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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Continued )  
4 Costing and Pricing of ) Docket No. UT-003013  
5 Unbundled Network Elements and ) Volume III  
6 Transport and Termination. ) Pages 124 - 156  
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8 A prehearing conference in the above matter  
9 was held on August 16, 2000, at 1:46 p.m., at 1300  
10 South Evergreen Park Drive Southwest, Olympia,  
11 Washington, before Administrative Law Judge LAWRENCE  
12 BERG.

13 The parties were present as follows:

14 QWEST CORPORATION, by LISA A. ANDERL,  
15 Attorney at Law, 1600 Seventh Avenue, Suite 3206,  
16 Seattle, Washington 98191.

17 THE WASHINGTON UTILITIES AND TRANSPORTATION  
18 COMMISSION, by SHANNON E. SMITH, Assistant Attorney  
19 General, 1400 South Evergreen Park Drive Southwest,  
20 Post Office Box 40128, Olympia, Washington 98504-0128.

21 VERIZON NORTHWEST, INC., by JENNIFER  
22 McCLELLAN (via bridge line), Attorney at Law, Hunton  
23 and Williams, 951 East Byrd Street, Richmond, Virginia  
24 23219.

25 WORLDCOM, INC., by ANN E. HOPFENBECK (via  
26 bridge line), Attorney at Law, 707 17th Street, Suite  
27 3600, Denver, Colorado 80202.

28 PUBLIC COUNSEL, by SIMON J. FFITCH (via  
29 bridge line), Assistant Attorney General, 900 Fourth  
30 Avenue, Suite 2000, Seattle, Washington 98164.

31 COVAD COMMUNICATIONS, by CLAY DEANHARDT,  
32 Attorney at Law, 4250 Burton Drive, Santa Clara,  
33 California 95054.

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1                   NEXTLINK WASHINGTON, ELECTRIC LIGHTWAVE,  
2                   INC., ADVANCED TELCOM, INC., NEW EDGE NETWORKS, INC.,  
3                   NORTHPOINT COMMUNICATIONS, McLEOD USA, AT&T, by GREGORY  
4                   J. KOPTA, Attorney at Law, Davis, Wright, Tremaine,  
5                   LLP, 1501 Fourth Avenue, Suite 2600, Seattle,  
6                   Washington 98101.

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24                   RHYTHMS LINKS, INC., TELIGENT SERVICES, INC.,  
25                   TRACER, by ARTHUR A. BUTLER, Attorney at Law, Ater  
                    Wynne, 601 Union Street, Suite 5450, Seattle,  
                    Washington 98101-2327.

24 Kathryn T. Wilson, CCR

25 Court Reporter

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

2 JUDGE BERG: The conference will please come  
3 to order. This is a prehearing conference before the  
4 Washington Utilities and Transportation Commission in  
5 Docket No. UT-003013. This is the matter of the  
6 continued costing and pricing of unbundled network  
7 elements and transport and termination. The prehearing  
8 conference is being held in Olympia, Washington on  
9 August 16th, the year 2000. My name is Larry Berg, and  
10 I'm the presiding administrative law judge. At  
11 hearing, I will be presiding along with the  
12 commissioners.

13 I'd like to begin this morning's session by  
14 taking appearances from the parties who are present,  
15 both in this room and by teleconference, and we will  
16 begin with those parties who are present within the  
17 room beginning on my left and moving to the right,  
18 starting with Ms. Anderl.

19 MS. ANDERL: Lisa Anderl representing Qwest  
20 Corporation. Do you need the full address?

21 JUDGE BERG: For counsel that have already  
22 entered appearances, it's not necessary to repeat any  
23 contact information.

24 MR. BUTLER: Arthur A. Butler appearing on  
25 behalf of Rhythms Links, Inc., Teligent Services, Inc.,

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1 and TRACER.

2 MR. DEANHARDT: Clay Deanhardt appearing on  
3 behalf of Covad Communications.

4 MR. KOPTA: Gregory J. Kopta of the law firm  
5 Davis, Wright, Tremaine, LLP, on behalf of AT&T,  
6 Nextlink, ELI, ATG, McLeod USA, Northpoint, and New  
7 Edge.

8 MS. SMITH: Shannon Smith on behalf of  
9 Commission staff.

10 JUDGE BERG: Appearances from those parties  
11 who are on the bridge.

12 MS. McCLELLAN: This is Jennifer McClellan of  
13 the law firm Hunton Williams representing Verizon  
14 Northwest, Inc., formerly known as GTE Northwest.

15 MS. HOPFENBECK: This is Ann Hopfenbeck  
16 representing WorldCom, Inc.

17 MR. FFITCH: Simon ffitch representing Public  
18 Counsel. Your Honor?

19 JUDGE BERG: Yes.

20 MR. FFITCH: As the parties are aware, I  
21 wanted to advise the Bench that our participation today  
22 with the leave of the Bench would be limited. As the  
23 parties and the Bench are aware, we have not filed  
24 testimony in this phase of the proceeding. I do intend  
25 to attend the hearings at least some of the hearing

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1 sessions and perhaps conduct brief cross-examination,  
2 but what I was hoping to do, Your Honor, was to very  
3 briefly state our intended level of participation and  
4 position on the administrative issues in hopes that  
5 there is a large number of the issues that are run  
6 through would not require our attendance, and I may not  
7 need to continue to participate in the entire  
8 conference, so if I just might address that now or at  
9 another time.

10 JUDGE BERG: Let me go ahead and finish going  
11 down the parties list. Are you telling me, Mr. ffitch,  
12 that there may be some agenda items that you want to  
13 comment on here today but you may not be able to stay  
14 on the line as they come up in the order on the agenda  
15 list?

16 MR. FFITCH: What I was hoping to do was to  
17 comment in about one or two minutes in advance just to  
18 advise you, for example, that we have no planned  
19 cross-examination and would only ask for a reservation  
20 of the minimal amount for any given witness, things of  
21 that nature. We have no cross-examination exhibits to  
22 distribute or identify.

23 JUDGE BERG: What I'll do is I'll finish  
24 working off my checklist, Mr. ffitch, and then I'll  
25 give you an opportunity to make a short statement so

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1 that if you do not wish to stay on the line for the  
2 whole proceeding, you can be excused.

3 MR. FFITCH: Thank you, Your Honor.

4 JUDGE BERG: Any other appearances on the  
5 bridge line? I'll just note that there is no response.  
6 Sprint Communications Company remains a party to the  
7 proceeding, even though they are not represented here  
8 today, and I have received a written communication from  
9 Mr. Finnigan that SBC Telecom will not be participating  
10 in the Part A cross-examination hearing and verified  
11 with him by telephone that his other client, Washington  
12 Independent Telephone Association, likewise would not  
13 be participating in cross-examination of witnesses in  
14 Part B.

15 Mr. Kopta, let me check with you. Will you  
16 be representing AT&T at the hearing?

17 MR. KOPTA: Yes, I will.

18 JUDGE BERG: Will you also be representing  
19 McLeod USA at the hearing?

20 MR. KOPTA: Yes, I will.

21 JUDGE BERG: At this time, would it be  
22 appropriate for the Commission to modify the parties'  
23 representatives list to show you as the contact for  
24 both of those parties?

25 MR. KOPTA: At this time, that would probably

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1 be appropriate, yes.

2 JUDGE BERG: Let me ask if there is anyone  
3 else on the bridge who desires to appear in this  
4 proceeding in a representative capacity who has not  
5 stated an appearance? Let the record show there is no  
6 response. At this time, Mr. Ffitch, why don't you go  
7 ahead and present your brief position on the agenda  
8 items.

9 MR. FFITCH: Thank you, Your Honor. With  
10 regard to Agenda Item 2, we have no preference on the  
11 order of cross and would accept your ruling on where  
12 Public Counsel would appear. We would not identify any  
13 cross or any witness except that we would request the  
14 opportunity to ask brief follow-up cross so to have a  
15 minimal time reservation, something like five minutes.

16 We do not have a preference on the order of  
17 witnesses. We do not have any cross-examination  
18 exhibits to identify or distribute. We have no  
19 outstanding discovery, and looking at the list here,  
20 with regard to Item 3, hearing room arrangements, we  
21 would accept the ruling of the Bench on hearing room  
22 arrangements.

23 JUDGE BERG: Will Public Counsel have more  
24 than one attorney here at any time?

25 MR. FFITCH: We will not, Your Honor. We

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1 will be in attendance throughout the hearing but  
2 intermittently. Our primary interest is in the  
3 line-sharing issue. I would intend to be present on  
4 the first day and then attend with the leave of the  
5 Bench, depending on the subject matter of that witness.  
6 We do not have a position on the motion to strike or  
7 the other issues that you've listed. I think that  
8 would complete my preliminary statement, Your Honor.

9 JUDGE BERG: All right. What about the  
10 process of getting cross exhibits to Mr. ffitch? Do  
11 you have any position on that?

12 MR. FFITCH: Your Honor, I'm flexible on  
13 that. I'm content to receive them in the hearing room,  
14 if that's the otherwise adopted procedure. I'm on  
15 annual leave at the present time and will be putting  
16 these materials together most likely at the beginning  
17 of next week, in any event, so if the things go to the  
18 office, they can be organized by my staff, so I'm  
19 flexible.

20 JUDGE BERG: If it's acceptable to you that  
21 we hold a set of cross exhibits here for you to pick up  
22 on Monday morning, the first day of hearings, that  
23 would probably be the easiest to accomplish.

24 MR. FFITCH: Your Honor, that would be  
25 acceptable.



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1 JUDGE BERG: Everything else that you've  
2 mentioned is acceptable as well from my perspective,  
3 Mr. ffitich. Do any of the other parties have any  
4 questions for Mr. ffitich? Hearing nothing, Mr. ffitich,  
5 you are welcome to continue to participate or be  
6 excused at any time without further notification.

7 MR. FFITCH: Thank you for the accommodation,  
8 Your Honor.

9 JUDGE BERG: You are welcome. All right, the  
10 next point I'd like to take up is in reference to Item  
11 2.1, the review of the order of cross-examination by  
12 counsel. Parties in the hearing room, let me direct  
13 your attention to the legal size document printed in  
14 landscape format. Along the top of this matrix are  
15 columns headed with the names of the parties, and along  
16 the left-hand side, the rows are labeled by the  
17 witnesses. The first page relates to week one of  
18 hearings, listing those witnesses previously proposed  
19 by the parties for week one, and the second page is  
20 week two. The order of parties at the top of the page,  
21 the column headings, is the preferred order from the  
22 Commission for parties to conduct cross-examination.  
23 This is a general preference and on a  
24 witness-by-witness basis. If the parties themselves  
25 have a special request to change the order, the

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1 Commission will entertain any requests as presented,  
2 and I'll just read across in that order at this time.

3         The first party is Qwest followed by Verizon,  
4 the CLEC's, and based upon information from Mr. Kopta,  
5 that would include AT&T and McLeod, to be followed by  
6 TRACER, to be followed by WorldCom, followed by Sprint,  
7 followed by Covad, followed by Commission staff,  
8 followed by Public Counsel, then questions from the  
9 Commission's advisors, notably Dr. Gabel, and then  
10 questions from the Bench.

11         I will note when I say TRACER, it actually  
12 shows up as TRACER plus on the matrix. Mr. Butler,  
13 that is intended to refer to questions from you on  
14 behalf of your joint clients. Likewise, it appears  
15 that I may need to add a column for those clients who  
16 are represented by Mr. Harlow. That would go in the  
17 column where McLeod presently is listed, so that would  
18 be following Covad we would have those other parties  
19 represented by Mr. Harlow, and I'm looking for my sheet  
20 at this time. That would be MPower, Inc., and ICG  
21 Telecom Group, Inc. Any comments from the parties at  
22 this time regarding that list of preferred  
23 cross-examination?

24         MR. DEANHARDT: Yes, Your Honor. I have  
25 discussed this, although, not with Ms. Hopfenbeck. I

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1 have with Mr. Kopta and also with Mr. Butler and  
2 Mr. Harlow. We were thinking that for efficiency sake  
3 on the witnesses that are primarily related to line  
4 sharing that it would make sense for both the Qwest  
5 witnesses and the Verizon witnesses for Covad to do the  
6 first cross-examination and then follow up with the  
7 order after that in the order that the Commission  
8 recommends if there is no further comments.

9           Those witnesses for Qwest would be, to my  
10 mind, Mr. Fitzsimmons, Mr. Thompson, Mr. Hubbard, and  
11 Ms. Brohl, and for GTE, that would be Mr. Boshier,  
12 Mr. Bykerk, Mr. Behrle, and I think also Ms. Casey, and  
13 actually, I can't remember if Tanimura is only line  
14 sharing or not.

15           MS. McCLELLAN: Tanimura is...

16           MR. DEANHARDT: So that one is probably less  
17 of an issue.

18           JUDGE BERG: Mr. Deanhardt, that's the result  
19 of discussions between yourself, Mr. Harlow,  
20 Mr. Butler, Ms. Hopfenbeck, and Mr. Kopta; is that  
21 correct?

22           MR. DEANHARDT: No. Everybody but  
23 Ms. Hopfenbeck. I did not have an opportunity to speak  
24 to her.

25           MS. HOPFENBECK: And I don't have any

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1 objection to Mr. Deanhardt's proposal.

2 JUDGE BERG: Perhaps what we should do is for  
3 all witnesses have Covad follow for Qwest, Verizon and  
4 lead before the CLEC's.

5 MR. DEANHARDT: What we tried to do, Your  
6 Honor, and I know this may cause some confusion in the  
7 order and back and forth, but is in order to make the  
8 hearings more efficient so that not everybody is asking  
9 the same questions is to assume then that for the other  
10 witnesses, Mr. Kopta or other people would take the  
11 lead, and we would be doing our individual interests  
12 after that and making sure our interests were covered,  
13 but that way, we don't have two or three attorneys  
14 doing two- or three-hour cross-examinations.

15 JUDGE BERG: That's what we will do then. I  
16 understand, thank you. Any other comments?

17 MS. ANDERL: Along those lines, we would just  
18 reserve the right during the hearing to discuss as to  
19 any particular witness whether Verizon would like to  
20 cross ahead of me, and we will just let you know on a  
21 witness-by-witness basis.

22 JUDGE BERG: That's right. I don't mean this  
23 to indicate that the parties are being required to  
24 proceed in this fashion. It did make some sense from  
25 the Commission standpoint, but we will just deal with

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1 it on a witness-by-witness basis.

2 The next point I'd like to take up is to  
3 review the order of witnesses and to address the  
4 specific requests of the parties relating to orders of  
5 witnesses.

6 MS. ANDERL: Your Honor, we have a matter  
7 that we've not brought up before on that with a special  
8 scheduling request for Mr. Inouye.

9 JUDGE BERG: Off the record for a moment  
10 (Discussion off the record.)

11 JUDGE BERG: While off the record, there has  
12 been discussion among the parties regarding the order  
13 in which counsel will conduct cross-examination during  
14 the two-week hearing to begin on Monday, August 21st,  
15 as well as discussion regarding the order of witnesses  
16 and the time in which witnesses will be on the stand  
17 for cross-examination. At this point, I find it's not  
18 necessary to specifically identify the order of  
19 witnesses or the order of cross-examination, but based  
20 on the discussions we've had with the parties, we will  
21 review and confirm today's discussion as well as the  
22 preference of the parties during the hearing on a  
23 witness-by-witness basis. We will make every effort to  
24 adjust the schedule to accommodate and balance the  
25 needs of all parties. Any comments from the parties

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1 before we go back off the record? Hearing nothing, we  
2 will be off the record.

3 (Discussion off the record.)

4 JUDGE BERG: We are back on the record.

5 While off the record, there was a discussion regarding  
6 outstanding discovery. Several parties have data  
7 requests for which responses are pending. The parties  
8 are requested to notify all other parties as soon as  
9 practical of their intent to use responses to discovery  
10 requests as cross-examination exhibits during the  
11 hearing. The Commission will entertain any objections  
12 to the use of those exhibits at the time they are  
13 offered.

14 Also, the parties have been requested to  
15 continue to work together outside of the hearing room  
16 regarding stipulations for admission of both prefiled  
17 and cross-examination exhibits. Anything the parties  
18 would like to add? Hearing nothing, we will be off the  
19 record.

20 (Discussion off the record.)

21 JUDGE BERG: While off record, the parties  
22 worked together to identify and assign exhibit numbers  
23 to all prefiled and cross-examination exhibits. For  
24 those counsel not in attendance, being Ms. Hopfenbeck  
25 representing WorldCom and Ms. McClellan representing

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1 GTE, those counsel agree that they will accept service  
2 of all cross-examination exhibits at the start of  
3 proceedings on Monday, August the 21st.

4       There was also discussion regarding the use  
5 of exhibits from the prior cost docket, UT-960369. No  
6 party expressed an intent to make use of any exhibit  
7 from that prior proceeding during the course of  
8 hearings in this case but indicated there might be  
9 reference to those other exhibits in briefs or other  
10 arguments. The Commission takes no position on that  
11 possibility at this time, but in doing so, it's not  
12 intended to either approve or preclude parties from  
13 doing so, and that if some reference to exhibits from a  
14 prior proceeding or any other reference an exhibit  
15 creates a circumstance of unfairness or a situation  
16 where other parties should be allowed an opportunity to  
17 respond, the Commission will address that need as it  
18 arises. Any comment from the parties on that?

19       MR. KOPTA: I would just make one  
20 clarification, Your Honor, which is that one of the  
21 exhibits we marked as a cross exhibit from Verizon for  
22 Mr. Knowles is a portion of an exhibit from the prior  
23 cost docket, so it's just a clarification of your  
24 earlier statement that no party referenced any exhibit  
25 that they were going to use on cross. There is one

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1 exhibit that will be used for that purpose, but your  
2 reference, I believe, was to some of the statements I  
3 had made, which was we did not intend to use any of  
4 them on cross and may find it necessary to refer in a  
5 very limited fashion to one or more exhibits that were  
6 admitted into the record in the earlier cost docket but  
7 would not do so in a manner that would be a comparison  
8 or otherwise a use that should have been made on  
9 cross-examination, but I understand your ruling that at  
10 this point, the Commission takes no position, and we  
11 will deal with that issue at the time it arises, if it  
12 does.

13 JUDGE BERG: If parties present an exhibit  
14 for admission in this proceeding that just happens to  
15 be an exhibit that was previously admitted in some  
16 other proceeding, and it is admitted, then it's  
17 available for use as any other admitted exhibit in this  
18 case. My concern would be an attempt to import the  
19 record from some other case not admitted in this  
20 proceeding or offered for admission in this proceeding.

21 MR. KOPTA: I understand, Your Honor. I  
22 think the reason that the issue was raised was because  
23 this is a continuation of a prior docket, which raises  
24 the issue of the extent to which one can refer to the  
25 record in the prior docket. Certainly, even the name



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1 we refer to this is the new generic proceeding, Phase  
2 IV, recognizes that Phases I through III were in the  
3 prior cost docket, so that's why we wanted to raise it  
4 at this point just to have it clear on the record what  
5 the limitations are in respect to referring to the  
6 record and the prior proceeding.

7 JUDGE BERG: Anybody else want to say  
8 anything else on that subject? The last point I wanted  
9 to touch on under the issues of witness  
10 cross-examinations and exhibits is that to the extent  
11 any parties' testimony or exhibits filed for use in  
12 Part A is also relevant to issues and testimony in Part  
13 B, they will be available for use in Part B. Do take  
14 note that there is at least one instance and possibly  
15 two instances where parties have prefiled testimony  
16 that is relevant to both Part A and Part B, and there  
17 is no need to segregate that testimony in order to use  
18 it in both parts of this proceeding.

19 MR. DEANHARDT: Your Honor, I just wanted to  
20 clarify that also leaves that testimony subject to  
21 cross-examination in the latter proceedings.

22 JUDGE BERG: Yes, it does. We'll be off the  
23 record.

24 (Discussion off the record.)

25 JUDGE BERG: Several other matters have been

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1 discussed off the record since the last portion of the  
2 transcript. With regards to the late petition for late  
3 intervention of Focal Communications Corporation in  
4 Part B, there is no objections stated, and Focal  
5 Communications Corporation will be allowed intervention  
6 subject to its coordinating its presentation with other  
7 parties as represented in that Part B proceeding.

8 With regards to other matters, Ms. Anderl for  
9 U S West indicated that U S West may request an  
10 opportunity for supplemental direct testimony to be  
11 filed or presented by Mr. Thompson during the hearing.  
12 Ms. Anderl has indicated she will file a letter and  
13 serve that letter on all parties with as much detail as  
14 she has available and that she will discuss with other  
15 counsel her request prior to the hearing. At the time  
16 that it comes up at the hearing, the Commission will  
17 rule on the request and any objections that other  
18 parties may pose.

19 Is there anything else the parties want to  
20 make part of this record before we take a break?  
21 Hearing nothing, we will be off the record again.

22 (Recess.)

23 JUDGE BERG: Qwest and Verizon have filed a  
24 joint motion to strike rebuttal testimony of John C.  
25 Klick, who has filed testimony on behalf of Covad

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1 Communications Company and Rhythms Links. An  
2 opposition to the joint motion was filed on behalf of  
3 Covad Communications and Rhythms, and at this point in  
4 the time, the Commission would like to allow the  
5 parties an opportunity to make additional reply  
6 comments. The Commission has the arguments of the  
7 parties in their pleadings, and it's not necessary to  
8 repeat those arguments, but we are looking to give the  
9 parties some additional opportunity to state their  
10 positions, and I think what I'd like to do is start  
11 with U S West and GTE. I'd like the parties to try and  
12 limit their comments to total, to GTE and U S West to  
13 five minutes apiece, and then give Rhythms and Covad an  
14 extra five minutes to state their position, so  
15 Ms. Anderl, are you prepared to begin?

16 MS. ANDERL: Yes, I am, Your Honor. Thank  
17 you. I would like to just start with a little bit of  
18 an overview and explain what I think happened with  
19 Mr. Klick's testimony to give you some context.  
20 Mr. Klick was not retained by Covad and Rhythms until  
21 very late in this docket. I was contacted on July  
22 18th, three days before responsive testimony was due by  
23 counsel for Covad and Rhythms. At that point in time,  
24 Ms. Berman asked me if I would waive the traditional 10  
25 days after which a protective agreement was filed and

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1 before which they could give their witness the  
2 confidential information; in other words, there is  
3 usually a 10-day period in which I could object. She  
4 asked if I would waive that in order that they could  
5 retain Mr. Klick and his firm to work on this in the  
6 Washington docket, and I said fine.

7           The point there is that was three days before  
8 the responsive testimony was due. Mr. Klick was, in  
9 fact, on the stand in Minnesota on the 19th of July, so  
10 I think it's unlikely that he was able to do a lot of  
11 work on the Qwest material during that time. I don't  
12 know what his firm is doing on the 19th, 20th, and  
13 21st, but I do know that responsive testimony was due  
14 and filed on the 21st.

15           It seems to me that what happened is that  
16 Covad and Rhythms attempted to file some placeholder  
17 testimony on the 21st because they simply had not had  
18 Mr. Klick on board for long enough to review the  
19 material and file the substantive responsive testimony  
20 that he should have filed during that second round of  
21 testimony. He did, in fact, put some placeholder type  
22 comments in his testimony that Mr. Deanhardt has cited  
23 in the opposition, but I don't think those types of  
24 comments are sufficient to hold the place and allow  
25 Covad and Rhythms to file, essentially, new cost

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1 testimony and new cost studies in the rebuttal round of  
2 testimony. Mr. Klick's own testimony belies the fact  
3 that he is not really filing rebuttal. He's filing  
4 responsive testimony. On the very first page of his  
5 rebuttal, August 4th testimony, he states when he was  
6 asked what the purpose of his testimony is that he's  
7 been asked by Covad and Rhythms to address the direct  
8 and response testimony filed in this docket. That's  
9 clearly what he does here. However, the only proper  
10 time for addressing the direct was in the response, and  
11 Covad and Rhythms clearly failed to do that.

12 I think the clearest example of an attempt to  
13 insert an entirely new cost study and analysis is the  
14 use of the AT&T nonrecurring charge study from the  
15 Minnesota docket. Mr. Klick clearly attempts to  
16 introduce the results of the cost study. He attaches  
17 it as his Exhibit No. 5 to his testimony.

18 I think that Covad and Rhythms are kind of in  
19 a bind here. Covad has said they are not introducing  
20 the cost model but only the results. However, if  
21 that's the case, then they are asking the Commission to  
22 make a decision based on a model that's not in evidence  
23 in the record. If, on the other hand, they are trying  
24 to introduce the actual cost study, then I think in  
25 rebuttal it's too late because there is absolutely

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1 nothing that precluded them from producing that AT&T  
2 nonrecurring cost model and study in the responsive  
3 round, the July 21st. In fact, we were looking for it  
4 because we were in the Minnesota docket with Covad and  
5 Rhythms, and my witness, Sheri Thompson, said to me  
6 that he was very, very surprised that we had not seen  
7 the AT&T nonrecurring material in the July 21st  
8 testimony; that we had kind of thought it might come in  
9 since Mr. Klick had been retained. Since it didn't  
10 though, we obviously didn't prepare any response to it,  
11 and when it did come in on August 4th, there was no  
12 opportunity to prepare a response for it.

13 That's why we think it's totally  
14 inappropriate to be allowing admission of that material  
15 at this point in time. You have detailed in the motion  
16 the testimony and exhibits that we believe ought to be  
17 stricken, and I believe that that concludes my remarks  
18 unless you have any questions.

19 JUDGE BERG: I may have questions, but I  
20 think I will hold them to the end. Ms. McClellan, do  
21 you wish to add anything to Ms. Anderl's statement?

22 MS. McCLELLAN: Yes, thank you. Briefly in  
23 response to Covad and Rhythms' opposition, I'd like to  
24 point out that the reason they could not provide this  
25 testimony in responsive testimony was because Verizon

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1 and Qwest did not provide enough information. However,  
2 when they did provide their rebuttal testimony, they  
3 only addressed the direct testimony instead of the  
4 prefiled testimony and the direct testimony we are  
5 now -- they do not specify that they are responding to  
6 a data request that was submitted to them after  
7 responsive testimony was filed, so I'm not sure if they  
8 can make the argument that they not have sufficient  
9 information to respond to in their responsive  
10 testimony, and they have not explained why they waited  
11 until rebuttal to provide response to our direct.

12 JUDGE BERG: Mr. Deanhardt?

13 MR. DEANHARDT: Thank you, Your Honor. First  
14 let me address the issue of Mr. Klick's retention. As  
15 counsel for Qwest is aware, the issue that counsel for  
16 Qwest had to be contacted on were the confidential  
17 exhibits to some of the testimony, but a significant  
18 amount of Mr. Thompson's testimony, including the price  
19 sheet, were not confidential. We had actually retained  
20 Mr. Klick prior to the three days prior that Ms. Anderl  
21 was talking about. To tell you the truth, the problem  
22 is I didn't realize there was a 10-day waiting period,  
23 and because some of us were in different places, we had  
24 a hard time getting all of our ducks in a row, so  
25 that's the reason why she didn't hear about it until

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1 three days before.

2 But beyond that, Mr. Klick, as Ms. Anderl has  
3 made reference to, was a witness for Covad and for  
4 Rhythms in the Minnesota cost docket and had seen some,  
5 but not all, of the information that was being  
6 presented in Washington before and was also, more  
7 importantly, familiar with line sharing and the issues  
8 enough that it wasn't like we had to bring Mr. Klick up  
9 to speed in two days. He had a basis from which to be  
10 able to prepare his testimony at the time we did retain  
11 him for the Washington docket.

12 Beyond that, I think it's important to note  
13 that this is a lot like the pot calling the kettle  
14 black. Mr. Thompson has interjected in his rebuttal  
15 testimony an entirely new set of cost proposals for  
16 line sharing, 1-A, 1-B, 1-C, 2, 3 and 4, none of which  
17 were in his testimony before, and also engineering  
18 numbers that were not in his testimony before. All of  
19 which I would say he testified to, although in slightly  
20 different form, in Minnesota prior to July 21st. In  
21 other words, the engineering assumptions that  
22 Mr. Hubbard created based on Minnesota information were  
23 testified to by Mr. Hubbard in Minnesota prior to July  
24 21st, and Mr. Thompson developed costs for those  
25 engineering assumptions in Minnesota prior to July



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1 21st.

2           As a matter of fact, the beginning of that  
3 week, I cross-examined him on them on Tuesday of that  
4 week, I believe, giving him at least three days that he  
5 could have prepared the testimony and filed it in  
6 Washington if he wanted to get it in his response  
7 rather than sticking it in his rebuttal, which is what  
8 he did.

9           The other issues, the issues of what  
10 Mr. Klick did and didn't address, I think Mr. Klick  
11 makes it clear, and I won't go into too much detail  
12 here because we've got it in our opposition. He took a  
13 look at the information that had been presented by  
14 Verizon and Qwest and was unable, from what was in the  
15 record part of the time that he filed his response  
16 testimony, to develop a clear vision of the costs that  
17 he should be relying upon to modify in order to propose  
18 line-sharing costs here.

19           Responding to what Ms. McClellan was saying,  
20 I think Mr. Klick also makes it clear in his rebuttal  
21 testimony that he never did get the discovery  
22 responses, as evidenced by the exhibits we attached to  
23 our opposition where Qwest has not supplemented  
24 discovery responses or testimony in the responsive  
25 testimony of Verizon or Qwest that gave him all the

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1 information he was looking for, but he did, in fact, do  
2 the best that he could with the evidence that was in  
3 the record, whether that came from direct or response  
4 testimony, in order to put together his rebuttal.

5 I think on the use of the AT&T and NRC study,  
6 I think this really goes back to the last issue I was  
7 talking about, which is there wasn't enough  
8 information. I think Mr. Klick makes this clear in his  
9 rebuttal testimony. There wasn't enough information  
10 for him to feel like he could appropriately modify the  
11 Qwest and Verizon NRC studies, and so therefore, he  
12 proposed a substitute. Now, whether we propose that  
13 substitute as an interim basis until such time as Qwest  
14 and Verizon file sufficient information to support  
15 their studies is a different question, and one of the  
16 many questions and issues that Verizon and Qwest can  
17 cross-examine Mr. Klick on in the same way that we are  
18 going to have to cross-examine Mr. Thompson on all of  
19 his new testimony, including the new study put in as  
20 recently as Monday, so I think that that can be handled  
21 there, and without repeating what is in my opposition,  
22 I believe that's all I have.

23 JUDGE BERG: Mr. Butler, do you have anything  
24 to add?

25 MR. BUTLER: No.

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1 JUDGE BERG: Ms. Anderl, if the Commissioners  
2 were to find that this information was in the public  
3 interest to consider in this proceeding but did feel  
4 there was some unfairness to U S West, and this is just  
5 an if, what additional process would be necessary in  
6 order to remedy the unfairness that you see in allowing  
7 this testimony at this time?

8 MS. ANDERL: Well, you've set up a  
9 hypothetical premise which I don't like, which is the  
10 motion to strike wouldn't be granted, but what is the  
11 alternative remedy. I think we would definitely need  
12 some additional time and possibly an opportunity to do  
13 some additional discovery. The solution to be explored  
14 on cross with Mr. Klick on the stand isn't really a  
15 good one because that's more tantamount of taking a  
16 deposition on the stand, and I don't really want to do  
17 that, but I do want to have an opportunity to look into  
18 the not insignificant amount of testimony and  
19 calculations that he submitted on August 4th, so  
20 whether that would mean that his -- well, I don't  
21 really want to propose that it be put into Part B  
22 because that would potentially delay a decision in the  
23 entirety of Part A.

24 JUDGE BERG: I'm just trying to get a handle  
25 on this because there isn't a lot of time to work out a

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1 solution, and there will be a decision the  
2 commissioners make, so I may be on a little bit of a  
3 fishing expedition just trying to assess what would be  
4 necessary from your client's perspective to relevel the  
5 playing field.

6 MS. ANDERL: And I guess I'd go back to that  
7 the testimony ought to be excluded, because we are  
8 prejudiced if it's allowed in, even if we are granted  
9 additional time. There is no benefit to really any  
10 parties by stretching the hearing out. We had  
11 opposition from various parties to Verizon's request  
12 for an extension of time, and I think that's obviously  
13 the second best solution, but it's not anywhere close  
14 to a good solution.

15 MS. McCLELLAN: Your Honor, I would just like  
16 to point out that had these cost estimates been  
17 provided in direct testimony, we would have had 60 days  
18 to review them and get the discovery we felt necessary  
19 and then respond to testimony. Had the testimony been  
20 provided in Mr. Klick's responsive testimony, we would  
21 have had 30 days to review those and then rebut that on  
22 rebuttal testimony.

23 As it is, with them filing in their rebuttal  
24 testimony, we've had less than two weeks to review  
25 that. Because they filed these in the rebuttal

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1 testimony, we've had two weeks to not only try to  
2 review but to prepare for the hearing as well. I would  
3 think at a minimum to level the playing field we would  
4 have at least as long as they had to allow our  
5 response, which is 30 days, but I don't see how that's  
6 possible because the hearing is next week.

7 MR. DEANHARDT: May I address that?

8 JUDGE BERG: Yes, and to whatever extent you  
9 can restate it would be helpful.

10 MR. DEANHARDT: I'm not sure I can restate  
11 what Ms. McClellan was saying. I was just going to  
12 address both sets of concerns, Ms. Anderl's and  
13 Ms. McClellan's.

14 JUDGE BERG: Try to be brief, and if we break  
15 some new ground, I'll allow Ms. Anderl to respond.

16 MR. DEANHARDT: I think, Your Honor, if the  
17 goal here is to level the playing field and that's what  
18 the Commission wants to do, then the Commission needs  
19 to level that playing field for the CLEC's as well as  
20 the ILEC's. In particular, I'm talking about all of  
21 the new testimony that Mr. Thompson has put in,  
22 including exhibits he's not even explained. He doesn't  
23 tell us, for example, in JLT-11 what the various  
24 breakdowns that he has, what they are supposed to be  
25 for. I have to ask him about that on

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1 cross-examination, which I plan to do. I recognize  
2 that these things happen that cost dockets in  
3 particular -- I've participated in enough of them to  
4 have been handed new cost numbers the day of the  
5 hearing and to have to adapt to that and ask  
6 cross-examination questions to find out about them and  
7 their source. It's not like this is the first time in  
8 the universe that has happened.

9 This applies only to Qwest, and I recognize  
10 not to Verizon at this point, but another aspect the  
11 Commission needs to consider in leveling the playing  
12 field is that again, this is something that was  
13 discussed in Minnesota, that NRC model in particular;  
14 that Qwest had the opportunity to cross-examine  
15 Mr. Klick, had the transcript of, and had the  
16 opportunity to ask discovery and didn't. They didn't  
17 ask a single discovery question about the NRC model in  
18 Minnesota.

19 The third point is, and this goes to the  
20 point about the weight versus the admissibility of the  
21 evidence, if you look at Mr. Klick's testimony, and I  
22 have to set aside the NRC model for a second, what you  
23 see is that he has tried to take a combination of  
24 Mr. Zulevic's testimony in his direct and response and  
25 the testimony of Qwest and the testimony of Verizon

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1 submitted through response, and the discovery  
2 responses, again, many of which have been never been  
3 updated, and then just takes the architectures for line  
4 sharing that were described in Mr. Zulevic's testimony,  
5 applies that to the numbers put out by Qwest and  
6 Verizon, the amounts, the issues, the dollar amounts,  
7 for example. There are differences in distances, but  
8 all of that comes from Mr. Zulevic's testimony and  
9 response. What he does is he takes the technical  
10 description of Mr. Zulevic's testimony, applies it to  
11 the numbers we finally got from Qwest and Verizon to  
12 put in his testimony on rebuttal. So while there is a  
13 lot of talk about it being new information and you this  
14 and you that, it's not really, and the question of  
15 prejudice, I don't think, frankly, that there is one.

16 JUDGE BERG: That starts to sound a lot like  
17 the arguments we see in the opposition. Ms. Anderl, is  
18 there anything that Mr. Deanhardt has raised that you  
19 want to respond to, and so try and stay within those  
20 bounds.

21 MS. ANDERL: Briefly. I think the point that  
22 Mr. Deanhardt makes is a good one; that Mr. Klick took  
23 the architecture from Mr. Zulevic, which they had back  
24 in May, and they took the numbers from Qwest, which  
25 they had back in May, and yet he didn't file his

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1 proposal on July 21st, which is when the response  
2 testimony was due. Mr. Zulevic is their witness. They  
3 had his information whenever they wanted it.  
4 Mr. Deanhardt said that even with the responsive  
5 testimony from Qwest, they didn't get what they wanted  
6 or needed, but that Mr. Klick ultimately on rebuttal  
7 did the best he could with the evidence that was in the  
8 record. There is no explanation that we've heard to  
9 date as to why that couldn't have been done on July  
10 21st testimony filing, which is when we legitimately  
11 think this proposal was due at the very latest.

12 With regard to the nonrecurring model, I  
13 think that there is absolutely no reason at all that  
14 couldn't have been provided in July because its  
15 submission was not dependent on anything at all that  
16 Qwest did here. Whether we saw it in Minnesota or not  
17 is irrelevant, I think, because what matters is what's  
18 Covad's case in Washington, and we didn't think that  
19 was in Covad's case in Washington.

20 JUDGE BERG: Dr. Gabel, based on your  
21 familiarity with Mr. Klick's testimony, are there any  
22 questions you have for purposes of clarification?

23 Dr. Gabel: No, there is not.

24 JUDGE BERG: Thank you, everybody. The  
25 Commission will try and get a resolution of the motion



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1 as quickly as possible.

2 MR. DEANHARDT: Thank you, Your Honor.

3 JUDGE BERG: That will adjourn the prehearing  
4 conference.

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6 (Prehearing adjourned at 5:50 p.m.)

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