the type that would
11 not be consistent with this agreement would be one
12 that changes retail prices or access charges of the
13 company. Am I right in that interpretation? Anyone?

14 MR. VAN NOSTRAND: What we were trying to
15 do with this additional language in Part Three was to
16 bring the agreement in line with what Dr. Blackmon
17 testified. When you asked a specific question about
18 how you reconcile the AFOR provision with the
19 prohibitions of Section 4(B), Dr. Blackmon testified
20 there wouldn't be an AFOR for that could be offered
21 that would be entirely consistent with this.

22 So what we're trying to do was to clarify
23 that this does not preclude a type of AFOR that is
24 consistent with what we have here in the agreement.
25 There may be other AFOR proposals where I think there

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1 would be a higher threshold, which would basically
2 require a reopening of sorts of this agreement, which
3 I think is also what Dr. Blackmon testified about.
4 That's what we're attempting to capture by this
5 language, because I believe the parties were
6 comfortable with what Dr. Blackmon testified to on
7 the panel on these provisions, is bring the written
8 agreement in line with what was said by Dr. Blackmon.

9 CHAIRWOMAN SHOWALTER: Okay. So as it
10 stands, this agreement does preclude an AFOR that
11 changes access charges and prices, subject to somehow
12 reopening this agreement, which is a different legal
13 question I have. But as it stands, the language
14 precludes the Commission from approving an AFOR that
15 changes prices or access charges.

16 MR. VAN NOSTRAND: I need to consult with
17 another panel member.

18 CHAIRWOMAN SHOWALTER: Okay.

19 JUDGE MOSS: Did you have some additional
20 thoughts on this question?

21 MR. VAN NOSTRAND: Well, I guess we believe
22 the record in response to the question of Dr.
23 Blackmon on this point expresses the view of the
24 parties as to the ability to come back and propose an
25 AFOR, and we've tried to come up with language which

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1 captures that. We think this goes part of the way
2 there, but I guess we feel we're satisfied with the
3 explanation in the transcript on exactly how this
4 provision would work.

5 CHAIRWOMAN SHOWALTER: But remember, Dr.
6 Blackmon's testimony was before you'd come in with
7 this language. So it was on the intent of the
8 parties before this language was presented, so I'm
9 trying to determine what this language actually
10 means. And so far, I haven't quite heard the answer
11 to my question, which is does this agreement, as
12 changed here, preclude the Commission from approving
13 an AFOR that changes prices or access charges?

14 MS. JOHNSTON: I think the answer to your
15 question is no.

16 CHAIRWOMAN SHOWALTER: It does not preclude
17 that?

18 MS. JOHNSTON: Not so long as, as you can
19 see at the bottom of page 10, there's a specific
20 reference to Sections 4(B)(1) and 4(B)(2) above, and
21 there are those exceptions there, the carve outs, (A)
22 through (D), and then (A) through (E) in (1) and (2)
23 respectively.

24 CHAIRWOMAN SHOWALTER: All right. So that
25 if the AFOR also was consistent with (1)(A) through

01306

1 (D) or (2)(A) through (E), then it would be all
2 right, but there's no exemption for an AFOR per se is
3 the way I'm reading it.

4 MS. JOHNSTON: That's correct.

5 CHAIRWOMAN SHOWALTER: Is that the way you
6 read it?

7 MR. VAN NOSTRAND: I think we need to take
8 a brief break and consult among the parties.

9 CHAIRWOMAN SHOWALTER: Okay. But before
10 you do, also, you might want to discuss my two other
11 questions. One is to the extent that this is binding
12 on the Commission in terms of an AFOR, one of the
13 questions I have is whether parties not a party to
14 this proceeding would have a right to object to our
15 changing the terms of this agreement or not. In
16 other words, supposing an AFOR down the line arises
17 and it involves changing a price, and maybe the
18 parties here who were parties to this agreement,
19 which is only four parties, don't mind reopening this
20 agreement, but maybe another party to the AFOR does
21 mind.

22 Is it -- are we allowed to reopen our
23 Commission order over the objections of a non-party
24 to this agreement? That's question number one.

25 Question number two is just a drafting

01307

1 issue, which it says, Except as provided in 4(B)(1)
2 4(B)(2), the Commission shall not take any action.
3 I'd just note that those two provisions don't
4 actually allow the Commission to lower the order, to
5 approve an order as requested; it just allows the
6 parties to make the request, so I would assume you
7 wouldn't have any objection to saying, in (1) and
8 (2), except that the company may seek and the
9 Commission may approve --

10 MR. VAN NOSTRAND: The procedure was
11 initiated pursuant to those, and the Commission will
12 be able to take the actions requested by what was
13 authorized in those sections.

14 CHAIRWOMAN SHOWALTER: The other way to do
15 it is down there in (3), it could be, Except for
16 actions requested in 4(B)(1) and (B)(2). Would it be
17 another way to do it?

18 MR. VAN NOSTRAND: Yes.

19 CHAIRWOMAN SHOWALTER: I just want to make
20 it clear that we have the authority.

21 MR. VAN NOSTRAND: We know the answer to
22 that question.

23 JUDGE MOSS: I think perhaps before the
24 parties retire to their discussions among themselves,
25 we ought to go ahead and get this argument out into

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1 the record regarding this pending motion, so that we
2 will have an opportunity during our break to consider
3 that.

4 CHAIRWOMAN SHOWALTER: Oh, that wasn't on
5 the record?

6 JUDGE MOSS: Oh, yeah, it was. I'm saying
7 before we go off now. So is there any party who
8 wishes to reopen the argument concerning the motion
9 for continuance to reopen discovery and to permit
10 supplemental testimony that has thus far been carried
11 with the case with the thought that, as things
12 developed on the record through the course of the
13 case, that any necessity perceived to exist for that
14 requested relief might disappear. Mr. Kopta, I
15 believe it was you who argued this originally.

16 MR. KOPTA: Yes, Your Honor, thank you. We
17 continue to maintain that additional proceedings are
18 necessary. Very briefly, our concerns are probably
19 threefold at this point.

20 First is the impact of the proposed
21 settlement on competitive issues. We've had no
22 opportunity to conduct any discovery on the meaning
23 of the settlement agreement and we've had extensive
24 discussions here and cross-examination of the
25 document. But from our position, that leaves as many

01309

1 questions open as it answers. Nor have we been given
2 any opportunity to present any evidence of our own in
3 terms of what impact the settlement agreement would
4 have on competitive issues. And so we feel
5 handicapped that we've not had an opportunity to
6 address the settlement as it's structured right now,
7 which is only resolving part of the issues, as
8 opposed to all of the issues.

9 The second area that we have concerns about
10 is the adequacy of the information that has been
11 presented. We have asked several questions of both
12 witnesses from US West and from Qwest information --
13 basic information about the impact of recent events
14 on the proposed merger, how the role of the chairman,
15 for example, is going to be impacted by Mr.
16 Trujillo's decision not to participate. None of the
17 witnesses have been able to respond to that question.

18 Similarly, the use of Qwest's facilities to
19 provide local and intraLATA services, which is
20 something that Mr. Pitchford testified was going to
21 be the case, he was unable to explain how that was
22 going to happen, which company was going to be
23 providing the service, how the assets were going to
24 be assigned to the affiliates within the merged
25 company. We think these are key questions to

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1 resolving issues that remain outstanding, and yet
2 there is no information on that -- on those issues.

3 And finally, we continue to try and have
4 discussions with the applicants on settling the
5 competitive issues. Unfortunately, we couldn't do
6 both. And although we do want to continue to try and
7 have those discussions, at this point, some
8 additional time, I think, would be very helpful in
9 terms of being able to devote some energy to
10 resolving those disputes, as opposed to trying to
11 brief this case in terms of assuming that there will
12 be no settlement and that we will be presenting these
13 issues to the Commission for resolution.

14 JUDGE MOSS: Thank you. Mr. Harlow, you
15 moved forward as if you have something to say.

16 MR. HARLOW: Just to support the motion as
17 stated by Mr. Kopta, and to note that we feel it's
18 important in connection with that discovery be
19 reopened, as well. Again, this case schedule was
20 highly compressed. We had just a week, less than a
21 week, because we actually had a noon cutoff on
22 discovery on rebuttal testimony. The applicants
23 presented a significantly greater volume in their
24 rebuttal testimony than they did in their opening
25 testimony in this case. We think it would be useful

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1 to bring information forward to help protect the
2 public interest.

3 JUDGE MOSS: Okay, thank you. Response.

4 MR. BUTLER: I'd like to join in the motion
5 of Mr. Kopta, his comments, as well.

6 JUDGE MOSS: I suppose I should ask if
7 there's anyone else in support of the motion? Mr.
8 Ffitch, you were at one time in support of the
9 motion.

10 MR. FFITCH: Your Honor, we continue to
11 support the motion now for the reasons stated by the
12 intervenors, and particularly in the interests of the
13 possibility that's been stated of resolving the
14 competitive issues through settlement.

15 CHAIRWOMAN SHOWALTER: Are you still
16 sticking to the 30 days is all that's required for
17 your continuance? I think that was what your request
18 was earlier.

19 MR. KOPTA: Yes, that's what we're asking
20 for at this point.

21 JUDGE MOSS: So you feel that's enough time
22 to get discovery that you need?

23 MR. KOPTA: We'd love to have more, but we
24 understand that we don't have the luxury of an
25 unlimited schedule, and we are cognizant of the

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1 applicants' concerns, as far as timing goes. We
2 realize that there are other proceedings going on
3 that allow for a significant amount of time before,
4 for example, the Minnesota Commission is scheduled to
5 even hear their review of the merger.

6 But we don't want to stand in the way of
7 this Commission's determination of issues, to the
8 extent that it needs to do that. So we have
9 requested the minimum amount of time we believe would
10 be necessary to be able to conduct some limited
11 additional discovery and then present additional
12 testimony, to the extent that it's necessary.

13 CHAIRWOMAN SHOWALTER: How many days of
14 hearings do you think would be necessary?

15 MR. KOPTA: That's hard to say at this
16 point. I would say a day or two, perhaps at the
17 most.

18 COMMISSIONER HEMSTAD: Well, of course, if
19 you wish, as a result of further discovery, to put on
20 more witnesses, the company, as a moving party here
21 and with the burden of proof, would have the right,
22 then, to demand the opportunity to respond to that.
23 You agree with that, certainly, don't you?

24 MR. KOPTA: I do.

25 COMMISSIONER HEMSTAD: I'm puzzled by your

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1 connecting requests for discovery was such, with the
2 opportunity to pursue settlement. When we have
3 delayed proceedings in the past, that's been at the
4 request of all of the parties, when there seemed to
5 be an opportunity for that, and in light of our
6 policy of encouraging settlement, the company here
7 declines to join in that request.

8 Are you suggesting that we should delay
9 proceedings so that settlement can be pursued if the
10 applicants don't want to discuss it?

11 MR. KOPTA: Well, that isn't the case at
12 the moment, Commissioner Hemstad. They have
13 expressed a willingness to discuss these issues with
14 us.

15 COMMISSIONER HEMSTAD: But they haven't
16 volunteered that they're prepared to delay the
17 process?

18 CHAIRWOMAN SHOWALTER: We haven't heard
19 from them yet.

20 COMMISSIONER HEMSTAD: Well, unless they
21 changed their position. That was their position
22 before.

23 MR. KOPTA: No, that's my understanding of
24 their position, and we simply want to do our part to
25 try and resolve these issues through settlement. To

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1 the extent that they are willing to devote the
2 resources to do so, then I think that opportunity
3 should be pursued. I think, as a practical matter,
4 it's inconsistent to say that they're willing to
5 discuss settlement and yet continue on an aggressive
6 path that really doesn't allow for both settlement
7 discussions and proceedings along a litigated
8 posture. I think that despite their representations
9 at the beginning of hearings that they could do both,
10 maybe they can, but we can't. We have much more
11 limited resources than the applicants, and we find
12 that it's exceedingly difficult to even try to do
13 both at the same time. And we would prefer to devote
14 energies to trying to get this settled, rather than
15 to try and continue to litigate, and if they are
16 serious about discussing those issues with us, we
17 would hope that they would allow some reasonable
18 additional period of time to allow those to take
19 place.

20 JUDGE MOSS: I'm a little puzzled on a
21 couple of points. One is, is it your request and
22 intention that you would wish to conduct discovery
23 into the settlement process itself

24 MR. KOPTA: No, Your Honor, not into the
25 settlement process, but simply what is the meaning of

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1 this document in terms of how it will be implemented,
2 how it will be interpreted. I mean, I think our most
3 recent discussion is illustrative of perhaps some
4 areas in which there is room for disagreement on how
5 this agreement is to be implemented. And certainly
6 to the extent that it affects competitors, on the
7 first day of hearings, there was some discussion of,
8 for lack of a better term, the trickle down effect
9 that the settlement agreement will have on
10 competitive concerns. And yet no one was able to
11 provide any real details on how and whether that
12 would even take place. So our concern is to examine
13 how this agreement, as currently formulated, will
14 impact competitive issues and competitors.

15 We don't have any intention of trying to
16 peek behind the veil, as it were, and see how this
17 agreement was arrived at. We take it as a fait
18 accompli and want to see what impact it would have as
19 it currently stands on the competitive issues.

20 JUDGE MOSS: I'm wondering what information
21 the Staff or the other signatories to the agreement
22 might have that would illuminate that question. I'm
23 thinking that this is something that could be argued
24 on brief. I mean, we have the agreement before us,
25 we had an opportunity for all interested persons to

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1 inquire about the agreement, we opened that up for
2 all parties. I'm just a little puzzled about what
3 further information could be developed through the
4 discovery process that would shed light on your
5 concern, which, granted, is a legitimate concern.
6 And further, how that might be brought forward in the
7 form of testimony. In other words, what facts would
8 you be seeking to develop?

9 MR. KOPTA: Certainly, from the point of
10 view of pure fact how the investment commitment in
11 this agreement impacts investment with respect to
12 facilities that are used by competitors is the
13 primary issue, at least as I see it. As currently
14 set up, the minimum investment level is significantly
15 below what last year's investment level was.

16 So to the extent that the intent is to
17 maintain a lower investment level and provide for
18 specific areas in the settlement agreement where
19 there will be investment, we'd like to know where
20 perhaps there will not be investment and where there
21 are any projects that would benefit competitors in
22 terms of constructing facilities in areas where there
23 have been traditional problems with held orders,
24 whether that will have any impact on the experiences
25 that the testimony here has demonstrated the

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1 competitors have had in terms of obtaining facilities
2 from US West.

3 In addition, from the point of view of
4 direct testimony, we would like to have the
5 opportunity to explore the extent to which we would
6 want to present evidence on the revised incentives
7 that the merged company would have under the
8 settlement agreement standing alone, without
9 competitive conditions, whether there would be
10 additional incentives to favor the retail customer at
11 the expense of the wholesale customer because there
12 are significant liabilities for failure to meet
13 retail service quality standards where there are no
14 such liabilities currently for failure to meet
15 wholesale customer needs.

16 And so we would want to be able to have a
17 witness to address the extent to which this
18 settlement agreement does shift those incentives and
19 what the impact of that would be.

20 JUDGE MOSS: Thank you for that. Any other
21 questions of the proponents? Shall we hear from the
22 opponents? Ms. Spade.

23 MS. SPADE: Thank you, Your Honor. In
24 their arguments today, intervenors haven't raised any
25 new issues since we argued this motion last week. In

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1 fact, their case for a continuance is weaker today.
2 At this point in the proceeding, there's no reason to
3 delay.

4 The joint applicants filed their
5 application for approval of the merger on August
6 31st, 1999, nearly seven months ago. During those
7 seven months, the parties have conducted extensive
8 discovery, serving hundreds of data requests upon the
9 joint applicants. We've spent more than four days in
10 this evidentiary hearing, in which the intervenors
11 have had a full opportunity to cross-examine all
12 witnesses, including the witnesses who participated
13 on the panel regarding the settlement agreement.

14 One of the intervenors' other stated
15 reasons for continuance was that they needed
16 additional time for preparation of the hearing, which
17 is now concluded.

18 Also during those seven months, the joint
19 applicants have received approvals of the merger from
20 the FCC, two of the eight state commissions within
21 the US West region that are investigating the merger,
22 and numerous out-of-region state commissions.

23 With respect to one of the intervenors'
24 points regarding information that was necessary on
25 key issues, we'd just like to respond that some

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1 discussions and decisions with respect to the merged
2 company's future actions are ongoing and probably
3 will not be decided before the closure of the merger.
4 Most importantly, though, with respect to the
5 settlement agreement or settlement discussions that
6 are ongoing between the joint applicants and the CLEC
7 intervenors, contrary to intervenors' assertions, a
8 delay in the proceeding would actually be
9 counterproductive at this point.

10 As noted last week, applicants have
11 provided a proposal to intervenors a week and a half
12 ago and have not yet received a response. There is
13 no reason, to me, a delay would speed up the
14 intervenors' response. As we all know, deadlines
15 encourage resolutions and compromise. With the
16 postponement of the procedural schedule, the
17 negotiations would lose their urgency.

18 With the present schedule, the parties can
19 continue to try to reach a negotiated agreement
20 concerning the remaining issues at least during the
21 next month, for sure, before briefs are filed.

22 In sum, there's simply no reason to
23 continue the proceeding at this point. A continuance
24 would only unnecessarily delay the Commission's
25 consideration of the merits of the pending merger.

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1 Therefore, the joint applicants respectfully urge the
2 Commission to deny the intervenors' motion.

3 JUDGE MOSS: Thank you, Ms. Spade. Ms.
4 Johnston, did I give you a chance to speak on this
5 this time? I may have neglected that.

6 MS. JOHNSTON: Well, last week Commission
7 Staff took no position on the intervenors' motion to
8 continue the matter. However, I'm of the opinion
9 now, given the extensive opportunity intervenors have
10 had to cross-examine the panel witnesses concerning
11 at least the settlement agreement on the retail
12 issues and I know there were some issues surrounding
13 the investment and implications of investment for
14 wholesale and competition related issues. And I
15 think that the transcript will satisfy the concerns
16 of the intervenors that there is room for movement in
17 terms of the Commission's ability to impose
18 additional commitments, whether they be performance
19 measures or standards or investments in the
20 competition-related environment.

21 So for those reasons, I see no need to
22 permit the intervenors, at least as far as Commission
23 Staff is concerned, to propound data requests aimed
24 at learning more about the settlement agreement
25 itself. I think that those questions have been

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1 satisfactorily answered.

2 JUDGE MOSS: You would then be opposed to
3 the motion?

4 MS. JOHNSTON: That's correct, although I
5 think that I'm only -- I can only take a position on
6 the proposed settlement. Because I took no position
7 on some of the other points raised by Mr. Kopta, I'm
8 not taking a position on those at this moment.

9 JUDGE MOSS: Okay. Thank you very much. I
10 think that what we will do, then, is take our
11 luncheon recess, and that will give the parties an
12 opportunity to confer on this issue respecting the
13 settlement agreement itself, as revised, and will
14 give the Bench an opportunity to consider the motion,
15 and then, when we return from lunch, we'll return to
16 these matters and conclude them and then take up the
17 other matters that I mentioned at the outset remain
18 on our agendas, many of which are in the nature of
19 housekeeping. So with that, let's come back at 1:30.
20 We're off the record.

21 (Lunch recess taken.)

22 JUDGE MOSS: We'll take up first the
23 continuing discussion on the proposed settlement.
24 And the parties have no doubt had an opportunity to
25 confer among themselves over the luncheon recess. I

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1 guess we'll hear from Mr. Van Nostrand again.

2 MR. VAN NOSTRAND: Thank you, Your Honor.

3 Indeed we did get a chance to confer. And not
4 surprising, we were able to reach agreement.

5 CHAIRWOMAN SHOWALTER: That's not
6 surprising?

7 MS. JOHNSTON: That's what I was going to
8 say.

9 MR. VAN NOSTRAND: Since we've reached
10 agreement on so many things. What we were proposing
11 to do in Section Three, first of all, in response to
12 Chairwoman Showalter's point on the editorial point
13 in how to make that read consistently in the sentence
14 in number three, we would strike "as provided in."

15 CHAIRWOMAN SHOWALTER: Can you wait till we
16 get tracked here? Oh, "except as provided in."

17 MR. VAN NOSTRAND: Right. We would strike
18 "as provided in" and insert the words "for actions in
19 response to requests made pursuant to." So as
20 revised, it would read, "except for actions in
21 response to requests made pursuant to Sections
22 4(B)(1) and 4(B)(2) above," and then the rest of the
23 sentence would remain in place, which recognizes that
24 what we're trying to capture are the requests that
25 can be made up above, and the Commission can take

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1 actions in response to those requests that are
2 authorized by those sections.

3 Then, with respect to the other issue that
4 was raised, the last sentence in number three, the
5 parties have agreed to revise the agreement to strike
6 the words "consistent with this Section 4(B)," the
7 last five words I guess of that section, strike the
8 words "consistent with this Section 4(B)."

9 CHAIRWOMAN SHOWALTER: Wait, I'm not --

10 MR. VAN NOSTRAND: I'm sorry, with this
11 agreement.

12 CHAIRWOMAN SHOWALTER: That is consistent
13 with this agreement?

14 MR. VAN NOSTRAND: No, just consistent with
15 this agreement, those four words.

16 CHAIRWOMAN SHOWALTER: All right.

17 MR. VAN NOSTRAND: And insert "supported by
18 the cap B parties to this cap A agreement." So that
19 sentence in its entirety would read, "This limitation
20 does not preclude the Commission from approving an
21 alternative form of regulation, or AFOR, with a
22 company that is supported by the parties to this
23 agreement."

24 CHAIRWOMAN SHOWALTER: Okay. So that
25 answers my question.

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1 JUDGE MOSS: Do we have anything further
2 from the Bench, then, with respect to the settlement
3 agreement? Okay. I believe that will conclude that
4 item of business for today's agenda. Will you be
5 submitting another markup or --

6 MR. VAN NOSTRAND: Yes. I think, given
7 that we've gone through the revisions on the record,
8 we'll probably just substitute a final clean document
9 for the record.

10 JUDGE MOSS: A full settlement agreement
11 document?

12 MR. VAN NOSTRAND: Yes.

13 JUDGE MOSS: That will substitute for the
14 existing exhibit.

15 MR. VAN NOSTRAND: 320, yes.

16 JUDGE MOSS: I think that's fine. That's
17 probably the best way to do it.

18 CHAIRWOMAN SHOWALTER: You know, could I
19 just ask you -- I now understand your agreement, and
20 this may or may not be a question you could answer
21 today, and maybe it's for the briefs. But now that I
22 do understand it, I guess the question is if the
23 Commission adopts this settlement agreement, I
24 understand that we could not approve an AFOR unless
25 it was supported by the parties. So then the

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1 remaining question is would a non-party to this
2 agreement have any standing to object to our
3 approving an AFOR that changes prices that has the
4 support of the parties?

5 MR. VAN NOSTRAND: We discussed that, as
6 well, in our meeting. I guess I can speak for the
7 joint applicants. We think the Commission has
8 procedures in place that allow it to reopen orders
9 and the notice that it must issue and the responses
10 that it would get to such a notice. There would be
11 issues about whether that party had standing and --
12 but, basically, it would be covered by the
13 Commission's existing procedures regarding reopening
14 of orders with regards to what rights parties would
15 have to object to that. The rules of the Commission
16 may apply as far as parties' standing. Those would
17 all be in place with respect to any action to reopen
18 the order. Does that --

19 CHAIRWOMAN SHOWALTER: Anyone else have any
20 comments on that point?

21 MR. FFITCH: Yes, Madam Chairwoman.

22 CHAIRWOMAN SHOWALTER: Say Madam Chair,
23 it's a lot easier.

24 MR. FFITCH: Madam Chair, thank you.
25 Perhaps just to elaborate a little bit on what Mr.

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1 Van Nostrand said, there's no intent here that any
2 party lose their due process rights that they would
3 have under the Commission's statutes or rules, for
4 example, in the context of the reopening of a
5 proceeding or the reopening of an order that might
6 arise if the four parties were to present an AFOR to
7 the Commission.

8 CHAIRWOMAN SHOWALTER: So that let's say an
9 AFOR that changes prices is supported by the parties,
10 and the parties to this agreement want us to reopen
11 or to open, reopen the settlement agreement, and some
12 other party, who's not a party to this agreement,
13 objects. They'd rather just keep prices unchanged,
14 for example. Is it your view that so long as we gave
15 that party an opportunity to argue the issue on the
16 merits, that that would be sufficient for that
17 party's due process rights, as opposed to an
18 insistence that we not vary from an order approving
19 the settlement agreement?

20 MR. FFITCH: I guess my understanding of
21 the effect of this provision is that another party to
22 this proceeding could --

23 CHAIRWOMAN SHOWALTER: Not this proceeding,
24 but another -- a later proceeding.

25 MR. FFITCH: Let me back up, I guess. If

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1 an AFOR were presented and then the Commission
2 reopened the question of the merger agreement and
3 gave notice that parties who received notice could
4 come forward and if they had standing, they could
5 raise any claims that they wanted to make regarding
6 this agreement or the merits of the AFOR, and the
7 Commission could entertain those and make a decision.

8 MS. JOHNSTON: That was my understanding,
9 as well.

10 COMMISSIONER HEMSTAD: I would just add the
11 comment, were that situation to arise, I'm sure we
12 would hear ample argument at that time on what the
13 rights of such -- call it an intervenor would be. I
14 don't see how we can precisely button that down
15 today. That awaits the event.

16 CHAIRWOMAN SHOWALTER: Thanks.

17 JUDGE MOSS: Okay. I believe that brings
18 that agenda item to a close. During the luncheon
19 recess, the Bench had an opportunity to and did
20 consider carefully the pending motion for continuance
21 to reopen discovery and to permit supplemental
22 testimony. It is the judgment of the Bench that
23 there already has been significant opportunity,
24 through the panel presentation that we had and the
25 examination of that panel and through the

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1 cross-examination of various witnesses through the
2 course of the evidentiary proceedings, to develop the
3 body of information related to the settlement
4 agreement that will provide a basis for decision.

5 It is further the Bench's judgment that the
6 process of additional discovery and perhaps
7 supplemental testimony in the subject areas described
8 in argument in favor of the motion is not necessary
9 for the parties to have adequate bases in the record
10 upon which to argue on brief the various points they
11 wish to urge, including those related to the
12 Commission's decisions on the proposed settlement
13 agreement.

14 As far as promoting the settlement process
15 itself, the Bench is of the opinion that the parties'
16 resources are adequate to allow that process to
17 continue in tandem with the post-hearing processes
18 that we'll establish here in a few moments. And we
19 encourage you all to go forward with that process and
20 see if you can achieve a more global proposed
21 settlement in this proceeding.

22 We ask that you bring any such development
23 quickly to the Commission's attention, so that we
24 might schedule an opportunity at an early date to
25 consider any such proposal and act on that promptly.

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1 So on these bases, the motion is denied.

2 Now, I believe that brings us to a point in
3 the proceeding, unless I'm missing something in my
4 notes here, where the Commissioners may wish to
5 retire from the Bench. And we'll take up the various
6 housekeeping and related matters that are necessary
7 parts of bringing any proceeding of this nature and
8 complexity to a close. We can go off the record.

9 (Discussion off the record.)

10 JUDGE MOSS: Okay. Let's go back on the
11 record. I think first we'll take up a purely
12 housekeeping matter, and that is the matter of
13 various -- getting various exhibits into the record.
14 There's been some previous discussions about in terms
15 of being offered by stipulation, if you will, and let
16 me just turn through the exhibit list here, and I'm
17 at page seven of 19, the updated exhibit list that
18 was distributed this morning. If you don't have a
19 copy of that, I know there are some extras back there
20 in the back.

21 On page seven of 19, I come to Exhibit
22 SC-250-T, which is the direct testimony of Michael
23 Brosch, and note that there are Exhibits Numbers 251,
24 SC-252, 253, 254 and 255. And it's my understanding
25 that the parties have agreed that these may be made

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1 part of the record without the need for the witness
2 being present. Mr. ffitch.

3 MR. FFITCH: That is my understanding, Your
4 Honor. And in addition, I'll just note for the
5 record that no motions to strike were received with
6 regard to these exhibits.

7 JUDGE MOSS: That is correct. So without
8 hearing objection, those exhibits will be received as
9 marked. If we move on to page nine, we come to the
10 Exhibit Number 280-T, which is the prefiled direct
11 testimony of Commission Staff member Kathleen M.
12 Folsom, and two exhibits there, 281, 282. We come
13 also to 285-T, which was the prefiled direct
14 testimony by David E. Griffith of the Commission
15 Staff, to 290-T, which is the prefiled direct
16 testimony of Suzanne L. Stillwell of the Commission
17 Staff, and in addition to that direct testimony,
18 there are exhibits numbered sequentially 291 through
19 SC-299.

20 And finally, for the Commission Staff
21 witnesses, we have Exhibit 310-T, prefiled direct
22 testimony by Maurice L. Twitchell, and an exhibit to
23 that, SC-311. And again, it's my understanding that
24 the parties have agreed that these exhibits may be
25 made part of the record without objection or without

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1 the necessity of the witnesses being present. Ms.
2 Johnston?

3 MS. JOHNSTON: That's correct.

4 JUDGE MOSS: Okay. And there being no
5 objection, then those will be admitted as marked.

6 MS. ANDERL: Your Honor, I didn't know if
7 we were coming back to this or not, but the exhibit
8 list identifies the testimony and exhibits of Peter
9 Cummings with a lower case A, indicating that it
10 should be given the same treatment as we've been
11 discussing, I think.

12 JUDGE MOSS: Thank you for bringing that to
13 my attention. Let's turn to that right now. That's
14 back on page three. And again, it was my
15 understanding that Exhibit Number 120-RT, Mr.
16 Cummings' rebuttal testimony, and accompanying
17 exhibits 121 and 122 would be admitted without
18 objection and without the necessity of the witness
19 being present, and you are confirming that for us.
20 There being no objection, those will be admitted as
21 marked.

22 All right. Now, unless I've missed
23 something else in here, we're up to page 10, where
24 there are indicated a number of Bench exhibits there,
25 320, 321, 322, and 323. These are all materials that

01332

1 became an early part of the record or potentially
2 part of the record. This is the -- well, the
3 exception being the partial settlement agreement
4 among US West, Qwest, Public Counsel and Staff, and I
5 understand we will have a revised form of that
6 submitted. When might we have that?

7 MR. VAN NOSTRAND: Probably tomorrow.

8 MS. ANDERL: Tomorrow or Thursday.

9 JUDGE MOSS: Okay. And of course, you'll
10 want to serve that on all parties and provide the
11 requisite number for the Commission. And then the
12 other exhibits include the joint application, the
13 supplement to that application, and the SEC Form S-4
14 that at least was part of my packet of materials
15 received in connection with the application. And the
16 Bench always prefers that there be no objection to
17 its exhibits. Oh, there's going to be an objection
18 this time.

19 MR. HARLOW: I'd like to just note, I
20 assume that the application and the supplement are
21 being admitted solely to illustrate the applicants'
22 position, and that the statements in there are not
23 considered to be taken as factual evidence.

24 JUDGE MOSS: The application is naturally
25 what is under review here, so I'm frankly admitting

01333

1 it for the convenience of the Commission to have it
2 in the record. It is what it is.

3 MR. HARLOW: I guess I'm not going to
4 object for the convenience of the Commission.

5 JUDGE MOSS: It's not testimony, if that's
6 what you're thinking. Okay. Those exhibits will be
7 admitted.

8 Now, let's see. I had a couple of question
9 marks in here, if I can find them. 449, MetroNet
10 cross exhibit. What is the status of that?

11 MR. HARLOW: Can we go in order, Your
12 Honor, because I have a note on 433 that I simply
13 wanted to --

14 JUDGE MOSS: I have 433 as admitted.

15 MR. HARLOW: Yes, but I wanted to, I guess,
16 correct, just clarify for the record that it's still
17 listed as showing all of those letters, when, in
18 fact, only two of them are admitted as part of that
19 exhibit.

20 JUDGE MOSS: Which ones are part of it?

21 MR. HARLOW: The ones that are part of it
22 are the April 26, 1999 letter and the June 16, 1999
23 letter, which actually isn't shown in there, but that
24 was the other one.

25 JUDGE MOSS: Okay. June 16, 6/16/99. All

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1 right. So that exhibit description will be revised
2 to read, after the word dated, it will simply say
3 6/16/99 and 4/26/99. The balance of that description
4 will be stricken. Okay.

5 MR. HARLOW: As for 449, MetroNet does not
6 intend to offer it and had not offered it.

7 JUDGE MOSS: Okay.

8 MR. HARLOW: According to my notes.

9 JUDGE MOSS: All right. What about -- I
10 see there's one C-446. I had a question mark there.

11 MR. HARLOW: That's the one I think we
12 determined off the record is the same as 443. There
13 may be a difference as to the confidential
14 attachment, but we're not intending to offer either
15 443 or 446. So effectively, the issue's rendered
16 moot.

17 JUDGE MOSS: Yes. Okay.

18 MS. ANDERL: Your Honor -- I'll withdraw
19 that.

20 JUDGE MOSS: Never mind.

21 MS. ANDERL: Never mind. I got 446 and 444
22 mixed up for a moment.

23 JUDGE MOSS: Never mind works for me.

24 Okay. Those are the only points I had marked in
25 here. I do understand that we're going to have some

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1 discussion with respect to a couple of exhibits, but
2 is there anything else that -- I consider this sort
3 of the nature of mechanical issues, you know, what
4 happened to this exhibit kind of questions. Are
5 there any more of those that anybody wants to bring
6 to my attention at this point in time? Gee, we
7 offered that and we thought it was admitted, and it
8 wasn't.

9 MR. HARLOW: I guess, yes, Your Honor.
10 Maybe we have to re-argue this, but my understanding
11 of the record on 58 was that you had agreed to take
12 official notice of that. That was the excerpt from
13 the other Commission docket.

14 JUDGE MOSS: Right. And we did have some
15 discussion about taking notice, and I made that
16 subject to my ability to go back and review the
17 Commission's rules on that subject matter, which I
18 have done, and I also encouraged the parties to do
19 that. Because what I quickly discovered was that
20 while there are mechanisms provided in those rules
21 that facilitate the admission of this sort of
22 material, the inclusion of this sort of material into
23 the record, there's that part of the rule that says,
24 subject to any objections.

25 So what we'll have to do, then, is allow

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1 the parties an opportunity to argue if there's any
2 objection to the admission of 58. It can certainly
3 be -- it is an official record, but the fact that it
4 is an official record does not, in and of itself,
5 make it admissible subject, particularly, I would
6 think, to an objection for relevance. You do get
7 past the authenticity hurdle by virtue of it being a
8 Commission record, but not the relevance of it.

9 MR. HARLOW: It's related to a number of
10 other exhibits I intend to offer for MetroNet, so --

11 JUDGE MOSS: You can argue that.

12 MR. HARLOW: Probably take up a fair --
13 assuming there's still an objection, Ms. Anderl, we
14 can take those all up at once, I think.

15 JUDGE MOSS: All right. Did you have a
16 list for me? I had asked that we be provided with a
17 list of any exhibits we were going to handle in this
18 fashion.

19 MR. HARLOW: I apologize, Your Honor, but I
20 just simply forgot to prepare a written list. I do
21 have the capability to list them very quickly.

22 JUDGE MOSS: Okay. Why don't you do that.
23 Fifty-eight.

24 MR. HARLOW: All right. Yes. Why don't we
25 start with Covad. Covad has one to offer, which is

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1 445. And then MetroNet offers 45, 46, 47, 48, 49 --
2 excuse me, not 49 -- 51, 52, and 58.

3 JUDGE MOSS: Okay. And to which of these
4 are there objections, Ms. Anderl?

5 MS. ANDERL: Your Honor, if I could just
6 pull them.

7 JUDGE MOSS: Okay. Take your time. I'm
8 doing the same thing.

9 MS. ANDERL: I guess I'm a little confused.
10 I thought that 45 was the response to data request
11 number 11, and we supplemented that. I thought it
12 was Mr. Harlow's intent to offer the answer including
13 the supplement, which, on my exhibit list, is Exhibit
14 56, which has already been admitted. So that's just
15 a point of clarification on Exhibit Number 45.

16 JUDGE MOSS: Okay. Let's stop there and
17 get through that point. It does appear to be the
18 same number.

19 MR. HARLOW: It is my intention to offer
20 the supplemented exhibit. I don't know why we have
21 two of them, but since we do and it's admitted, I'll
22 withdraw my request as to 45.

23 JUDGE MOSS: Forty-five won't be offered
24 then, okay.

25 MS. ANDERL: Your Honor, we do object to

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1 the balance of the ones identified by Mr. Harlow on
2 the basis that none of those data requests would have
3 been admissible through Mr. Reynolds on
4 cross-examination of him because they are all outside
5 the scope of his direct testimony and they are not
6 otherwise relevant to the matters in this docket.

7 We objected to the data requests, we
8 answered them without waiver of those objections, and
9 we, I guess, renew the objections that we originally
10 made in the responses themselves as to the relevancy
11 to this proceeding.

12 JUDGE MOSS: Okay. Well, whether Reynolds
13 would or would not have been the appropriate witness
14 really doesn't concern me too much. What does
15 concern me is the question of relevance. We'll give
16 Mr. Harlow an opportunity to demonstrate how these
17 are relevant. On what issue material to the
18 determination of the case do these materials bear?

19 MR. HARLOW: If I may, unless Your Honor
20 has specific questions, I'll just address them
21 generally, because I think they all go to the same
22 theory of the case. First of all, MetroNet may well
23 argue that along the lines of many of the other
24 opponents to this merger, that US West has priced
25 Centrex service, which is service that US West's

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1 testimony, Mr. Reynolds in particular, touts as a
2 competitive alternative to US West in an
3 anticompetitive manner, and it is priced in a way
4 that would not comply with Sections 251 and 252 of
5 the act.

6 Therefore, the exhibits go to two things.
7 Number one, to rebut Mr. Reynolds' testimony, which
8 was intended to show that US West is subject to
9 competition in this state much greater than that of
10 the -- that the CLECs, in particular, Mr. Moya for
11 Covad, according to Mr. Reynolds, there's much more
12 competition than Mr. Moya's testimony. So the
13 exhibits go first to that point.

14 Secondly, they go to MetroNet's overriding
15 theory of the case, which is US West is restricting
16 competitive entry through a variety of means which
17 are established by these data request responses,
18 including the terms in the contract which are
19 attached and authenticated by US West, including the
20 pricing, and we're going to get to this issue further
21 when I offer -- or request official notice of US West
22 tariffs, to which I understand US West doesn't
23 object.

24 We feel that, on balance, since there is a
25 certain amount of discretion of the Bench in terms of

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1 how much leeway to allow, given that we're doing this
2 on a request to admit exhibits without
3 cross-examination, the efficiency here is significant
4 and we ought to be able to argue our case on brief
5 based on these exhibits, as well as the documents
6 I'll be requesting official notice of.

7 And there's no -- there's certainly
8 relevance, and I think it's up to US West on brief to
9 argue their side of the case, which is that, well,
10 this doesn't have anything to do with the merger.
11 That's the ultimate issue in this case, what has to
12 do with the merger, what are the appropriate
13 conditions. We're entitled to get evidence in which
14 is available to the Commission in this very efficient
15 manner and make our arguments to the Commission, and
16 the Commission ultimately may decide to proceed to
17 approve the merger without those conditions. That
18 really goes to the ultimate issue and not to the
19 admissibility of this evidence.

20 JUDGE MOSS: Okay, thank you. Let me take
21 a minute to look at these.

22 MR. HARLOW: I should clarify, Your Honor,
23 that I wasn't intending to argue 445 at this time.
24 It simply goes to MetroNet's offer.

25 JUDGE MOSS: Did you have something else,

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1 Ms. Anderl?

2 MS. ANDERL: Yes, Your Honor. I guess I
3 would just point out that MetroNet's claims of
4 anticompetitive conduct and pricing by US West have
5 been ongoing for a number of years, these disputes
6 between the companies. That alone clearly suggests
7 to me that there's no nexus to the merger shown.

8 In fact, MetroNet filed an antitrust suit
9 against US West some months back, and these identical
10 issues which are raised here will be raised and
11 likely resolved in the context of that lawsuit.

12 I think it is important that these could
13 not -- these exhibits could not legitimately have
14 come in through Mr. Reynolds' testimony or through
15 cross of him because that's one of the main reasons
16 Mr. Harlow asserts they ought to come in, is to rebut
17 what Mr. Reynolds said. You're very familiar with
18 what he said on page 27 of his testimony. His
19 testimony was a rebuttal of what Mr. Moya said. I
20 don't think that any of these exhibits go to that
21 issue.

22 And with regard to allowing MetroNet to
23 essentially make its direct case through
24 cross-examination exhibits without allowing US West
25 the opportunity to know as of February 1st this year

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1 what their direct case was and to rebut it and to
2 cross-examine on it or do discovery on it I think is
3 fundamentally unfair and not the right way to
4 proceed.

5 JUDGE MOSS: Mr. Moya's testimony does
6 discuss this point.

7 MS. ANDERL: Mr. Moya's testimony simply
8 discusses the extent to which he believes competitive
9 entry is present in US West's territory. And Mr.
10 Reynolds only said, Well, if you read the report that
11 Mr. Moya was relying upon, there are other things you
12 should consider, as well, including Centrex, resold
13 Centrex lines. That's all it says. And Mr. Moya is
14 not a witness for MetroNet. He's Covad's witness.

15 JUDGE MOSS: Well, we tend to make our
16 cases where we can.

17 MS. ANDERL: I understand that, Your Honor.

18 JUDGE MOSS: I sort of weigh all this in
19 the balance, and we did have some testimony on this,
20 and in particular the joint applicants conducted some
21 cross-examination related to the specific point, and
22 I made a note of that at the time, anticipating that
23 we would have this argument either by memorandum or
24 orally today, and that is really what tilts my
25 consideration, the fact that we did have this as a

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1 subject matter during our cross-examination.

2 I have had an opportunity just now to
3 review these data requests and the responses. And
4 while I will venture to say that a couple of them, at
5 least, are pretty close in the balance, I think, on
6 balance, it is in the best interest of the record to
7 allow these to be included. And so I will overrule
8 the objection and allow these exhibits to be admitted
9 and Mr. Harlow will have an opportunity to make
10 whatever argument he chooses to on brief and you will
11 have an opportunity to respond to that, because we
12 are going to have reply briefs. So I will do that.

13 I think the risk of prejudice to the
14 applicants is certainly no greater, no less than the
15 risk that Mr. Harlow would not be able to make out
16 his case, so that comes out in the wash, so to speak.
17 That's how I'll rule on these. Now, what about 445?

18 MS. ANDERL: No objection.

19 JUDGE MOSS: That saves time. All right,
20 then. Let me take a moment here and we'll admit 46,
21 47, 48, 51, 52, 58, and 445. Now, are there any
22 other exhibits, that is to say, items identified on
23 the current version of the exhibit list that we need
24 to take up from any party? Okay. Hearing nothing on
25 that point, then, I'll be -- I'm under the working

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1 assumption that the exhibit list is correct as just
2 revised.

3 MS. ANDERL: Your Honor, there is --

4 JUDGE MOSS: I'll ultimately check it
5 against the record, but if something comes to your
6 attention in the meantime, I'll appreciate you
7 bringing it to mine. Did you have something else,
8 Ms. Anderl?

9 MS. ANDERL: No, I was just wondering if we
10 had provided enough copies to the Bench of Exhibit
11 452, which is the FCC order.

12 JUDGE MOSS: Well, I actually downloaded it
13 from the Internet, because I couldn't find my copy.
14 I think one of my colleagues took it and claimed it
15 as his or her own. I won't be gender specific at the
16 risk of identifying who that might have been. But,
17 anyway, I lost it down -- it probably would be best
18 if you provided me with a copy, so that I'm certain
19 that I have a copy that we've all been using and that
20 kind of thing. So why don't you give me two copies,
21 if you can conveniently provide them. I'll
22 substitute those for my Internet version.

23 MS. ANDERL: I think we can do that before
24 we leave today.

25 JUDGE MOSS: That would be great. I

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1 believe that I have adequate copies, which sometimes
2 is to say that there remains a clean copy left. If I
3 come to the point where I discover that is not true,
4 I may have to ask somebody to furnish me with a copy
5 of an exhibit. I will do that on an ex parte basis.
6 That's all that would be for, is to get a clean copy
7 of something that I don't have.

8 Now, Mr. Harlow, you mentioned that you had
9 some matters as to which you wanted to request the
10 Bench take official notice.

11 MR. HARLOW: Yes, Your Honor. I thought I
12 might start with the tariff and price list
13 provisions, since Ms. Anderl indicated last week that
14 she would have no objection to those. The first
15 would be US West Communications, Inc. tariff WN U-31,
16 Section 9.1.16, which, for the record, pertains to
17 Centrex plus. Second would be US West
18 Communications, Inc. washington price list for
19 exchange and network services, Section 9.1.16, which
20 also pertains to Centrex plus.

21 The third item would be US West
22 Communications transmittal number 2858 L, as in list,
23 comprised of a letter and price list replacement
24 sheets. The letter is dated April 18, 1997.

25 And finally, US West advice number 3119 T,

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1 as in Tom or tariff, comprised also of a cover letter
2 and replacement tariff sheets, cover letter dated
3 March 3rd, 2000.

4 JUDGE MOSS: March 3rd?

5 MR. HARLOW: March 3rd, 2000.

6 JUDGE MOSS: Okay.

7 MR. HARLOW: Actually, that last offering
8 is for Covad, not for MetroNet.

9 JUDGE MOSS: Okay. Is Mr. Harlow correct
10 that there's no objection?

11 MS. ANDERL: Well, yes and no. We didn't
12 talk about it in this level of detail. I was under
13 the impression that Mr. Harlow was just going to ask
14 generally for official notice to be taken of the
15 various tariffs and price lists that were on file.
16 I think we don't object to that. This specific list
17 I haven't looked at, because I didn't know about it,
18 and it may be that if Mr. Harlow wants to argue
19 things out of those pieces of the tariffs and price
20 lists, we may want to point out other sections.

21 So it might be a better idea to take a more
22 general notice or permit the parties to cite to filed
23 or approved tariffs or price lists. He's gotten
24 pretty granular there, and there may be a page before
25 or a page after that we would need in our reply.

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1 MR. HARLOW: I wouldn't object to that,
2 Your Honor. I simply wanted to put the company on
3 notice as to the specific -- their tariff is rather
4 voluminous, and simply to cite to the tariff wouldn't
5 help them much.

6 JUDGE MOSS: Yeah, I think it is
7 appropriate that you do what you have done. And I
8 believe our rules even provide for that in this type
9 of situation, that you identify the specific portions
10 of voluminous documents that you wish to be part of
11 the record.

12 The other side of the coin that we're faced
13 with here is Ms. Anderl has not had an opportunity to
14 review the tariff with respect to the specific
15 portions, and so I suppose that what I shall do,
16 then, is leave the matter this way. The Bench will
17 take notice of these materials. I will ask that, to
18 the extent a party wishes to refer to specific
19 portions in initial brief or in reply, that those be
20 provided for the convenience of the Bench, those
21 specific portions. I don't want to fill the record
22 with these very thick documents, but if it's a page,
23 few pages sort of thing, it would also be more
24 convenient to have them furnished. And I would not
25 encourage that being done in the way of a formal

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1 appendix to the brief or anything, just furnish them,
2 so that -- for my convenience.

3 The record copy, if you will, and I'm using
4 little quotes symbol here, is the official record on
5 file. So okay. Anything else of that nature?

6 MR. HARLOW: Sorry, Greg, I have two more.
7 Request that the Commission take official notice of
8 two of its orders. The first would be the fourth
9 supplemental order in Docket UT-911488, which service
10 date on that was November 18, 1993, and also the
11 Commission's 15th supplemental order in Docket Number
12 UT-950200, dated April 11, 1996.

13 MS. ANDERL: It's been my understanding,
14 Your Honor, that the Commission doesn't need to take
15 official notice of its own orders, and that those can
16 be cited even without -- in a brief or in an argument
17 without specifically having referenced them or asked
18 for such notice prior. And so with that, I guess we
19 don't object, but we don't think it's necessary.

20 JUDGE MOSS: Is there any need to make
21 these exhibits?

22 MR. HARLOW: I don't think so, Your Honor.
23 The rule, which is 750, gives the Bench discretion as
24 to what kind of copies need to be distributed.

25 JUDGE MOSS: Yeah, it seems to me that the

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1 parties are free to refer to Commission orders on
2 brief without them being part of the record. And I
3 know there's some discussion in the rules about
4 judicial cognizable facts, including orders,
5 exclusive of findings of fact and that sort of thing,
6 I think it's clear that the parties can refer to the
7 Commission's orders, just as they can refer to
8 precedent and authorities. So with that
9 understanding, we won't make them part of the record,
10 but you certainly may refer to them in your
11 arguments.

12 MR. HARLOW: Thank you, Your Honor. That's
13 all I have.

14 JUDGE MOSS: Mr. Kopta.

15 MR. KOPTA: Thank you, Your Honor. The
16 only other documents that we had thought about having
17 the Commission take official notice of would be
18 interconnection agreements that the Commission has
19 approved under the Telecommunications Act of 1996.
20 They're kind of neither fish nor fowl in that they're
21 not a tariff, but they're also not an order. So I'm
22 not sure what needs to be done, but since there were
23 several references, particularly in Mr. Reynolds'
24 testimony, to whether interconnection agreements have
25 certain provisions or do not, then I think it would

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1 be beneficial to be able to -- for both the joint
2 applicants and the intervenors to be able to refer to
3 interconnection agreements that the Commission has
4 approved.

5 And I don't know whether it's necessary if
6 you need to identify specific ones, since there are
7 over 100, I suppose, based on the latest count. But
8 certainly for our purposes, the interconnection
9 agreements between AT&T and US West and TCG-Seattle
10 and US West would be the ones that we would designate
11 as specific to the request that we would have for
12 official notice.

13 JUDGE MOSS: There has been a fair amount
14 of reference to interconnection agreements by various
15 parties in the course of the proceeding and what
16 those agreements provide, so it may be useful to have
17 those, but I would like to hear from the joint
18 applicants on this question, and then we'll discuss a
19 little bit how we might want to handle the matter.
20 Or if you have nothing to say, that's all right, too.
21 If a party wants to refer to something in an
22 interconnection agreement, do you have a problem?

23 MS. ANDERL: We don't have any objection to
24 that. I guess I'm struggling with the technicalities
25 of whether it needs to be official notice or not, but

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1 we certainly know that some of the parties believe
2 that the interconnection agreements are relevant,
3 probably including us.

4 JUDGE MOSS: Well, I suspected as much.

5 MS. ANDERL: And yet don't want to burden
6 the record with hundreds of pages.

7 JUDGE MOSS: Yeah, that's the concern I
8 have, is I don't want to burden the record either.
9 You're right, under our rule, these things are
10 neither fish nor fowl. I had some discussion with
11 some of the other judges this morning on this very
12 subject, and we all agree they probably fall into
13 that provision even though those aren't specifically
14 in that. And that conclusion is no doubt of the type
15 that would get us in trouble at some point.

16 So I think to avoid that, it sounded like,
17 Mr. Kopta, that there were some specific agreements,
18 at least, and I'm wondering if, further, there are
19 specific portions of the specific agreements. I know
20 those things are fairly lengthy, each of them, and --
21 well I shouldn't say that. I haven't looked at all
22 of them. But the ones I've looked at are pretty
23 long. So is it possible to, if you will, focus this
24 down to a manageable sized exhibit, let's say
25 something a little less wieldy than the SBC-Ameritech

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1 order?

2 MR. KOPTA: That's a good question. I
3 mean, for our purposes, what we're trying to do is
4 demonstrate a negative. So it's difficult to say
5 that there's nothing in the agreement that says X by
6 designated certain pages. One assumes that the joint
7 applicants may refute that by saying, yes, on page Y,
8 you'll find a provision that we believe addresses
9 that issue. So that's why we're still kind of -- we
10 can't get our way out of this box, unfortunately.

11 JUDGE MOSS: I think the thing to do, then,
12 will be handle this in the same way we discussed
13 earlier with respect to some other tariffs and
14 whatnot. I do feel reasonably comfortable in the
15 conclusion that these fall within the Commission's
16 rules on official notice. That's 480-09-745 and 750,
17 I think cover the universe on that subject. And so
18 let's handle it that way. And to the extent parties
19 wish to refer to these in argument, they may do so.
20 And again, I will couch it in terms of furnishing the
21 Bench a courtesy copy of those relevant or cited
22 sections, and that will make life easier for those of
23 us who are involved in the post-hearing task.

24 MR. KOPTA: Thank you, Your Honor.

25 JUDGE MOSS: You're very welcome. All

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1 right. Anything else of this nature? Everybody else
2 happy with the record?

3 MS. ANDERL: Does that indicate, Your
4 Honor, then, that none of the other cross exhibits
5 are offered by any of the parties? Is that your
6 understanding?

7 JUDGE MOSS: Not as far as I'm concerned.

8 MS. ANDERL: I didn't hear it, either.

9 JUDGE MOSS: This exhibit list is going to
10 get a lot shorter in about two hours, as in these
11 notebooks are going to shrink in size, too. I throw
12 all this stuff away if it's not offered, so --

13 MR. FFITCH: Your Honor, will you be
14 issuing a further revised exhibit list?

15 JUDGE MOSS: Yes I will. I will issue a
16 final -- what I hope is a final exhibit list, and
17 we'll get that out to the parties in a day or two.

18 MR. FFITCH: Great.

19 JUDGE MOSS: Okay. Let's see how my
20 agenda's doing here. It would appear, except for
21 that catch-all category of other business, the one
22 important subject we need to discuss is a briefing
23 schedule. I have mentioned several times the Bench's
24 intention to have both simultaneous initial briefs
25 and simultaneous reply briefs. We want to establish

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1 the timing for filing and also consider the
2 possibility of page limitations, particularly on the
3 reply briefs, and so we're going to go off the record
4 for a few minutes and have that discussion, and
5 hopefully arrive at something that's mutually
6 agreeable, and then we'll go back on the record to
7 memorialize that. So we're off the record.

8 (Discussion off the record.)

9 JUDGE MOSS: Let's go back on the record.
10 We have had some discussion off the record with
11 regard to our post-hearing process and other
12 procedural matters and have determined that April
13 28th will be the date for the filing of simultaneous
14 initial briefs, and that those will be subject to the
15 Commission's rules on page length, format and so
16 forth.

17 We are also providing for the filing of
18 simultaneous reply briefs on May 12, and those will
19 be limited to 30 pages. And again, should conform to
20 the Commission's other requirements for briefs, which
21 are in the rules in WAC 780-09.

22 I want to remind the parties on the record,
23 as I did off the record, that reply briefs are
24 limited to arguments directed specifically to an
25 opponent's arguments in the initial brief. If you go

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1 beyond that, the entire brief, the entire reply
2 brief, that is, may be rejected, and we will be
3 looking at that, so please be cautious about that.
4 In fact, it might be most useful to peg your points
5 to specific headings in an opponent's brief. That
6 will also facilitate the consideration of the
7 competing arguments on the individual points.

8 Were there any other matters that we needed
9 to document on the record? Mr. Kopta.

10 MR. KOPTA: Just the service.

11 JUDGE MOSS: The service. Yes, we did
12 discuss the matter of service. The dates that I have
13 given are in hand dates, and the parties have been
14 discussing how they may cooperate to ensure that the
15 in hand service is affected by facsimile or other
16 electronic transmission, including e-mail and e-mail
17 attachment or otherwise. And I feel assured that the
18 parties will get those briefs into each other's hands
19 on the dates indicated, and so we will follow that
20 process.

21 Now, of course you should follow up any
22 electronic service with a hard copy, just as you
23 follow up any electronic filing with the Commission
24 with a hard copy and the requisite number of copies
25 for internal distribution purposes here. Mr. ffitich.

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1 MR. FFITCH: I just wanted to clarify my
2 understanding about the joint applicants' briefing
3 rights. Is it my understanding that they each have
4 independent briefing rights?

5 JUDGE MOSS: They could brief separately.
6 They are separate parties in the case. And though
7 they have proceeded jointly, unless you can point me
8 to something that would limit them because of the --

9 MR. FFITCH: Well, I was going to -- I
10 guess I had understood you to say that they should
11 not duplicate the issues.

12 JUDGE MOSS: Right, I think it's
13 understood. We did discuss off the record that, to
14 the extent they do decide to file separate briefs,
15 they would coordinate that effort so that we don't
16 have duplicative arguments. And my recollection is
17 that the joint applicants themselves thought that
18 that would probably be a pretty good approach.

19 MS. ANDERL: That's right, Your Honor.

20 JUDGE MOSS: Okay. Anything else? Well, I
21 do want to thank you all for one of the most
22 professional hearings I've ever had the pleasure to
23 help conduct, and I think you all did a marvelous
24 job. And I look forward to the briefs and working
25 with the Commissioners as we bring this case to a

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1 final conclusion.

2 (Proceedings adjourned at 2:54 p.m.)

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