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BEFORE THE WASHINGTON

UTILITIES AND TRANSPORTATION COMMISSION

3)
4	Comcast Phone of Washington, LLC)UT-031459
4	d/b/a Comcast Digital Phone,)Volume I
5	Application for Mitigation of)Pages 1-38
5	Penalty Assessment or for Stay.)
	And)
6	In the Matter of Comcast Phone of)UT-031626
7	Washington, LLC Petition for an)Volume I
7	Interpretive and Policy Statement)Pages 1-38
8	or a Declaratory Ruling that WAC)
8	480-120-439 Does Not Apply to)
9	Comcast Phone of Washington, LLC,)
9	or an Order Granting Exemptions)
10	from Reporting Regulations.)
	_____)

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A prehearing conference in the

above-entitled matter was held at 10:08 a.m. on Monday, November 17, 2003, at 1300 South Evergreen Park Drive, Southwest, Olympia, Washington, before Administrative Law Judge DENNIS MOSS.

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The parties present were as follows:

WeBTEC, by Arthur A. Butler, Attorney at Law, Ater Wynne, LLP, 601 Union Street, Suite 5450, Seattle, Washington 98101 (via teleconference bridge.)

COMCAST PHONE OF WASHINGTON, LLC, by Judith Endejan, Attorney at Law, Graham & Dunn, Pier 70, 2801 Alaskan Way, Suite 300, Seattle, Washington 98121.

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Barbara L. Nelson, CCR

Court Reporter

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1 COMMISSION STAFF, by Shannon Smith,
2 Assistant Attorney General, 1400 S. Evergreen Park
3 Drive, S.W., P.O. Box 40128, Olympia, Washington,
4 98504-1028.

5 QWEST CORPORATION, by Adam Sherr,
6 Attorney at Law, 1600 Seventh Avenue, Room 3206,
7 Seattle, Washington 98191.

8 PUBLIC COUNSEL, by Simon ffitch,
9 Assistant Attorney General, 900 Fourth Avenue, Suite
10 2000, Seattle, Washington, 98164 (via teleconference
11 bridge.)

12 MCI, by Michel Singer Nelson, Attorney
13 at Law, 707 17th Street, Suite 4200, Denver, Colorado
14 80202 (via teleconference bridge.)

15 AT&T COMMUNICATIONS OF THE PACIFIC
16 NORTHWEST, TCG SEATTLE, and TCG OREGON, by Letty
17 Friesen, Attorney at Law, 1875 Lawrence Street, Suite
18 1575, Denver, Colorado 80202 (via teleconference
19 bridge.)

20 TIME WARNER TELECOM OF WASHINGTON, LLC,
21 by Gregory J. Kopta, Davis, Wright, Tremaine, 2600
22 Century Square, 1501 Fourth Avenue, Seattle,
23 Washington, 98101 (via teleconference bridge.)

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1 JUDGE MOSS: Why don't we go on the record.
2 Good morning, everyone. My name is Dennis Moss. I'm
3 the presiding Administrative Law Judge in the matters
4 for which we are convened this morning in prehearing.
5 There are two dockets. The first is styled Comcast
6 Phone of Washington, L.L.C., doing business as
7 Comcast Digital Phone, application for mitigation of
8 penalty assessment or for stay, Docket Number
9 UT-031459.

10 The second matter is styled In the matter of
11 Comcast Phone of Washington, L.L.C., petition for
12 interpretive and policy statement or a declaratory
13 ruling that WAC 480-120-439 does not apply to Comcast
14 Phone of Washington, L.L.C., or an order granting
15 exemptions from reporting regulations. That's Docket
16 UT-031626.

17 By a previous order, the Commission has
18 consolidated these dockets, and we'll talk a little
19 bit in a few minutes about our process that we use to
20 process these two matters that are consolidated, but
21 first let's take appearances. And hopefully the
22 interference on the conference bridge line will
23 improve. I apologize for the feedback. Let me try
24 turning this thing down a little bit more.
25 Appearances. Let's begin with you, Ms. Endejan.

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1 MS. ENDEJAN: Good morning, Your Honor,
2 thank you. Judith Endejan, appearing for Comcast
3 Phone of Washington, L.L.C. My business address is
4 Graham & Dunn, Pier 70, 2801 Alaskan Way, Suite 300,
5 Seattle, Washington, 98121-1128. My phone is
6 206-624-8300; my fax is 206-340-9599; my e-mail is
7 jendejan@grahamdunn.com. Thank you.

8 JUDGE MOSS: Thank you. And since we have
9 you here in the room, Mr. Sherr, we'll begin with you
10 for the petitions to intervene.

11 MR. SHERR: Thank you. Good morning, Your
12 Honor. Adam Sherr, of Qwest. My address is 1600
13 Seventh Avenue, Room 3206, Seattle, Washington,
14 98191. Telephone number, 206-398-2507; fax number is
15 206-343-4040; e-mail address is adam.sherr@qwest.com.

16 I'd also like to make an appearance for Lisa
17 Anderl of Qwest, same address and fax number. Lisa's
18 phone number is 206-345-1574, and her e-mail address
19 is lisa.anderl@qwest.com.

20 JUDGE MOSS: What's your direct dial, Mr.
21 Sherr?

22 MR. SHERR: It is 206-398-2507.

23 JUDGE MOSS: Zero-seven, okay. And I also
24 had your zip code wrong. What was that again?

25 MR. SHERR: It is 98191.

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1 JUDGE MOSS: I try to get all these things
2 down in advance and I want to make corrections here,
3 because I will be putting out a service list.

4 MR. SHERR: Thank you, Your Honor.

5 MS. ENDEJAN: Your Honor, if I might add my
6 direct dial number?

7 JUDGE MOSS: Oh, sure.

8 MS. ENDEJAN: My direct dial is 206-340-94

9 --

10 JUDGE MOSS: How embarrassing.

11 MS. ENDEJAN: -- 9495, I think.

12 JUDGE MOSS: I always used to live in fear
13 and panic when I'd enter my appearances. I don't
14 keep my business card out on the tables. Forgot my
15 phone number or whatever. All right. Let's go ahead
16 with Staff, since Staff is present in the hearing
17 room.

18 MS. SMITH: Shannon Smith, Assistant
19 Attorney General, appearing for Commission Staff. My
20 address is 1400 South Evergreen Park Drive, S.W.,
21 P.O. Box 40128, Olympia, Washington, 98504-0128. My
22 telephone number is 360-664-1192. My e-mail address
23 is ssmith@wutc.wa.gov.

24 JUDGE MOSS: Thank you, Ms. Smith. Let's be
25 off the record just for a second.

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1 (Discussion off the record.)

2 JUDGE MOSS: Let's be back on the record.

3 Let's have the appearance for Time Warner.

4 MR. KOPTA: Thank you, Your Honor. Gregory
5 J. Kopta, on behalf of Time Warner Telecom of
6 Washington, L.L.C. I'm at Davis, Wright, Tremaine,
7 LLP, 2600 Century Square, 1501 Fourth Avenue,
8 Seattle, Washington, 98101-1688. My direct dial
9 number is 206-628-7692; fax, 206-628-7699; e-mail,
10 gregkopta@dwt.com.

11 JUDGE MOSS: Thank you, Mr. Kopta. For
12 AT&T.

13 MS. FRIESEN: Good morning, Your Honor.
14 Letty Friesen, on behalf of AT&T Communications of
15 the Pacific Northwest, Inc. and AT&T Local Services
16 on behalf of TCG Seattle and TCG Oregon. My address
17 is 1875 Lawrence Street, Suite 1575, Denver,
18 Colorado, 80202. My telephone number is
19 303-298-6475; my fax number is 303-298-6301; my
20 e-mail address is lsfriesen@att.com. And I'm getting
21 a whole lot of feedback, so I hope you guys can hear
22 me.

23 JUDGE MOSS: We do have some people working
24 back there on the system, so maybe that will help.
25 And Ms. Friesen, I had a slightly different e-mail

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1 for you. I think I got it right. Is, as in Sam,
2 friesen@att.com.

3 MS. FRIESEN: That's correct, Your Honor.

4 JUDGE MOSS: Okay. I had some additional
5 stuff in there, so that's good. Get that cleared up.
6 All right. Let's go ahead. For MCI.

7 MS. SINGER NELSON: Thank you, Judge.
8 Michel Singer Nelson, on behalf of MCI. Let's see.
9 My address is 707 17th Street, Suite 4200, Denver,
10 Colorado 80202. Telephone number is 303-390-6106;
11 fax is 303-390-6333; and my e-mail address is
12 michel.singer_nelson@mci.com.

13 JUDGE MOSS: And Mr. Butler, you're also for
14 MCI?

15 MR. BUTLER: No, I'm appearing for WebTEC.

16 JUDGE MOSS: You're for WebTEC, I'm sorry.
17 For some reason I had you down under the MCI. I
18 don't know why.

19 MR. BUTLER: Arthur A. Butler, Attorney for
20 WebTEC, the Law Firm of Ater Wynne, LLP. Address 601
21 Union Street, Suite 5450, Seattle, Washington,
22 98101-2327. Telephone is 206-623-4711; fax is
23 206-467-8406; e-mail is aab@aterwynne.com.

24 JUDGE MOSS: Thank you. And let's see.
25 We've already taken Qwest's appearance. Mr. ffitch.

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1 MR. FFITCH: Simon ffitch, Assistant
2 Attorney General, Public Counsel Section, Washington
3 Attorney General's Office, 900 Fourth Avenue, Suite
4 2000, Seattle, Washington 98614 (sic). The phone
5 number is 206-389-2055; the fax number is
6 206-389-2058; e-mail is simonf@atg.wa.gov. Just to
7 confirm, the zip code is 98164.

8 JUDGE MOSS: All right. Thank you. Is
9 there anyone else who wishes to enter an appearance?
10 All right. Let's take up the petitions to intervene,
11 and we do have four -- or five, Time Warner Telecom
12 of Washington, Qwest, MCI, AT&T and WebTEC.

13 And before we get to that, let me just ask
14 you, Ms. Singer Nelson, can we just refer to MCI as
15 MCI, or is there some reason we need to refer to the
16 company as WorldCom, now known as MCI?

17 MS. SINGER NELSON: I think it's safe to
18 start referring to MCI as MCI.

19 JUDGE MOSS: All right. Thank you. All
20 right. Let me just ask generally, then, if there are
21 any objections to any of the petitions to intervene?
22 And if there are, we'll take them up individually.

23 MS. SMITH: Yes, Your Honor. Commission
24 Staff has objections to the petitions to intervene.

25 JUDGE MOSS: All right. To all of them?

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1 MS. SMITH: At least four of the five.

2 JUDGE MOSS: On the same grounds, or will
3 there be separate grounds for each?

4 MS. SMITH: The same grounds perhaps for
5 MCI, AT&T and Time Warner; different grounds for
6 Qwest, and unsure at this point about WeBTEC.

7 JUDGE MOSS: Okay. Well, why don't we just
8 take them serially, then. Let's start with Time
9 Warner.

10 MR. KOPTA: Thank you, Your Honor. Time
11 Warner Telecom of Washington, L.L.C., referred to as
12 Time Warner, is a competitive local exchange carrier
13 that provides facilities-based service in the state
14 of Washington.

15 To the extent that this proceeding will
16 evaluate the Commission rule dealing with service
17 quality reporting and its applicability to local
18 exchange companies, including companies that are not
19 incumbent local exchange companies like Qwest or
20 Verizon, then the issues that will be raised in this
21 proceeding will directly impact Time Warner Telecom.
22 And we would like, because Time Warner is directly
23 impacted by this proceeding, then we would like to
24 participate. Certainly represent that we will not
25 expand any issues in this proceeding, but would seek

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1 to preserve our rights and protect our rights and
2 participate in any evaluation of the proper
3 interpretation of the Commission rule, as well as
4 it's applicability.

5 JUDGE MOSS: All right. Ms. Smith.

6 MS. SMITH: Yes, Your Honor. If I may, I
7 have a question for counsel in aid of our objection.

8 JUDGE MOSS: All right.

9 MS. SMITH: Mr. Kopta, this is Shannon
10 Smith. And my question is whether Time Warner serves
11 two percent or more of the access lines in the state
12 of Washington?

13 MR. KOPTA: At this point, I don't know
14 whether Time Warner serves two percent or more of the
15 access lines in the state of Washington.

16 MS. SMITH: Then, Your Honor, we would ask
17 for a statement from counsel or from the company to
18 come in at a later date, preferably in the next
19 couple of days, because if Time Warner does not serve
20 two percent of the access lines in the state of
21 Washington, then it is not impacted by the rules in
22 question in this docket, and its intervention in this
23 docket would do nothing but broaden the issues as
24 they are in the prehearing conference notice.

25 The rules at issue apply only to those

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1 companies that serve two percent or more of the
2 access lines.

3 JUDGE MOSS: Well, whether they serve two
4 percent or more today, they might serve two or more
5 percent tomorrow, so they're potentially impacted by
6 the rule since there's no other rulemaking on this.
7 And these are likely to be the Commission's rules at
8 least for the foreseeable future, so why would that
9 be important?

10 MS. SMITH: Well, because if the rules don't
11 apply to them, then the interpretation or
12 applicability of the rules or whether the rules apply
13 to them aren't at issue.

14 JUDGE MOSS: Okay. Anything else? Any
15 other basis for your objection?

16 MS. SMITH: That's all, Your Honor.

17 JUDGE MOSS: Okay. Let's look at Qwest.

18 MR. KOPTA: Your Honor, if I might, just a
19 moment. My understanding, also, based on reviewing
20 the petition that Comcast originally filed, was that
21 there was some issue with respect to how one
22 determines whether one has two percent of the access
23 lines or not, because, at least for now, some of the
24 companies that designate that information, number of
25 access lines that they serve in the state of

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1 Washington, file that on a confidential basis and
2 other companies would not have access to that
3 information.

4 So in addition to the points that Your Honor
5 raised, I think there is that issue, as well, in
6 terms of how to determine whether one does serve two
7 percent or more of the access lines in the state of
8 Washington.

9 JUDGE MOSS: Well, that may or may not be an
10 issue in the case. We'll talk about that
11 momentarily. But I think, for present purposes, we
12 don't really need to explore that. I started to jump
13 to Qwest, but instead, I believe you said your
14 objection would be the same with respect to MCI; is
15 that right, Ms. Smith?

16 MS. SMITH: Yes, Your Honor, and Time
17 Warner.

18 JUDGE MOSS: And as to Time Warner?

19 MS. SMITH: Yes, Your Honor.

20 JUDGE MOSS: Okay. So let's hear from MCI.

21 MS. SINGER NELSON: Your Honor, MCI, like
22 Time Warner, is a competitive local exchange carrier
23 in the state of Washington. We have two subsidiaries
24 particularly that provide services in Washington and,
25 to the extent that the issue in the case is whether

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1 or not the service quality reporting rules apply to
2 competitive local exchange carriers in Washington,
3 MCI is affected by that determination and would like
4 to participate in this proceeding. MCI does not
5 believe that it will broaden the issues that are
6 involved in the case and asks, on that basis, to be
7 an intervenor in the case.

8 JUDGE MOSS: Okay. And did you have
9 anything to add to your objection with respect to
10 MCI?

11 MS. SMITH: Our question is the same for
12 MCI, Your Honor, whether MCI serves two percent or
13 more of the access lines in the state of Washington?

14 MS. SINGER NELSON: And Your Honor, I can
15 represent that MCI does not, at this point in time --
16 MCI does not have over -- or two percent or more of
17 the access lines in Washington. However, that does
18 not mean that at some point in time MCI will not have
19 two percent or more of the access lines.

20 So for determining whether or not these
21 rules apply to CLECs with two percent or more access
22 lines, I think whether or not we have them now
23 doesn't make a difference.

24 MS. SMITH: And Your Honor, if I -- I guess
25 I have another question for MCI, and that is if the

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1 Commission decides to consider in this docket whether
2 the service quality rules apply or -- if the
3 Commission decides not to take up the issue in this
4 docket of whether the rule applies to CLECs, does MCI
5 have an interest in the issue of whether Comcast
6 should be penalized for failure to file service
7 quality reports?

8 MS. SINGER NELSON: I think, to the extent
9 that precedent is set in this docket relating to
10 Comcast and the competitive carrier and whether it's
11 penalized, yes, MCI still does have an interest
12 because of the potential for precedent to be set.

13 JUDGE MOSS: Okay. Let's hear from AT&T.

14 MS. FRIESEN: AT&T, quite like Time Warner
15 and MCI, offers service, local service in the state
16 of Washington. We do have access lines in the state.
17 At present, I don't know the exact number, whether we
18 meet the two percent criteria that Staff holds out or
19 not. Suffice to say that if this rule were
20 interpreted in the fashion that we believe it's going
21 to be interpreted by Staff and it's attempted to
22 apply to Comcast, that that will, in fact, set
23 precedent and it will, in fact, impact AT&T in a very
24 direct manner.

25 So from AT&T's perspective, we believe that

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1 we are an absolutely necessary party to this
2 proceeding, as this is turning into a rather more
3 broad proceeding on whether or not the service
4 quality reporting requirements should apply to CLECs.

5 JUDGE MOSS: Okay. Anything to add on AT&T,
6 Ms. Smith?

7 MS. SMITH: Yes, Your Honor. The Commission
8 Staff does not believe this is a broad proceeding.
9 The Commission Staff has applied or has issued a
10 statement of how it sees the rule applying to a
11 company that is affected by these rules. AT&T is not
12 affected by these rules or may not be. We don't know
13 whether it provides over two percent of the access
14 charges -- or access lines, and that's why that's an
15 important determination in these cases. Because if
16 these companies don't serve two percent or more of
17 the access lines, then they're not affected by these
18 rules, and whether or not they will be affected in
19 the future is not grounds to allow them to intervene
20 in this docket.

21 JUDGE MOSS: Thank you. Let's hear from --
22 oh, let's hear from WeBTEC. Get this telephone stuff
23 done.

24 MR. BUTLER: Yes, Your Honor. WeBTEC's
25 interest in this proceeding is as consumers of

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1 telecommunications services, both from incumbent and
2 from competitive providers today and in the future,
3 and our interest is really impacted only to the
4 extent to which the service quality rules would
5 purport to be applied to competitive carriers. And
6 our interest there is with respect to what service
7 quality requirements are imposed on competitive
8 carriers and how they're going to be enforced by the
9 Commission. Otherwise, our interests are served if
10 we could be placed on the interested party list.

11 JUDGE MOSS: Mr. Butler, your last didn't
12 quite come through. Did you say though that your
13 interests would be served by being on the interested
14 persons list?

15 MR. BUTLER: Yes, insofar as this case would
16 not apply or would not deal with the question about
17 whether service quality requirements would be applied
18 to competitive carriers. In other words, we don't
19 have a particular interest in whether penalties are
20 imposed upon a particular company.

21 JUDGE MOSS: But you are interested in the
22 other proceeding, which presumably will speak in some
23 fashion or another to the applicability of the rules
24 to a CLEC positioned such as Comcast allegedly is
25 positioned, that is to say, having two percent or

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1 more of the access lines in Washington?

2 MR. BUTLER: That's correct.

3 JUDGE MOSS: So to that extent, you would
4 want to be an intervenor?

5 MR. BUTLER: Yes.

6 JUDGE MOSS: Okay. And let's see, I guess
7 Qwest. Oh, I'm sorry. Ms. Smith, did you have
8 something further with respect to WebTEC? I skipped
9 you there.

10 MS. SMITH: No, Your Honor. No objection.
11 Thank you.

12 JUDGE MOSS: Okay. And Qwest, then.

13 MR. SHERR: Thank you, Your Honor. Adam
14 Sherr, for Qwest. Qwest did file a written petition
15 to intervene. I will be brief. Qwest has a direct
16 and substantial interest in the outcome of this case.
17 Comcast and Qwest are competitors for local exchange
18 customers in Washington. This case, from the
19 perspective of regulatory parity, will have an impact
20 on the competitive landscape in this state.

21 Qwest does not intend to broaden the scope
22 of the docket and Qwest believes it is appropriate
23 that the Commission grant its petition.

24 JUDGE MOSS: Anything on Qwest, Ms. Smith?

25 MS. SMITH: Yes, Your Honor. It's the

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1 Commission Staff's understanding that Qwest is
2 obligated to comply with the service quality rules,
3 but Qwest itself has obtained a waiver of these
4 rules. And we just don't see any interest that Qwest
5 would have with respect to whether these rules apply
6 to Comcast or not.

7 JUDGE MOSS: Okay. And you have no
8 objection on WebTEC?

9 MS. SMITH: That's correct, Your Honor.

10 JUDGE MOSS: All right. If there's nothing
11 further, I'm prepared to rule.

12 MS. SMITH: In addition, Your Honor, the
13 Commission Staff believes that this matter really
14 should be heard as a brief adjudicative proceeding
15 because at issue is whether Comcast violated the
16 Commission's service quality rules by failure to
17 report on service quality or whether the Commission
18 should mitigate that penalty. That is one that the
19 Commission has stated that it ordinarily will hear as
20 a -- or can hear as a brief adjudicative proceeding.
21 And if this Commission decides to convene this as a
22 brief adjudicative proceeding, that determination
23 could bear on the petitions to intervene.

24 JUDGE MOSS: Thank you. All right. We'll
25 take up process in just a minute, so I may hear some

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1 other discussion about that. Insofar as
2 interventions are concerned, even in brief
3 adjudicative proceedings, we entertain petitions to
4 intervene and act on those, so I don't see that it
5 has a direct impact insofar as that is concerned.

6 We do have two matters here. One is, of
7 course, the application for mitigation of penalty,
8 but the other matter we have here is somewhat broader
9 in the sense that it implicate -- well, and of course
10 the mitigation penalty, to a degree, the application
11 for mitigation, that is to say, implicates, to a
12 degree, at least, the question of how we interpret a
13 particular rule in Chapter 480-120 Washington
14 Administrative Code. So to that extent, the
15 proceeding is perhaps somewhat broader and of broader
16 interest to the industry than it might otherwise be.

17 There's no objection to WeBTEC's petition to
18 intervene, and I do find that, to the extent I last
19 described, WeBTEC does have an interest in the
20 proceeding and that its participation would be in the
21 public interest and, accordingly, its petition to
22 intervene will be granted.

23 Similarly, with respect to the other
24 petitions that we have in writing and have heard
25 argument concerning this morning, while it may be,

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1 and we don't really know, that none of these
2 petitioners currently has two percent or more of the
3 access lines in Washington, which is the triggering
4 measurement by which the rule in question is applied,
5 it certainly may be the case that, in the future, one
6 or more or all of these petitioners will have that
7 number of access lines, and unless these rules are
8 changed, presumably whatever interpretation we reach
9 in this proceeding will have some potential impact on
10 these petitioners, these companies, and so with that
11 in mind, I would grant the petitions -- I find that
12 the petitioners have stated a substantial interest in
13 the proceeding and, moreover, that their
14 participation would be in the public interest without
15 broadening the issues in the proceeding, at least
16 with respect to the Docket 031626 matters.

17 And so that would lead me to grant the
18 petitions by Time Warner, MCI, and AT&T.

19 With respect to Qwest, it has stated its
20 interest as a competitor and its interest in
21 regulatory parity. Waiver is something that is
22 individual to a company and doesn't really affect
23 Qwest's position, I think, with respect to its place
24 in the industry. Others may seek a waiver. Indeed,
25 I believe a waiver is a form of alternative relief

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1 that Comcast has sought in this very proceeding.
2 That's something we may take up and consider.

3 In any event, it does strike me that, as a
4 major incumbent local exchange company in Washington
5 State, that Qwest's participation will certainly be
6 in the public interest. It may have a substantial
7 interest in the outcome of the proceeding, as well,
8 and therefore I would grant that petition. So in
9 sum, all of the petitions to intervene are granted.

10 Now, let's take up any motions or requests.
11 I assume -- well, I won't assume that. I started to
12 say I would assume the parties would want discovery,
13 but my first thought is that, and I'm keeping -- I'm
14 mindful of your suggestion, Ms. Smith, that we
15 proceed on a brief adjudicative proceeding type
16 format. I don't know that we -- we do that as a
17 formal matter, necessarily, but it does strike me
18 that this is the type of proceeding that is quite
19 amenable to being processed on a paper record, that I
20 don't really see that there are any material facts in
21 dispute.

22 Perhaps there is some dispute over how we
23 measure two percent of the access lines in
24 Washington, but I'll be blunt. In looking at the
25 papers that I have seen exchanged thus far, certainly

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1 by any readily available measure, there's no dispute
2 but that Comcast exceeds that number by a
3 considerable margin.

4 And I'm wondering -- and I'll put the
5 question to you, Ms. Endejan. Do you plan to try to
6 prove that Comcast doesn't have two percent of the
7 access lines?

8 MS. ENDEJAN: No, Your Honor. If I might
9 just take a minute, because, really, this is really
10 one of the more unusual regulatory proceedings that
11 I've been involved in, because it is truly -- we're
12 trying to put a round peg into a square hole here.
13 And we struggled with what we think is the most
14 expeditious and appropriate way to get this issue
15 resolved. And one of the subsidiary issues here, not
16 necessarily for Comcast, but for the other CLECs, is
17 how do you know when you got two percent when the
18 issue of the number of access lines in the state is a
19 relatively moving target.

20 So that is something that, while it may not
21 necessarily impact Comcast, it is still an embedded
22 problem with the rule, okay. So that it is, from the
23 standpoint of if you look at the reports that go to
24 the FCC versus the reports that go to DOR that Staff
25 referred Comcast to, there is over a 500,000 access

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1 line swing, and so that could make a difference.

2 So that is something that should be
3 explored, which goes to my next point, which is this
4 is really a proceeding to look at problems with a new
5 rule that may not have been anticipated at the time
6 the rule was adopted.

7 Now, I don't think that plugging it into an
8 adjudicative format with extensive discovery, you
9 know, prefiled testimony, et cetera, is necessarily
10 the most productive use of the Commission's time, nor
11 of the parties' when really what we're talking about
12 is having resolved as a matter of policy and wisdom,
13 regulatory wisdom, whether this rule should be
14 applied to CLECs.

15 Now, is that a matter that should be, quote,
16 litigated or should it be addressed in written
17 comments, briefs, et cetera, by the parties. That
18 might be the most productive use of the Commission's
19 time. And once that issue is resolved, then the
20 issue of the penalty comes into play, because if, in
21 fact, you know, the Commission sees the problems with
22 the rule, I think that that might lay the groundwork
23 for determining whether issuance of a penalty was
24 appropriate. And we really can't get there without
25 resolving that first leg of the case.

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1 So I think -- and I'm just, you know
2 throwing -- and then let me also add a third wrinkle
3 to this, which is I'm not certain there wouldn't be a
4 way for this whole regulatory mess to be cleared up
5 if the parties had an opportunity to productively
6 meet with Staff, to tell the Staff, Look, we can't
7 report on a central office basis, because we are a
8 video company, but this is what we can do.

9 If the underlying concern here is to provide
10 information so that consumers will be able to know
11 what service quality is, there must be some way that
12 the parties can work out something that doesn't
13 require hundreds of thousands of dollars to redevelop
14 and redeploy personnel to fix this problem. It's a
15 practical problem.

16 So I would like to see built into whatever
17 proceeding we have some sort of discussion of an
18 alternative that would be workable for the CLECs with
19 respect to reporting if, in fact, the Commission
20 decides, as a policy matter, CLECs should. And you
21 know, we don't support that, but I understand and
22 recognize there are alternate viewpoints on that.

23 JUDGE MOSS: All right. Well, I will just
24 say, as I hinted at a moment ago, I'm inclined to
25 think this is a type of proceeding that we can

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1 resolve without necessity for testimony and live
2 hearings and that sort of thing. To the extent there
3 is any relevant fact that jumps out at me, it's the
4 one question that the company is prepared to concede,
5 that it does exceed the two percent.

6 As to what proper measure of two percent
7 might be, I don't know that we would get there in
8 this proceeding. There might be a more appropriate
9 forum for that particular question, although we might
10 have some exchange of views on that, just as a useful
11 exchange of information.

12 It does also strike me that this is a case
13 that could benefit from some informal discussion
14 among the parties, and cuing it up in this fashion
15 sort of brings everybody out who wishes to
16 participate in those types of discussions and would
17 promote such an exchange of ideas.

18 It would also seem, Ms. Smith, to be
19 consistent with your idea about brief adjudicative
20 proceeding in the sense that this is a procedurally
21 efficient approach if we basically have an exchange
22 of what would be at least tantamount to cross motions
23 for summary determination. We have cued the matter
24 up as an adjudication, consolidated dockets. That
25 would I think be the appropriate formal vehicle and

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1 would give the parties an opportunity to exchange
2 their arguments, to present their arguments in
3 writing on stipulated facts.

4 Do you think that's a workable process or
5 would you suggest some alternative or tweaking of
6 that, Ms. Smith?

7 MS. SMITH: If I may have a moment, please,
8 Your Honor?

9 JUDGE MOSS: Sure.

10 MS. SMITH: Your Honor, Staff would tend to
11 agree that this is something that could be handled on
12 a paper record, as opposed to a live hearing,
13 although we do have a comment in response to Ms.
14 Endejan's comments.

15 Staff has been willing to and has tried to
16 negotiate this matter with Comcast, but we haven't
17 gotten anywhere with Comcast with respect to what the
18 company would be willing to provide. So we have made
19 those attempts, but to this point they've been to no
20 avail.

21 JUDGE MOSS: I'm often heard to recite one
22 of my favorite quotes from Boswell, The prospect of
23 the hangman's noose does wonderfully concentrate the
24 mind. So perhaps cuing things up as an adjudication
25 that will inevitably lead to a Commission

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1 determination will promote further discussions among
2 the parties to a fruitful end. At least I will hold
3 forth optimism to that effect and, of course, Comcast
4 has itself suggested the possibility that this will
5 be a fruitful way to proceed.

6 And so the parties, of course, will have to
7 be encouraged and I do encourage the parties to put
8 aside any sense of animosity that might have
9 developed over the course of events as things have
10 unfolded.

11 Corporations, in my experience, like people,
12 sometimes have a tendency to take things personally
13 when they -- and they must put that aside in order to
14 reach resolutions that are mutually satisfactory in
15 various types of disputes.

16 So I do think that there is an ample
17 opportunity here to resolve this matter on paper
18 without the necessity for live hearing, so I'm not
19 going to schedule one. We will set forth a
20 procedural schedule that will allow time for the
21 parties to discuss this matter informally among
22 themselves, and I would like for that to include the
23 various players involved.

24 Since it is a matter of rule interpretation
25 that potentially affects other companies in the

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1 future, it would be fruitful, I think, to include
2 those interested parties in the matter, and of course
3 Public Counsel, as well. So Ms. Smith, did you have
4 something further?

5 MS. SMITH: Yes, Your Honor, this affects
6 your statement that there should be time for parties
7 to brief this. Commission Staff would note that when
8 the Commission imposed the penalty against Comcast,
9 it imposed that penalty for violations as of the date
10 of the penalty imposition, and it was a thousand
11 dollars at that time.

12 We have now gone a few months. If there is
13 an obligation on behalf of Comcast to file reports,
14 Comcast failed to file reports in August and
15 September, so there is an issue of ongoing penalties
16 that needs to be raised by the parties in this
17 matter, because if Comcast has failed to comply as of
18 the date of the penalty, then there are ongoing
19 penalties that we would want to show and subject
20 Comcast to further penalties for failure to comply
21 with the rules.

22 JUDGE MOSS: Well, I don't think that's
23 before us in this proceeding. The only thing before
24 us in this proceeding is the penalty that's been
25 imposed. I don't sit as prosecutor, so I'm not in a

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1 position to impose further penalties or act on that
2 one way or another. That's something that will be
3 brought to the Commission.

4 MS. SMITH: Well, Your Honor, may we have
5 the opportunity, then, to bring a motion for further
6 penalties in this docket? I mean, the issues already
7 have been broadened beyond whether Comcast owes the
8 Commission a thousand dollars. And if this
9 proceeding is going to be broadened to allow
10 companies that aren't even impacted by the rule to
11 file pleadings in this matter, then it also would be
12 the appropriate proceeding for the Commission Staff
13 to move for further penalties against Comcast if the
14 Commission were to find that Comcast is obligated to
15 comply with the rules.

16 JUDGE MOSS: I'll be blunt with you, Ms.
17 Smith. I don't think that -- off the top of my head,
18 and I may be shown to be wrong, I do not believe that
19 would be an appropriate motion in this proceeding. I
20 don't believe the Commission's rules or its statutes
21 permit that, but I may be mistaken as a matter of
22 law. I don't know. I would encourage you, however
23 to consider that carefully and -- before you bring
24 that in the form of a formal motion that shows that I
25 am wrong as a matter of law and something we could

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1 act on, or proceed otherwise.

2 And I will say that I'm not confident how
3 productive it is sitting here today to raise that
4 sort of thing, but you are -- of course, I can't
5 control what the parties do in terms of matters such
6 as this, and if the Commission Staff feels it's
7 appropriate to raise the stakes, so to speak, then I
8 suppose that's what the Commission Staff will do.

9 MS. ENDEJAN: Your Honor, if I may just
10 interject with a request. When you're building the
11 schedule, I think it's perfectly appropriate to try
12 to handle this in written pleadings, but Comcast
13 would request the opportunity for oral argument to
14 address the Commissioners, and I don't think that
15 would be untoward, because --

16 JUDGE MOSS: You mean at the conclusion of
17 the proceeding, as a step preceding the conclusion?

18 MS. ENDEJAN: Correct, we would request the
19 opportunity to orally address them. You know, we had
20 hoped this matter would have been handled on the open
21 meeting agenda at some point, but that didn't
22 materialize, and had it been on the open meeting
23 agenda, Comcast would have had the opportunity to
24 address the Commissioners, and we certainly would
25 request that opportunity in whatever procedural

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1 schedule you build in.

2 JUDGE MOSS: Okay. I'm going to defer any
3 ruling on that, and of course that's something that
4 would be a bit down the line anyway, so there's no
5 harm in my taking that under advisement, and I will
6 do so. You know, oftentimes oral argument is useful
7 as a supplement to briefs, but sometimes the briefs
8 are quite adequate in and of themselves, and so we
9 would consider that a little further down the line.
10 Let's just postpone that.

11 MS. ENDEJAN: Thank you, Your Honor.

12 JUDGE MOSS: All right. Before we move on
13 to procedural schedule, I think our basic process
14 will be what I described as an exchange of cross
15 motions for summary determination. We'll set a
16 couple of dates there, and then we'll defer on the
17 question of oral argument.

18 I'm going to go off the record in a little
19 bit and see if the parties can come up with a
20 schedule, and if they can't, then I may -- that will
21 give me an opportunity to get my calendar, which I
22 always forget, and I may have to impose a schedule if
23 the parties can't agree to one.

24 There is one other matter I wish to take up,
25 however, before going off the record to allow the

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1 parties an opportunity to discuss procedural
2 schedule, and that concerns an ex parte matter.

3 In late September, shortly before Comcast
4 filed its application for mitigation in Docket Number
5 UT-031459, or its petition in Docket Number
6 UT-031626, and significantly before the Commission
7 served notice of this adjudicative proceeding under
8 RCW 34.05.43 -- I'm sorry, 413(5), Rhonda Weaver, who
9 is Comcast's director of governmental and regulatory
10 affairs, had separate informal conversations with
11 Chairwoman Showalter and Commissioner Oshie
12 concerning, in part, Comcast's view that WAC
13 480-120-439 does not or should not apply to Comcast.

14 Although the conversations occurred before
15 service of the notice of hearing and thus before the
16 official commencement of this adjudication, as
17 defined in RCW 34.05.413(5), they occurred at a time
18 when Comcast had notice of the penalty and when it
19 alone had a right to request an adjudicative hearing
20 (which it did very shortly after the contact.)

21 The contact relates to one of the
22 Commission's adjudicative functions, the
23 determination of cause to issue a penalty assessment,
24 and it relates to the subject of this now pending
25 adjudication. The Commissioners therefore believe

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1 that they should report the contacts as within the
2 prohibition of RCW 34.05.455.

3 During the contacts, Ms. Weaver briefly
4 expressed, in general terms, both Staff's view that
5 WAC 480-120-439 applies to Comcast and Comcast's view
6 that WAC 480-120-439 does not or should not apply to
7 Comcast. Neither Chairwoman Showalter nor
8 Commissioner Oshie expressed any definitive view one
9 way or the other.

10 There appears to have been nothing in Ms.
11 Weaver's comments that is not now before the
12 Commission in the company's pleadings in these
13 proceedings and hence open to such rebuttal as may be
14 appropriate through the exercise of each party's
15 right to be heard.

16 Accordingly, we consider this disclosure
17 adequate to protect all parties' rights and, subject
18 to any further comment from the parties, we will
19 consider the matter closed. Is there any further
20 comment concerning this matter? Hearing none, the
21 matter is considered closed.

22 All right. Now, let's let you all have an
23 opportunity to see if you can work out a procedural
24 schedule that will work for all the other business
25 that you have on your plates at this point in time

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1 over the next couple of months or so, and be mindful
2 of the holidays that are coming up as you set that
3 schedule, and I know you will. So we'll be off the
4 record.

5 (Discussion off the record.)

6 JUDGE MOSS: Okay. Let's be back on the
7 record. The parties have had an opportunity to
8 discuss informally among themselves certain
9 procedural schedule matters and have agreed that
10 their preferred dates are -- or workable dates, I
11 should say, for opening round of I'll call it cross
12 motions for summary determination or briefs, if
13 parties prefer, would be December the 5th. Did you
14 all want that to be an in-hand date or --

15 MS. ENDEJAN: Electronic.

16 JUDGE MOSS: Electronic exchange date. Ms.
17 Smith, do you care?

18 MS. SMITH: Electronic is fine with Staff,
19 Your Honor.

20 JUDGE MOSS: Okay. We'll make December 5th
21 a date for electronic exchange of briefs, and copy me
22 on those, please. And then they'll be officially due
23 in the records center on the 8th, the following
24 Monday. So get your hard copies to the records
25 center by the following Monday. That will be

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1 original plus 13 in this proceeding.

2 For replies, December the 23rd. I have
3 indicated to the parties that I will be unable to get
4 to this before the first of the year, in any event.
5 We had some discussion concerning how this matter
6 will go forward. At this juncture, this matter has
7 been delegated, if you will, to me, as presiding
8 officer. The Commissioners are not sitting. What
9 that means in terms of our procedural rules is that I
10 would ordinarily enter an initial order that would be
11 subject to petitions for review and those would go to
12 the Commissioners.

13 The parties may waive an initial order, and
14 the matter can be taken up directly by the
15 Commissioners in the Commissioners' discretion. And
16 so I can ask now whether Comcast, as the Applicant,
17 wishes to waive the initial order or not, or we can
18 take that question up later.

19 MS. ENDEJAN: Not at this time, Your Honor.

20 JUDGE MOSS: Not at this time, all right.
21 Fine. That settles it, then. If one party objects,
22 then we don't do it. So that will be the plan, then.
23 Initially we'll have the opening and reply, written
24 arguments. We will contemplate, on the basis of our
25 review of those, whether we need to have oral

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1 argument to supplement that. And if so, we'll
2 schedule that in due course at a time that we will
3 try to determine is mutually convenient for all
4 parties.

5 Again, any initial order would be subject to
6 petitions for review. Those would be in writing and
7 allow for answers. And that would be another
8 opportunity to take up the question, if raised, of
9 the possibility for oral argument before the
10 Commissioners on those petitions for administrative
11 review.

12 I do want to again, on the record, encourage
13 the parties to take some time for informal
14 discussions. There may be other avenues to resolve
15 this immediate dispute that do not necessarily even
16 call for a Commission interpretation of the WAC in
17 question. I don't know what possibilities there may
18 be out there, but it would be worthwhile at least to
19 explore the range of possibilities for the parties to
20 do that. And if you choose to do that and believe
21 that the process would benefit from the assignment of
22 a mediator or other third party neutral, please
23 request that, and you could actually tender that
24 request through me or you could put that request to
25 the Commission, perhaps attention of Bob Wallis,

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1 who's the director of the Administrative Law
2 Division.

3 Either way, it would be processed
4 appropriately within the Commission and the
5 Commission will decide whether it believed the
6 assignment of a third party neutral would be
7 appropriate. That, again, is discretionary with the
8 Commission.

9 I mentioned that, on paper filings, we need
10 the original plus 13 in this proceeding to meet the
11 Commission's internal distribution needs. Your
12 filings need to be through the Commission's
13 secretary, either by mail to the secretary at WUTC,
14 P.O. Box 47250, 1300 South Evergreen Park Drive
15 Southwest, Olympia, Washington, 98504-7250, or by
16 other means of delivery to the Commission's offices
17 at the physical address I just mentioned.

18 I want to stress that we require filings of
19 substance -- in this case, that will be your briefs
20 or cross motions for summary determination -- to be
21 filed electronically, preferably in a PDF format
22 supplemented by MS Word or WordPerfect, in addition
23 to the paper filing that is required under our
24 procedure rules for formal filings.

25 Service on all parties must be simultaneous

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1 with filing. If parties wish to do so, they may
2 affirmatively waive their right to receive paper
3 service and receive service only by electronic means.
4 You need to file a letter with the Commission stating
5 that you waive other forms of service if that is what
6 you wish.

7 I'll enter a prehearing order in the next
8 day or so. That will include an appendix to keep you
9 mindful of format requirements for filings, and I ask
10 that you do pay attention to that.

11 Since we won't be having a evidentiary
12 hearing, this will probably be our last prehearing
13 conference, but if we need to convene another
14 conference, that will be done by notice, perhaps
15 short notice. Is there any other business order the
16 take up at this point?

17 (Discussion off the record.)

18 JUDGE MOSS: Oh, I'm going to do a roll call
19 for those of you on the bridge line. Actually, we
20 can do it off the record. Don't hang up. I'm about
21 to go off the record, but I do want to hear from the
22 parties on the bridge line whether they need a copy
23 of the transcript. So if there's no further
24 business, we'll be off the record.

25 (Proceedings adjourned at 11:08 a.m.)