

0057

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND)	UT-033011
TRANSPORTATION COMMISSION,)	Volume III
Complainant,)	Pages 57-123
vs.)	
ADVANCED TELECOM GROUP, INC.;)	
ALLEGIANCE TELECOM, INC., AT&T)	
CORP.; COVAD COMMUNICATIONS COMPANY,)	
ELECTRIC LIGHTWAVE, INC., ESCHELON)	
TELECOM, INC., f/k/a ADVANCED)	
TELECOMMUNICATIONS, INC., FAIRPOINT)	
COMMUNICATIONS SOLUTIONS, INC.,)	
GLOBAL CROSSING LOCAL SERVICES,)	
INC., INTEGRA TELECOM, INC., MCI)	
WORLDCOM, INC., McLEOD USA, INC.,)	
SBC TELECOM, Inc., QWEST)	
CORPORATION; XO COMMUNICATIONS,)	
INC.; f/k/a NEXTLINK COMMUNICATIONS,)	
INC.,)	
Respondents.)	

A hearing regarding motions to compel
discovery responses in the above-entitled matter was
held at 9:03 a.m. on Tuesday, July 20, 2004, at 1300
South Evergreen Park Drive, Southwest, Olympia,
Washington, before Administrative Law Judge ANN
RENDAHL.

Barbara L. Nelson, CCR
Court Reporter

0058

1 The parties present were as follows:

2 QWEST CORPORATION, by Adam Sherr (via
3 teleconference bridge), Attorney at Law, 1600 Seventh
4 Avenue, Room 3206, Seattle, Washington 98191, and
5 Douglas Nazarian, Attorney at Law, 111 Calvert
6 Street, Suite 1600, Baltimore, Maryland 21202 (via
7 teleconference bridge.)

8 COMMISSION STAFF, by Christopher
9 Swanson, Assistant Attorney General, 1400 S.
10 Evergreen Park Drive, S.W., P.O. Box 40128, Olympia,
11 Washington, 98504-1028.

12 ESCHELON TELECOM OF WASHINGTON, by
13 Dennis D. Ahlers, Senior Attorney, Eschelon Telecom,
14 Inc., 730 Second Avenue South, Suite 1200,
15 Minneapolis, Minnesota, 55402 (via teleconference
16 bridge.)

17 WORLD.COM, INC., AND ITS REGULATED
18 SUBSIDIARIES, by Michel Singer Nelson, Attorney at
19 Law, 707 17th Street, Suite 4200, Denver, Colorado,
20 80202 (via teleconference bridge.)

21

22

23

24

25

26

27

28

29

30

31

32

33

34

0059

1 JUDGE RENDAHL: Let's be on the record.
2 Good morning. My name is Ann Rendahl. I'm the
3 Administrative Law Judge in the proceeding before us,
4 Washington Utilities and Transportation Commission
5 versus Advanced TelCom Group, et al, in Docket Number
6 UT-033011.

7 Today is Tuesday, July the 20th, 2004, and
8 we're here before the Commission to hear arguments on
9 Qwest Corporation's motion to compel responses to
10 data requests to Staff. Qwest filed that motion, I
11 believe, on Friday -- on Thursday. Copies were
12 received by the Commission on Friday. Staff filed
13 its response yesterday afternoon. And I'm first
14 going to allow Qwest to, in arguing its motion, make
15 any arguments in reply to Staff's response, and then
16 I'd like to have argument from Staff, and then, if we
17 need to do so, we'll go through each and every data
18 request at issue.

19 As I noted off the record, we need to be
20 done by 11:00. So first, let's take appearances from
21 the parties, and if you've already made an appearance
22 in this proceeding, you don't -- do not need to do
23 more than just state your name and the party that you
24 represent.

25 Mr. Nazarian, I believe you are new to this

0060

1 proceeding, so you'll need to make a full appearance,
2 which is your name, address, telephone number, fax
3 number and e-mail.

4 MR. NAZARIAN: Okay. Thank you, Your Honor.

5 JUDGE RENDAHL: Well, let's start with
6 Staff.

7 MR. NAZARIAN: Okay. Sorry.

8 JUDGE RENDAHL: Mr. Swanson.

9 MR. SWANSON: Chris Swanson, Assistant
10 Attorney General, for Commission Staff.

11 JUDGE RENDAHL: Thank you. And for Qwest.

12 MR. NAZARIAN: For Qwest, Your Honor,
13 Douglas Nazarian, from Hogan and Hartson, LLP, 111
14 Calvert Street, Suite 1600, Baltimore, Maryland
15 21202.

16 JUDGE RENDAHL: That's 111 Calvert Street,
17 Suite 1600, Baltimore, and what's the zip code?

18 MR. NAZARIAN: 21202.

19 JUDGE RENDAHL: Thank you.

20 MR. NAZARIAN: My telephone number is
21 410-659-2725; my fax number, 410-539-6981; and my
22 e-mail address is drmnazarian@hhlaw.com, and I'm here
23 representing Qwest.

24 JUDGE RENDAHL: Thank you. Mr. Sherr.

25 MR. SHERR: Yes, good morning. Adam Sherr,

0061

1 in-house counsel for Qwest, as well.

2 JUDGE RENDAHL: And for Eschelon, Mr.
3 Ahlers.

4 MR. AHLERS: Dennis Ahlers, for Eschelon
5 Telecom.

6 JUDGE RENDAHL: And for MCI.

7 MS. SINGER NELSON: Michel Singer Nelson, on
8 behalf of MCI.

9 JUDGE RENDAHL: Thank you. Is there any
10 other party on the bridge line who I have not already
11 -- who I have not taken an appearance from? Okay.

12 Before we get started, since most of you are
13 on the bridge line and we do have a court reporter
14 taking down a transcript of today's proceeding, you
15 will need to speak slowly so that the court reporter
16 can take down what you have to say. It's difficult,
17 also, to know who's speaking, so if you can identify
18 yourself when you do speak, that's also helpful for
19 the court reporter.

20 So let's go ahead, Mr. Nazarian. Any reply
21 to Staff's answer and your brief argument.

22 MR. NAZARIAN: Thank you, Your Honor. Let
23 me start off by saying we very much appreciate you
24 scheduling this hearing on an expedited basis and for
25 hearing us today in advance of Mr. Wilson's

0062

1 deposition.

2 My fundamental response to the Staff's
3 opposition to our motion is, I guess, initially one
4 of surprise at the tone and the description of the
5 back and forth that Mr. Sherr and I had with counsel
6 for the Staff over the course of the last couple
7 weeks. I don't want to dwell on it, really, because
8 it's not what this motion is about.

9 This motion is really about a very simple
10 question, which is whether Qwest's data requests, the
11 ones that are at issue in this motion, are fairly
12 characterized, as we believe they are, as seeking a
13 narrative response explaining the Staff's policies or
14 positions in this case.

15 The objective of these data requests from
16 the very beginning, and they were served well in
17 advance of Mr. Wilson's deposition knowing, as we did
18 at the time, when Mr. Wilson would be deposed, was to
19 attempt to understand really what the Staff's
20 position in this case was, particularly with respect
21 to the Exhibit B agreements, and we had hoped that we
22 would get responses to those requests so that we
23 could focus the deposition of Mr. Wilson and also,
24 quite frankly, understand what it is the Staff is
25 alleging in this case.

0063

1 I tried four other unfiled agreements cases
2 in different states, and the whole Exhibit B theory
3 of this case is completely new to us. We have done
4 the research and we still do not understand what it
5 is we're being accused of doing. We don't understand
6 what -- I mean, the context of a series of agreements
7 that everybody seems to agree were not required to be
8 filed, how it is that Qwest can be liable for
9 discriminating against CLECs who were not parties to
10 those settlement agreements, which, you know, again,
11 were backward looking agreements that don't fall
12 within the filing requirements.

13 We're not looking, as the Staff seeks to
14 characterize, for an advisory opinion about what we
15 should have done. We literally don't know what it
16 means to say that the terms of these settlement
17 agreements that are not subject to the filing
18 requirement need to be made available to other CLECs,
19 you know, when they arise out of disputes that are,
20 as we understand them, completely, you know, unique
21 on their facts.

22 We served this discovery to understand how
23 it is that the Staff believes Qwest committed this
24 discrimination, for which it seeks a thousand dollars
25 per agreement per day, and it's really as simple as

0064

1 that.

2 You know, as Your Honor pointed out, Mr.
3 Wilson's deposition begins tomorrow. We suspect that
4 the Staff is going to take the same position in its
5 data request, which is to say that everything we've
6 asked seeks some sort of legal conclusion or is
7 otherwise out of bounds.

8 What I do know is that we haven't asked for
9 any sort of, you know, internal legal deliberation,
10 we haven't asked the Staff how it came to reach its
11 conclusions, you know, what is behind the theory; we
12 just need to know what the theory is. And after I
13 finish, Mr. Swanson and the others have spoken, Your
14 Honor, I'd be happy to go through each of these at
15 whatever level of detail Your Honor wishes and
16 explain how it is.

17 We think quite clearly that they request
18 from the Staff an articulation of the Staff's
19 position in a way that falls squarely within the
20 Administrative Code Section 480-07-400(c)(3).

21 And unless Your Honor wants to talk more
22 about the Staff's description of the meet and confer
23 process in our telephone conversation, that's all I
24 would say at this point.

25 JUDGE RENDAHL: Well, I don't know that we

0065

1 need to go into that. You know, at this point you
2 all are here and it appears to me, from having
3 reviewed the motion and the response, that we don't
4 need to be here on all of these data responses --
5 data requests and responses, but I'm going to turn to
6 Staff now.

7 MR. SWANSON: Thank you, Your Honor. In
8 summary, Staff's position is very well, I believe,
9 laid out in its response, and that is that these data
10 requests seek, in a sense, either advisory opinions,
11 legal opinions, or legal analysis or legal
12 conclusions related to allegations either in this
13 case or allegations that don't necessarily relate to
14 this case.

15 Qwest indicates it doesn't know what it
16 means in terms of the Exhibit B agreements. It's not
17 clear on what the law is. Staff's response to that
18 is that it seems to -- it seems to me that if Qwest
19 is unsure about the law or does not believe that
20 Staff has brought an adequate case, it certainly has
21 remedies, in terms of making its argument in brief
22 and in testimony that Staff hasn't made its case or
23 that Staff -- or that another legal theory is better
24 than Staff's legal theory.

25 Just as in another relatively simple case,

0066

1 for example, you know, like a theft case or a
2 possession of stolen property case, if Qwest believes
3 that -- or if the other party believes that the
4 prosecutor hasn't made the case, certainly they can
5 show facts and make argument that they haven't made
6 the case.

7 Using discovery tactics in this way is
8 completely inappropriate, in Staff's opinion, and
9 also believes that this would set a bad precedent for
10 the Commission in terms of, in a sense, allowing
11 folks just to send out data requests asking the
12 parties to identify all authorities it relies on for
13 particular propositions, even particular propositions
14 that the party hasn't necessarily taken a position on
15 in the testimony or in the complaint in this case and
16 in a different pleading in another case.

17 For all those reasons, Staff believes that
18 Qwest's motion to compel should be denied.

19 JUDGE RENDAHL: Okay. I guess at this
20 point, before we start going through the specific
21 questions -- and I'm going to use Qwest's motion as a
22 basis for going through that, understanding that both
23 Qwest and Staff attached copies of the requests and
24 responses at issue. If we need to refer to those
25 exhibits, we can do so, but I think it's helpful to

0067

1 just go through Qwest's motion.

2 And Mr. Nazarian, starting at page eight of
3 your motion and addressing the requests, beginning
4 with number five, can you explain to me what fact
5 you're looking for in these particular questions?

6 MR. NAZARIAN: I don't think we are
7 particularly looking for facts, Your Honor; we're
8 looking for an articulation by the Staff of its
9 position with respect to which -- you know, just
10 looking at number five, for example, which statutes,
11 regulations or other authorities create an obligation
12 broader than that contained in the October 4th, 2002
13 FCC order.

14 So we are looking for the Staff to tell us, I
15 guess in the first instance, whether it's taking a
16 position, and we know from the responses 2, 3 and 4
17 that we obviously -- (inaudible).

18 JUDGE RENDAHL: I'm sorry, can you repeat
19 that last statement?

20 MR. NAZARIAN: Yes, Your Honor, I'm sorry.
21 We now know, from the Staff responses to Data
22 Requests 2, 3 and 4, that the Staff is not taking a
23 position that Qwest's filing obligation or the
24 definition of interconnection agreement for purposes
25 of filing requirements is broader than the FCC order.

0068

1 So with respect to Number 5, it may be that the
2 answer is none, because they've established that for
3 other data requests, that their definition of
4 interconnection agreement tracks the FCC orders.

5 In fact, they gladly told us that, without
6 any objection, but what we are looking for that we
7 are not -- you know, the question doesn't seek the
8 statement of fact; it seeks an identification of what
9 the Staff's position is, and that's true for this
10 whole range of them.

11 JUDGE RENDAHL: But wouldn't you also say it
12 might create an implication -- it might ask for an
13 implication of a fact?

14 MR. NAZARIAN: Well, it certainly asks --
15 I'm not sure I understand Your Honor's question, but
16 --

17 JUDGE RENDAHL: Well, data requests are to
18 seek information, particularly under the rules, the
19 Commission's rules, data, as well as, as you state, a
20 narrative response seeking policies and positions,
21 which is really what's at issue here. But I guess,
22 as I look through this list of 5 through 18, on pages
23 eight and nine, it progresses from asking for
24 statutes to admitting a legal position.

25 And I'm concerned about both the wording, if

0069

1 what you're asking for is Staff's position, you know.
2 Qwest can make its case as Staff says, if it believes
3 that Staff doesn't have a proper legal basis, can
4 make its case in its testimony and its brief. And
5 it's improper, in my mind, to ask Staff to make your
6 case for you.

7 MR. NAZARIAN: Well, I certainly -- I'm
8 sorry, were you finished, Your Honor? I didn't mean
9 to --

10 JUDGE RENDAHL: I'm done.

11 MR. NAZARIAN: Okay, thank you. We
12 certainly are not expecting Staff to make our case
13 for us. We will carry the burden of making our case
14 ourselves and have done so throughout this case and
15 will do so. The question really is what case is it
16 that the Staff is making, and that's really what
17 we're trying to understand. The complaint is a very
18 broad strokes complaint, and that's fine. That's
19 what notice is going to be about.

20 But with respect to this particular range, 5
21 to 18, there's a very important issue that underlies
22 the Exhibit A agreements, which is one that has been,
23 for the most part, not addressed in the other unfiled
24 agreements cases, but the one time it was addressed,
25 in the New Access arbitration, it led to a ruling in

0070

1 Qwest's favor, which is what is the scope of CLECs'
2 ability to opt in to interconnection agreements under
3 Section 251, 252(i).

4 We do not know, as we sit here, what the
5 Staff's position is with respect to the rights of
6 CLECs, in the Staff's view, to opt in to
7 interconnection agreements. I know, for example, in
8 Minnesota, Department of Commerce took the position
9 that, you know, despite FCC rulings and despite FCC
10 regulations about the requirement that CLECs satisfy
11 (inaudible) --

12 JUDGE RENDAHL: Can you repeat that, Mr.
13 Nazarian?

14 MR. NAZARIAN: Yes, Your Honor. I know that
15 the Minnesota Department of Commerce, in that case,
16 took the position that even though there are -- there
17 was an FCC ruling in the first report and order,
18 paragraph 1350, and a corresponding federal
19 regulation saying that CLECs have to satisfy related
20 -- presumably related terms and conditions before
21 they can opt in, I know that in Minnesota and other
22 places they've taken the position that that
23 requirement is of no particular consequence and that
24 any CLEC can look at an agreement and take whatever
25 terms -- opt in to whatever terms it likes regardless

0071

1 of whether it can or is willing to take on related
2 terms. That's what we're trying to understand about
3 the Staff's position now, you know.

4 There's a recent FCC order -- recent, by
5 that, I mean a week ago --

6 JUDGE RENDAHL: Right.

7 MR. NAZARIAN: -- that changes a lot of this
8 landscape, but I don't know what the Staff's position
9 is with respect to CLECs' ability to opt in to
10 agreements that were entered back in 2000, 2001,
11 2002. And that's what we're driving at here.

12 JUDGE RENDAHL: Mr. Swanson.

13 MR. SWANSON: Staff's response, I guess,
14 would be, first, Staff is making an assumption that
15 why Mr. Nazarian, or I guess, rather, why Qwest needs
16 this information is the scope of CLECs' ability to
17 opt in to interconnection agreements, that in a sense
18 would go to the issue of sanctions or damages.

19 Because I'm not sure -- I guess my sense is
20 either the agreement needs to be filed or it doesn't
21 need to be filed. And again, I guess Staff takes the
22 same position. If that's the case, then Qwest can
23 certainly present its position that one particular
24 theory or another particular theory is better in
25 terms of the scope of other CLECs' ability to opt in

0072

1 to interconnection agreements and attempt to get the
2 Commission to buy off on that theory, I would assume
3 for Qwest, limiting the amount of sanctions if the
4 Commission was to adopt that theory. I guess that's
5 my sense, but I could be misunderstanding the
6 argument of Mr. Nazarian.

7 JUDGE RENDAHL: Well, let me ask you this,
8 Mr. Swanson. Are you aware of any Commission
9 decisions on the issue of how the pick and choose
10 rule is applied in the state of Washington?

11 MR. SWANSON: I am not aware personally. Is
12 that what you're asking? Yeah.

13 JUDGE RENDAHL: Right. I've been working in
14 this area of telecom, but I have never worked on a
15 particular pick and choose case. My particular sense
16 is that the Commission has issued a policy statement
17 on the issue and may have entered a decision on
18 disputes between parties in that case. And I guess,
19 as I -- to both parties, both Qwest and Staff, this
20 is an issue that, if the Commission has taken a
21 position on this issue, I would expect Staff to
22 pursue whatever position the Commission has taken in
23 the past and it would be safe to assume that Staff
24 would take that position.

25 This is an issue about how the parties are

0073

1 going to argue this case, and I -- from Mr. Nazarian,
2 if Minnesota has taken a position on something,
3 that's something Qwest can argue. And Qwest can look
4 at the Commission's decision on this and doesn't need
5 to ask Staff what the Commission's position has been
6 on this.

7 Now, if there is no Commission position on
8 how the pick and choose rule was applied, then I can
9 understand why you would go to Staff on this issue.
10 But it is my sense that the Commission has addressed
11 this issue in the past.

12 If that is the issue that Qwest needs to get
13 into, is how Staff will apply the pick and choose
14 rule, I would expect the two of you could sit down
15 and talk about this, understanding, you know, you may
16 dispute what the Commission -- what the exact -- you
17 know, how the Commission should apply it in this
18 particular case, but you should be able to sit down
19 and talk about, Well, this is what the Commission has
20 done here in Washington, and Qwest, you can argue
21 amongst each other what has happened in Minnesota or
22 other states, but that doesn't need to come here to
23 me. That's not a fact. That's an issue that you all
24 can decide.

25 And so if that's the basis of asking

0074

1 Questions 5, 6, 7, 8, 9, 10, 15, 16, 17 and 18,
2 there's no need for Staff to respond to these
3 questions, because I think that can be addressed in
4 your testimony and in your briefs, and I do expect
5 the parties to talk to one another and talk to each
6 other about what's out there, but I do think, to the
7 extent there are Commission decisions on pick and
8 choose in Washington, then that's something that
9 Qwest can look to. It doesn't need to ask Staff what
10 the Commission's decisions have been on that and what
11 the statutes and regulations are.

12 MR. NAZARIAN: Your Honor, let me just be
13 very clear about something. I do not and Qwest is
14 not asking the Staff to tell us what the law is, and
15 I certainly don't expect that. It's our job to
16 understand what the law is and make the arguments we
17 need to make. All I want to know is what position
18 the Staff is taking, and it's been my experience in
19 these unfiled agreements cases -- I've had two kinds
20 of experience.

21 The first is there isn't any Commission
22 guidance. Now, I'm not aware of anything in
23 Washington, but I'm not going to represent that I've
24 exhaustively researched it. So if there is
25 something, that's fine. But what I also have

0075

1 experienced is that the parties to these cases have
2 taken the opportunity to push the envelope and to
3 take positions that are stronger.

4 And the Minnesota example is simply an
5 example, Your Honor, of how, you know, the law said
6 what it said, but the advocacy position taken by the
7 state in that case was very different than what the
8 law says. Now, again, we're not asking the Staff or
9 anybody else to do our work for us. I do think we
10 are entitled to understand what position they're
11 taking.

12 Now, if Staff wants to say we are seeking to
13 -- in this case, we will ask the Commission to apply,
14 you know, its prior ruling to these particular facts
15 or something, then at least we know that the Staff is
16 not seeking to press the theory farther than it's
17 already gone. And as I sit here, I don't know what
18 their intentions are in that regard.

19 JUDGE RENDAHL: Okay. Well, I'll also, you
20 know, as you go down this list, Questions 5, 6 and 7
21 are asking for what the state of the law is. That's
22 something that I think Qwest can determine. Now, the
23 wording that -- create an obligation, you know,
24 that's the implication that I was stating. That's
25 the implication of what the law means, and I think

0076

1 that's not a proper question for a data request.

2 If you are wanting Qwest to -- if you want
3 Staff to explain a particular position it has taken,
4 then you need to reference the position, either from
5 the testimony or from the complaint, and ask your
6 question about that.

7 MR. NAZARIAN: Okay. All right. So just so
8 I'm clear, then, Your Honor, if I, during Mr.
9 Wilson's deposition, wish to ask him to discuss a
10 position he's taken in his testimony, that question
11 is fair game.

12 JUDGE RENDAHL: Yes, if he's taken a
13 position in his testimony, you can inquire as to
14 that, as opposed to a broad general legal question.

15 MR. NAZARIAN: Okay.

16 JUDGE RENDAHL: Okay. So for that reason,
17 I'm going to deny the motion as to 5, 6, 7, 8, 9 on
18 that basis, and as to 10 and 15 and 16, you're asking
19 for an admission of a legal theory, as opposed to an
20 admission of fact. Again, I'm going to deny the
21 motion as to 10, 15 and 16. As to 17 and 18, well,
22 17 refers to 16, and 18 is, again, asking for an
23 admission of either a legal conclusion or a legal
24 theory.

25 Now, if you're asking about process issues,

0077

1 I don't think asking for an admission of what a
2 process is is an appropriate way to characterize it.
3 I think it's fair to ask Staff if they're familiar
4 with what the process is and, if they know what that
5 process is, to explain it, but I don't think you've
6 done so in these questions.

7 MR. NAZARIAN: Okay. Thank you, Your Honor.

8 JUDGE RENDAHL: Okay. And then, as to the
9 next page, 11, again, that's not asking for an
10 admission of fact. That's asking for Staff's
11 position on the theory of the case. You know, here
12 we have sort of a back and forth as to whether
13 something is backward looking or has an ongoing
14 obligation. That's something you all can argue in
15 your brief.

16 I think you thoroughly understand what the
17 FCC's declaratory ruling on this is, and if you want
18 to know how this applies to a particular agreement or
19 how a particular agreement is interpreted under the
20 FCC's declaratory ruling, you know, we'll get to that
21 later, because I think that's what the questions are
22 as to the particular agreements later, but the
23 general conclusion, I think Staff has answered it,
24 and I think you all can argue this issue on brief.

25 That applies to 11 and 12. So as to those,

0078

1 I think I'm going to deny the motion as to 11 and 12,
2 as well.

3 MR. NAZARIAN: Okay. Thank you, Your Honor.

4 JUDGE RENDAHL: I have some questions about
5 the next page. On page 11 of your motion, question
6 24.

7 MR. NAZARIAN: Yes, Your Honor.

8 JUDGE RENDAHL: This goes to the process
9 question. It seems to me you're asking for Staff's
10 understanding of the process; correct?

11 MR. NAZARIAN: Well, yes, at least, Your
12 Honor. I mean, this now gets right at what I was
13 talking about before with respect to the Exhibit B
14 agreements. You know, the Exhibit B agreements are
15 all settlement agreements that do not have ongoing
16 obligations, and it is my understanding --

17 JUDGE RENDAHL: Well, let me ask you that.
18 Is that Qwest's opinion or is that something that
19 Staff and Qwest have agreed to?

20 MR. NAZARIAN: I wouldn't hold Mr. Swanson
21 to having agreed to it here, although if he wants to,
22 that's fine, but it is my understanding of Staff's
23 position that the Exhibit B agreements do not have
24 ongoing obligations and, therefore, are not subject
25 to the Section 252 filing obligation. Mr. Swanson

0079

1 can correct me if I've got it wrong, but that's how I
2 understand it. Okay.

3 JUDGE RENDAHL: He's conferring.

4 MR. SWANSON: I apologize. I'm sorry, Mr.
5 Nazarian. Just a moment.

6 MR. NAZARIAN: I'm sorry, I'm sorry.

7 MR. SWANSON: Yeah, I guess Staff's position
8 is that, you know, we haven't claimed in testimony
9 that they are subject to 252. That doesn't
10 necessarily mean that we've drawn a conclusion one
11 way or another. It's just that that's not the cause
12 of action we're bringing.

13 And again, I guess Staff's response would be
14 Qwest can certainly argue against the case that Staff
15 has made, but broadening that case to something that
16 Staff hasn't even argued doesn't seem appropriate.
17 If Staff hasn't taken a position on something, it
18 doesn't seem to me that analysis of a position Staff
19 has taken -- has not taken, rather, is appropriate.

20 MR. NAZARIAN: Well, I guess, Your Honor,
21 that's the void I kind of find myself in here. And
22 it's with a set of agreements that at least there's
23 no allegation Qwest violated any law by not filing.

24 So I'll leave it at that. I don't want to
25 try to put any positions on the Staff they're not

0080

1 taking, but there's no allegation in this case that
2 Qwest was required by Section 252 to file the Exhibit
3 B agreements, okay.

4 So then the allegation is, nevertheless,
5 Qwest has discriminated against other CLECs under
6 three different Washington State statutes, which are,
7 on their face, very broad anti-discrimination
8 sections. We are not required by federal law to file
9 these, and yet somehow we are alleged to have
10 discriminated against other CLECs by not making these
11 agreements public or somehow making the terms of
12 these settlement agreements available to others.

13 And questions 24 and 25 are really as simple
14 as what is it that you claim we were supposed to have
15 done. If we're not required to file them, what is it
16 we were supposed to do, just as a matter of process.
17 I really don't think it's unreasonable for us to ask
18 that question.

19 MR. SWANSON: And I guess Staff's response
20 would be, you know, the argument that you've just
21 made, you know, it's very articulate and it sounds
22 like something that would be appropriate for brief.
23 I just -- Staff just doesn't understand why Qwest
24 wants to make an argument in this proceeding or in
25 this forum rather than in brief.

0081

1 JUDGE RENDAHL: Well, I guess the question
2 as to what the process is, I agree, does not seem to
3 be unreasonable. And I guess I don't see that the
4 response is as clear as it should be. And I do see
5 this as exploring a Staff position, given that it is,
6 in a sense, a new theory. So I think it's reasonable
7 to expect more clarity in the response, and so I'm
8 going to grant the motion to compel as to 24.

9 And as to 25, I'm going to -- let me read it
10 over, and then I want to hear from the two of you on
11 it.

12 MR. SWANSON: And Staff would like to seek
13 some clarification on 24, if it may, at some point.

14 JUDGE RENDAHL: Okay. Now, this sort of
15 jumps ahead as to the process for the deposition.
16 Considering that the deposition is going forward
17 tomorrow and that it may make more sense for the
18 parties to explore this in deposition rather than to
19 re-issue data requests or to re-issue responses, I
20 leave it up to the parties to decide which is more
21 efficient, to address the issue in the deposition or
22 to have Staff respond on paper. I don't care, but
23 it's really a matter of efficiency for the parties.

24 And so I think if -- once we're done today,
25 if it's possible for you, Mr. Swanson, to see what

0082

1 further -- what might make it easier for Staff to
2 answer this question, I would think that Qwest would
3 be amenable to allow some clarity on this issue. Is
4 that right, Mr. Nazarian?

5 MR. NAZARIAN: Well, we'll certainly work
6 with them. I mean, I must confess I can't see what's
7 unclear about the question, but, you know, that
8 certainly is something we could have some back and
9 forth on in the course of the deposition tomorrow, if
10 nothing else, and maybe Mr. Swanson and I could talk
11 about that tomorrow or whenever.

12 So long as -- if Your Honor is ruling that
13 the Staff is required to answer 24, then I think it
14 may well be that, through the course of some
15 questioning and back and forth in the course of
16 questioning in the deposition, we may be able to get
17 at that better than on paper. So we are certainly
18 amenable to taking that approach. I just want to
19 make sure we know which questions they're going to be
20 required to answer.

21 MR. SWANSON: And Staff just wants to
22 clarify, at least, that with regard to procedures, I
23 think that that's an assumption in 24 that there are
24 necessarily procedures. I mean, if we're talking
25 about discrimination, and discrimination doesn't

0083

1 necessarily involve specific procedures set out in
2 law that need to be filed. And I guess that's
3 Staff's only concern, is that certainly Staff will
4 answer the question, but to the extent that it
5 necessarily lays out or expects Staff to list certain
6 procedures in law or somewhere else that Qwest needs
7 to follow, it may not be able to do that.

8 MR. NAZARIAN: Right. Well, if there are no
9 procedures, well, that's an answer.

10 JUDGE RENDAHL: And I guess this goes to,
11 you know, an expectation that, yes, we're in
12 litigation, but I also expect the parties to
13 communicate.

14 What Qwest is asking here, it seems to me,
15 is what does Staff expect Qwest should do about these
16 agreements; how should it have approached these
17 agreements in the first place. So to the extent that
18 there are established procedures, you can answer that
19 question. To the extent that there are procedures
20 Staff believes Qwest should have followed, even if
21 they are not -- if there's a process that Staff
22 believes they should have followed, even if it's not
23 something in the Commission's procedural rules or
24 telecom rules, I think that's an appropriate thing to
25 clear up and it may move the parties either towards a

0084

1 greater understanding of the case or, you know, help
2 with developing testimony and brief. And so I think
3 it's an appropriate question.

4 But, again, in terms of cautioning you as to
5 what is appropriate in these questions and in
6 deposition, I don't think it's appropriate for Qwest
7 to be asking about legal theories, legal analysis,
8 applications of law to fact or what the legal
9 implications are of information. Those are
10 conclusions that Qwest can draw on its own in its
11 testimony and in its brief. To the extent that
12 there's a position such as this issue about process,
13 I think that's appropriate. Does that give you some
14 guidance?

15 MR. NAZARIAN: It does, Your Honor. Thank
16 you.

17 JUDGE RENDAHL: Okay. As to 25, again, I
18 think to the extent -- and I would grant the motion
19 as to 25, but I think Staff has answered, to some
20 extent, but, again, I think it needs a little more
21 clarity, more fullness in the answer than Staff has
22 provided.

23 But I will deny the question 26 as to
24 citations to relevant authorities. That, again, goes
25 into this issue of the opting in, which I don't think

0085

1 is relevant anymore, given Staff's response here in
2 this hearing, and as well as I believe you said to --
3 in Staff's answers to some of the data requests.

4 MR. NAZARIAN: Well, Your Honor, I don't
5 want to give the impression that we understand -- I
6 mean, with respect to the Exhibit B agreements, there
7 is this whole question of making terms available.
8 That's still very murky to us and I don't pretend to
9 understand it. As to Exhibit A, I mean, we talked
10 about that earlier, and I understand Your Honor's
11 ruling, but as to Exhibit B --

12 JUDGE RENDAHL: So you're asking for the
13 process -- I guess, question 24, the process is for
14 what Qwest should have done after entering into the
15 agreements to make them available, and that also --
16 then your question 26 is what process would CLECs
17 have to somehow adopt the terms?

18 MR. NAZARIAN: Yes, because it seems to me
19 that, implicit in the Staff's theory -- but, again,
20 I'm -- you know, we're shooting in the dark here --
21 implicit in the Staff's theory is that if there's
22 discrimination that comes about by virtue of secrecy,
23 then, you know, then the argument must be that we,
24 Qwest, are somehow obligated to avoid secrecy by
25 disclosing terms, and correspondingly, if CLECs

0086

1 suffer discrimination by virtue of the fact that
2 terms of settlement agreements aren't available to
3 other CLECs, we're somehow obliged to make them
4 available.

5 And since we seem to have an agreement that
6 Staff is not alleging that that disclosure and
7 availability of terms comes about for these
8 agreements by way of the 252 process, then our
9 question is what exactly is it we were supposed to
10 do. It's a different -- it's the same kind of
11 question as 24, 25, but on the other side of it,
12 which is to say 24 and 25 are more about what we
13 should have done; 26 is more about how are the CLECs
14 supposed to opt in.

15 JUDGE RENDAHL: Okay. Mr. Swanson.

16 MR. SWANSON: I guess Staff believes that
17 Qwest is making this much more complicated than it
18 needs to be. You know, this -- really, this is an
19 issue of discrimination. And again, Qwest can
20 certainly make its argument, but if we were looking
21 at a similar type discrimination complaint, say
22 discrimination in the workplace or something else,
23 you know, the facts aren't that complicated and I
24 don't think that the concept of discrimination is
25 that complicated.

0087

1 And you know, if Qwest believes that it's
2 treated the other parties fairly or has not given
3 undue preference or discriminated, it certainly can
4 make that argument, and it -- you know, the fact, in
5 analogous discrimination in the workplace, it
6 wouldn't be necessary that the parties necessarily
7 detail what it is that a party should have done.
8 Rather, all the burden of proof is is to show
9 discrimination.

10 MR. NAZARIAN: Well, Your Honor, if I could
11 respond to that. If this were a workplace
12 discrimination case, we would have a claim that, for
13 example, a person was a member of a protected class
14 who was denied a promotion, for example, that he or
15 she was, you know, either entitled to or should have
16 been considered under a body of law that is known and
17 cited.

18 Here what we have, and again, maybe I'm just
19 missing something, but what we have is the allegation
20 that when Qwest entered into a settlement agreement
21 with CLEC A over a billing dispute, that the fact of
22 that agreement somehow discriminated against some
23 other CLEC who didn't have that particular billing
24 dispute, may not even, for all I know, purchase that
25 product from Qwest, may not even be on that sort of

0088

1 platform.

2 So you've got two parties to a settlement
3 agreement, one of whom is Qwest, and Qwest is somehow
4 discriminating against people that aren't even part
5 of the settlement agreement. I can tell you this.
6 We have researched this question.

7 JUDGE RENDAHL: I think I've heard enough,
8 and I think at this point I'm going to grant the
9 motion as to 24, 25 and 26, going as to the process,
10 but not as to any citations to relevant authorities,
11 because I understand Qwest's questions going to what
12 Staff's position is as to the process. And so
13 that's, I think, pretty clear.

14 And whether you choose to do that through
15 asking for written response or through the
16 deposition, I leave that up to the parties.

17 MR. SWANSON: And Staff would certainly --
18 and we'll be clarifying it. Staff does not intend to
19 step on or trample Qwest's business decisions. In a
20 sense, some of these decisions are business
21 decisions, and Staff would not pretend or try to tell
22 Qwest how to do its job in terms of managing, and
23 that's part of the reason that Staff is reluctant to
24 go too far in terms of setting out what Qwest should
25 or should not do, but certainly we'll try to answer

0089

1 the question.

2 MR. NAZARIAN: But, on the other hand, if
3 they want a thousand dollars per day --

4 JUDGE RENDAHL: Well, you don't need to
5 argue this at this point. This is beyond the focus
6 of what we need to argue today.

7 MR. NAZARIAN: Okay. I'm sorry, Your Honor.

8 JUDGE RENDAHL: Okay. Moving on to page 13
9 of the motion, with requests 19 through 22 and 49
10 through 53. Again, with 19, we have a seeking
11 admission not of a fact, but of an implication of a
12 fact, and so for that reason, I guess 19, 20, 21, 22,
13 for the reasons I stated earlier for the first set of
14 DRs, I'm going to deny the motion as to those
15 particular questions.

16 These are arguments the parties can make as
17 to what harm existed and what the implications of
18 that alleged harm are.

19 As to 49, could you briefly, Mr. Nazarian,
20 tell me what it is Qwest is seeking in the series of
21 questions 49, 50, 51 and 52? It seems to me that 52
22 and 53 are almost identical. I'm not sure what the
23 --

24 MR. NAZARIAN: All right. The purpose of
25 these questions, Your Honor, is to determine the

0090

1 Staff's position on the question of whether --

2 JUDGE RENDAHL: Can you speak up?

3 MR. NAZARIAN: I'm sorry, Your Honor. The
4 purpose of 49 through 53 -- can you hear me?

5 JUDGE RENDAHL: Yes.

6 MR. NAZARIAN: Okay, thank you -- is to
7 determine the Staff's position as to whether actual
8 discernible harm, prejudice or disadvantage is
9 necessary to trigger these three anti-discrimination
10 statutes. The language of the statutes is in the
11 nature of undue or unreasonable prejudice or
12 disadvantage. I think it's -- if it's not identical,
13 it's consistent with.

14 What we want to know is whether the Staff's
15 position is that they actually have to suffer some
16 harm or they can hypothesize or speculate that there
17 might be harm. Forty-nine asks that question sort of
18 in its broadest sense.

19 Fifty asks whether any form of hypothetical,
20 any sort of hypothetical prejudice or disadvantage
21 qualifies as undue or unreasonable prejudice or
22 disadvantage or whether there has to be -- there's
23 some level of prejudice or disadvantage that has to
24 be out there.

25 Fifty-two asks for the standard in

0091

1 determining -- that the Staff would apply in
2 determining whether the prejudice or disadvantage
3 relating to the failure to file is undue or
4 unreasonable. Fifty-three --

5 JUDGE RENDAHL: It would seem to be
6 identical, but I'm going to look at the --

7 MR. NAZARIAN: Yeah, I'm going to go back
8 and look, too. That -- it sure looks identical.

9 JUDGE RENDAHL: They appear to be identical.
10 I think they're identical.

11 MR. NAZARIAN: They look identical, Your
12 Honor.

13 JUDGE RENDAHL: So that's okay.

14 MR. NAZARIAN: So I meant exactly for 53
15 what I meant for 52.

16 JUDGE RENDAHL: Okay.

17 MR. NAZARIAN: So it really drives at this
18 question about whether --

19 JUDGE RENDAHL: Well, I guess are you asking
20 whether Staff has a position or are you inquiring as
21 to a position Staff has already taken on this?

22 MR. NAZARIAN: I want to know if they have a
23 position, because they haven't taken one that I'm
24 aware of.

25 JUDGE RENDAHL: Because the way I read the

0092

1 data request wording is a data request seeks a
2 narrative response explaining a policy position or
3 document. So to the extent that they have not stated
4 a position, I'm not sure it's fair to ask whether
5 they have one.

6 MR. NAZARIAN: Well, what I do know is that
7 when you look at Mr. Wilson's testimony with respect
8 to these agreements, you see very broad descriptions
9 of what the agreements do, but there's no real
10 discussion of how anybody's been harmed by that. So
11 the questions are -- I guess they follow from the
12 existing position, which is, because the settlements
13 were not -- because we didn't do whatever it is we're
14 supposed to do with these settlement agreements that
15 we still don't quite get, there's discrimination.
16 And the question that follows is that (inaudible).

17 JUDGE RENDAHL: I'm sorry, the court
18 reporter couldn't hear that last phrase.

19 MR. NAZARIAN: I'm sorry.

20 JUDGE RENDAHL: That's okay. We're on the
21 telephone. It makes life difficult.

22 MR. NAZARIAN: So the question is, for these
23 agreements, you know, that we were supposed to do
24 something with, whatever that is, is it just enough
25 that we didn't do that, or does there have to

0093

1 actually be some harm, and if so, how much. So it's
2 a question that flows from the position we know they
3 have taken.

4 Now, you know, maybe, Your Honor, the best
5 way to get at this is to ask Mr. Wilson about the
6 specific agreements tomorrow, which I'm happy to do.

7 JUDGE RENDAHL: And I think that may be the
8 best way. I think asking the question as you have,
9 in a very broad, general way that really, in my mind,
10 seems to go to sort of general legal theories, is
11 best explored in testimony to which Staff can
12 respond, or in brief.

13 MR. NAZARIAN: Okay.

14 JUDGE RENDAHL: But to the extent that you
15 have particular questions about particular agreements
16 and there are facts that can be addressed and pulled
17 out from those agreements, I think those are fair
18 questions.

19 MR. NAZARIAN: Okay. So long as it's clear
20 that if I ask Mr. Wilson about a particular
21 agreement, that I can ask him what is the harm to the
22 rest of the CLEC world, where is the discrimination,
23 and is it hypothetical or is it real, you know, those
24 kinds of questions. If I can ask him those questions
25 about specific agreements, then I think we'll do

0094

1 that.

2 JUDGE RENDAHL: Can you restate what you
3 just asked?

4 MR. NAZARIAN: Oh, I hope so. So long, Your
5 Honor, as I can ask Mr. Wilson as to particular
6 agreements about the nature of the discrimination
7 that that agreement causes, the harm that other
8 CLECs, in his testimony, have suffered or may suffer,
9 and whether that harm is real or hypothetical, as
10 long as I can ask him those kinds of things and he'll
11 be required to answer them, then I think we'll do
12 that.

13 MR. SWANSON: And I guess Staff would just
14 respond that, you know, I know Mr. Wilson will do his
15 best to present his legal opinion and also draw
16 conclusions from the facts, and that's really how I
17 see Staff responding to those kind of questions, is
18 that -- is in terms of the facts that Staff is aware
19 of, or the facts that Staff has testified to.

20 JUDGE RENDAHL: Well, I think it is
21 reasonable to ask whether Staff believes that harm
22 has occurred or could have occurred from an agreement
23 that Staff has included in Exhibit B to the
24 complaint. And to the extent that we need to get
25 into this again based on argument during a

0095

1 deposition, which I hope we don't need to get into, I
2 would just caution Qwest to avoid asking
3 interpretation from Mr. Wilson, who is not an
4 attorney, as to what constitutes undue or
5 unreasonable prejudice or disadvantage under the
6 statutes, but just restrict the questions to whether
7 there is actual or hypothetical harm from an
8 agreement and what the nature of that harm might be.

9 MR. NAZARIAN: Well, okay.

10 JUDGE RENDAHL: Is that understandable?

11 MR. NAZARIAN: Well, I want to make sure I
12 get it, because I do think, since he is the one and
13 only Staff witness so far, unless someone else is
14 going to serve as rebuttal, I would have thought it
15 would be fair to ask him, you know, first of all,
16 what harm or discrimination he says there is, and
17 second of all, what makes that undue or unreasonable.

18 I think it's fair for us to ask him that,
19 because, otherwise, I mean, he is testifying as a
20 telecommunications economist, he is making broad
21 statements about the discrimination he says Qwest has
22 caused CLECs to suffer, and it does seem to me that
23 we are entitled, should be entitled to explore where
24 that boundary of undue or unreasonableness lies.

25 Now, you know, he can express it in his

0096

1 capacity as a telecommunications economist expert --
2 or witness for the Staff. I mean, I'm not going to
3 ask him to do it as a lawyer, but since he is the
4 person they're putting up for this testimony, unless
5 Your Honor tells me that that's not fair game, I
6 would have thought that the testing of those
7 boundaries would be within the range of what I could
8 ask him about.

9 MR. SWANSON: And I guess Staff's position
10 would be, you know, Qwest certainly can explore that
11 and can explore that with its attorneys in brief and
12 argue that the answers that Mr. Wilson supplies, from
13 Qwest's position, aren't adequate or do not meet the
14 legal standard as Qwest sees it.

15 That doesn't seem particularly difficult, it
16 doesn't seem particularly complex, and Staff feels
17 that Mr. Wilson certainly can answer the questions as
18 the Judge has set out in terms of harm, but doesn't
19 feel that Mr. Wilson should have to apply the law to
20 the facts in that way, anyway.

21 MR. NAZARIAN: Well --

22 JUDGE RENDAHL: I guess, because this is a
23 new area, and obviously the Commission's
24 understanding of the statute and what the meaning of
25 undue or unreasonable prejudice or disadvantage,

0097

1 those words are going to be at issue before the
2 Commission, and the interpretation of those words is
3 going to be at issue.

4 I think what Mr. Wilson can testify to is,
5 both in his role as a telecom witness and as a
6 telecom economist, is what the harm or discrimination
7 is in the particular agreement that occurred and, as
8 an economist, what the economic harm or
9 discrimination would be, but as to whether that is
10 undue or unreasonable, yes, that is what the
11 complaint alleges.

12 I'm assuming that if Mr. Wilson says that
13 something creates harm or discrimination, that it
14 fits within that definition, and Qwest can argue in
15 brief and testimony whether that harm is undue or
16 unreasonable. And that will be at issue before the
17 Commission, whether the harm is, in fact, undue or
18 unreasonable, and I would expect both parties to make
19 that argument.

20 Now, if Mr. Wilson has stated in his
21 testimony that a certain harm is undue or
22 unreasonable, then that's fair game.

23 MR. NAZARIAN: Well, he says they're all
24 undue or unreasonable. And what I'd like to explore
25 is whether, you know, there's some amount of harm,

0098

1 whatever that is, that lies below the level of undue
2 and unreasonable.

3 JUDGE RENDAHL: Well, if he has stated in
4 his testimony and you can refer Mr. Wilson to a
5 particular page of his testimony, then I think that's
6 fair game to inquire. Now, we have to remember that
7 this isn't cross-examination in hearing, that this is
8 a deposition. And depositions and data requests are
9 to inquire as to the facts and the positions of the
10 parties. And if there are -- you know, there's a
11 difference in cross-examination than in depositions
12 and in data requests, so we need to remember that.

13 MR. NAZARIAN: Fair enough, Your Honor.
14 Thank you.

15 JUDGE RENDAHL: All right. So let's move
16 on. As to 49 through 53, I'm -- I think I said I was
17 denying the motion as to those, but we've restated
18 what would be appropriate, and you can ask Mr. Wilson
19 what harm or discrimination occurred, and if he said
20 in his testimony that there was undue or unreasonable
21 harm, then -- or undue or unreasonable prejudice or
22 disadvantage resulting from that harm, then you may
23 inquire as to his position.

24 MR. NAZARIAN: Okay.

25 JUDGE RENDAHL: All right. So moving on to

0099

1 requests 27 through 47, these have to do with the
2 hypothetical.

3 MR. NAZARIAN: Yes, Your Honor.

4 JUDGE RENDAHL: And reading through the
5 hypothetical, I have no issue -- there was some
6 discussion in the motion and answer as to whether
7 hypotheticals are appropriate in data requests. I
8 think they are if they go to factual issues or
9 positions, not as to legal analysis, legal theory, or
10 the legal implications of a hypothetical -- an answer
11 to a hypothetical.

12 So looking at the actual answers themselves,
13 and I believe that would be 27 through 47, Qwest is
14 seeking to compel answers to all 20 responses?

15 MR. NAZARIAN: Yes, Your Honor, because, for
16 practically all of them, they didn't answer at all.
17 For the few that they did, you know, the answer's not
18 an answer. I mean, for example, if you just look at
19 27, they gave an answer, you know, Without waiving,
20 Staff answers that it depends on the specific terms
21 of the agreement and whether it was meant to resolve
22 a one-time billing dispute.

23 I mean, we've given them facts and
24 hypotheticals that answer that question, so that the
25 response, purported response is it depends on things

0100

1 that are already in there that we're just not going
2 to answer.

3 JUDGE RENDAHL: Well, looking at the
4 hypothetical, there -- putting myself in the position
5 of somebody answering this, (C)(i) says generic
6 recital clause, clauses. And then, (4), standard,
7 nonsubstantive boilerplate language.

8 Well, I think there can be some dispute,
9 having been involved in this process of the
10 interconnection agreement area and the unfiled
11 agreement area, that parties can dispute as to what
12 is standard, nonsubstantive boilerplate language. So
13 to that extent, Staff's response that it depends on
14 the specific terms of the agreement seems to me
15 reasonable, although it may be that Staff needs to
16 respond a little bit more as to what that means.

17 MR. NAZARIAN: Well, I guess I understand
18 Your Honor's point. I mean, by characterizing the
19 recital clauses as generic and boilerplate is
20 standard and nonsubstantive, we certainly had
21 intended to strip off any question about whether any
22 of that would matter.

23 I mean, the other approach we could have
24 taken, I suppose, is to draw up some hypothetical
25 agreement and attach it and ask to respond to that

0101

1 one, but, you know, the way this hypothetical is
2 structured, you know, there is one substantive issue
3 and the rest is just how, you know, the rest of the
4 agreement that doesn't matter for purposes of these
5 questions is set up.

6 And what they're saying is, Well, it depends
7 on things that don't matter, is how I read it, but --

8 MR. SWANSON: And I guess Staff's -- you
9 know, Mr. Nazarian's suggestion that an agreement, I
10 guess a hypothetical agreement, in a sense, be drawn
11 up, I think in some ways, you know, that's more
12 useful and it negates any risk that, you know, a
13 party will -- that we'll have to argue about what it
14 is the terms of the agreement are in the
15 hypothetical, but --

16 MR. NAZARIAN: Yeah, but at the same time,
17 if I do that, every single one of these questions is
18 objected to on, you know, the whole host of other
19 grounds.

20 JUDGE RENDAHL: Well, at this point I'm just
21 talking about 27.

22 MR. NAZARIAN: Okay.

23 JUDGE RENDAHL: But 28, now, are we here
24 talking about the Exhibit B agreements again, I'm
25 assuming?

0102

1 MR. NAZARIAN: Yes, that was the idea.

2 JUDGE RENDAHL: All right. So where --
3 again, we get back to the question of whether there
4 is a filing requirement, and the issue is whether, I
5 understand in your mind, whether it's a Section 252
6 requirement or some other requirement.

7 MR. NAZARIAN: Well, again, I've understood
8 the Staff, the Staff's complaint, at least, not to be
9 alleging that there's a 252 issue, but rather, you
10 know, some other -- well, you know, I don't know what
11 it is we were -- the idea was that in this
12 hypothetical was here's an Exhibit B agreement, okay,
13 you know. It's a straight billing dispute. It
14 doesn't have any forward looking obligations, nothing
15 like that. And so tell us, in 27, whether we should
16 have filed it with the Commission, and 28. If they
17 say anything other than no, what should we have done
18 with it.

19 And so that the answer -- so without waiving
20 the objection, the answer about how any agreement has
21 ongoing obligations pertaining to (inaudible.)

22 JUDGE RENDAHL: The court reporter didn't
23 hear your phrase as to 251(b) and (c).

24 MR. NAZARIAN: I'm sorry. The response that
25 the Staff provided about how agreements -- any

0103

1 agreement that has ongoing obligations pertaining to
2 251(b) and (c) has to be filed for approval. Well,
3 interestingly, that states what the law under 252 --
4 under 252 is.

5 So I mean, on the one hand they're saying
6 they don't want to answer a question about what the
7 law is, but then they do that. But that's, of
8 course, not the point. The point is this is set up
9 to be an Exhibit B agreement, and you know, they're
10 not alleging that the 252 filing requirement applies
11 here. So the answer is a non-answer.

12 MR. SWANSON: I guess, you know, Staff
13 response, and I don't know if Staff is
14 misunderstanding, but to the extent the judge has --
15 Judge, you've ruled on Staff's obligation to do its
16 best to provide some sense of what the -- I guess,
17 you know, Staff is clarifying in terms of procedures,
18 but in terms of what Qwest should have done, I think
19 Staff now understands that, and to the extent this
20 question goes to that, Staff can do its best.

21 JUDGE RENDAHL: To the extent that 27 asks
22 for the same issue as in 24, 25 and 26, would that
23 help Qwest?

24 MR. NAZARIAN: I've got to look at 24, 25
25 and 26 again. I think the answer is yes, Your Honor.

0104

1 That's the whole point.

2 JUDGE RENDAHL: Right, they go to the
3 process. So to the extent that Staff explains the
4 process of what Qwest should have done in resolving
5 the dispute, how it should have been brought before
6 either the Commission or the CLECs and then how the
7 CLECs should have been able to take advantage of
8 that, do those questions address the issue in 28?

9 MR. NAZARIAN: They do.

10 JUDGE RENDAHL: All right. So I'm going to
11 deny as to 28. As to 27, I think Staff has answered
12 it appropriately, given the question that was asked,
13 and if you wish to clarify that further in the
14 deposition, you may do so. So I'm going to deny as
15 to 27.

16 As to 29, that seems to go towards process.

17 MR. NAZARIAN: Yes.

18 JUDGE RENDAHL: Okay. So that will be
19 denied. Can you explain what you're asking for in
20 30?

21 MR. NAZARIAN: Yeah, in 30 -- 30 is if their
22 position is that the Commission needs to approve
23 these Exhibit B settlements, what standards is the
24 Commission supposed to use?

25 JUDGE RENDAHL: Would that be included in

0105

1 the process?

2 MR. NAZARIAN: Well, yeah, it would, to the
3 extent that -- you know, if the answer is the
4 Commission doesn't approve the Exhibit B settlements,
5 then that answers the question.

6 JUDGE RENDAHL: Well, I'm going to deny it
7 and allow you to, based on Staff's responses to 24
8 through 26, either in written response or deposition,
9 allow you to inquire further on this issue of the
10 standard, but, you know, this may be getting more
11 towards the point of, you know, you all arguing what
12 should be done and, you know, to the extent that
13 Staff has not taken a position on this and doesn't
14 address it in terms of what the process should be,
15 you know, here we are getting into, you know, what to
16 address at hearing and what to address in brief or in
17 testimony.

18 So at this point I'll deny it, and see how
19 you all can work it out on the issue of procedures
20 and --

21 MR. NAZARIAN: Okay.

22 JUDGE RENDAHL: This next one, 31, also
23 seems to go towards the process that you were asking
24 for, particularly in 26.

25 MR. NAZARIAN: Yeah, I think 31, 32, 33 all

0106

1 fall into that category.

2 JUDGE RENDAHL: All right. Well, then I'll
3 deny 31 through 33, so that we can streamline things
4 here. Okay. Thirty-four, that seems to be process,
5 as well.

6 MR. NAZARIAN: Yes.

7 JUDGE RENDAHL: I'll deny it. Again, that's
8 a process.

9 MR. NAZARIAN: Right. Thirty-four through
10 37 all follow together.

11 JUDGE RENDAHL: All right. So 34 through 37
12 are denied, as well. And in denying these, I'm
13 intending that Staff respond in full to the questions
14 24 through 27 as to the process, if they have a
15 process in mind or are aware of a process.

16 MR. SWANSON: Yes, Judge.

17 JUDGE RENDAHL: Now, what about 38? Mr.
18 Nazarian, can you explain a bit what you intended in
19 this question?

20 MR. NAZARIAN: Yes, here's -- this drives
21 directly at the discrimination issue. The question
22 asks that if, in the Staff's view, Qwest is required
23 either to get Commission approval or otherwise make
24 Exhibit B settlements publicly available -- here's
25 the question. With the hypothetical settlement of a

0107

1 (inaudible).

2 JUDGE RENDAHL: I'm sorry, a hypothetical
3 settlement of minutes of use --

4 MR. NAZARIAN: Dispute.

5 JUDGE RENDAHL: Dispute, thank you.

6 MR. NAZARIAN: With a hypothetical minutes
7 of usage dispute, does the Staff take the position
8 that, by settling this with CLEC A, Qwest is then
9 required to settle all minutes of usage disputes it
10 might have with other CLECs? In other words, does
11 some other CLEC with a minutes of usage dispute out
12 there suffer discrimination because Qwest settled
13 with CLEC A, but hasn't settled with it. That's the
14 question.

15 MR. SWANSON: Is that, in a sense -- I'm
16 sorry, I shouldn't be asking you directly. I
17 apologize.

18 JUDGE RENDAHL: No, please go ahead.

19 MR. SWANSON: Okay. Does that, in a sense,
20 go -- does that go to the issue of whether the harm
21 is hypothetical or real? Is that really what that
22 is?

23 MR. NAZARIAN: No, it's really more basic
24 than that. It is -- it is a question about the
25 Staff's position as to how discrimination happens.

0108

1 In other words, here we've got, again, a settlement
2 between Qwest and CLEC A, and they've got a
3 particular dispute between the two of them that they
4 then settle. This question and the ones that follow
5 it are designed to determine whether Qwest somehow
6 has discriminated by entering into the settlement,
7 and if so, how, in the Staff's view, that happened.

8 So the questions that follow, the 30, 38, 42
9 -- or 41, following that question, and then 42 picks
10 off with a somewhat broader question about whether
11 the fact of this settlement requires Qwest to enter
12 other settlements, because we're -- we don't -- we
13 literally don't understand how it is that the
14 settlement between Qwest and CLEC A causes
15 discrimination vis-a-vis CLEC B. That's what we
16 don't -- that's what we've driving at.

17 MR. SWANSON: So the question isn't is there
18 hypothetical discrimination, and if so, what is it;
19 and is there real discrimination, and if so, what is
20 it. That isn't the question.

21 MR. NAZARIAN: The question is how is it
22 that there -- well, the question, the literal
23 question is the fact that we entered into this
24 settlement agreement as to minutes of usage, we have
25 to settle other minutes of usage disputes.

0109

1 MR. SWANSON: As a conclusion of law, in a
2 sense? That's what's -- I'm sorry.

3 MR. NAZARIAN: As a statement of position,
4 as a, you know, what is -- if we settled this, does
5 that mean we have to settle another one, and then the
6 questions that follow augment that. The 35 --

7 JUDGE RENDAHL: Well, does this, in a sense,
8 go to this opt-in process in question 26, as to sort
9 of what the process is for other CLECs to opt into
10 this agreement, in that if you have settled a dispute
11 relating to minutes of use with one CLEC, can CLEC B,
12 C, D and E come in and say, Well, we also have a
13 similar minutes of use dispute, can we now have the
14 same term as CLEC A did. Is that what you're asking?

15 MR. NAZARIAN: It's a variant on that, Your
16 Honor.

17 JUDGE RENDAHL: Or are you asking whether
18 Qwest has to then proactively settle disputes with
19 the other CLECs?

20 MR. NAZARIAN: That's really more what this
21 question asked. I mean, it gets at the same issue as
22 in 26, but it gets at it by way of asking what is the
23 position with respect to Qwest's obligation now,
24 having settled the one dispute to settle another one.

25 JUDGE RENDAHL: Mr. Swanson.

0110

1 MR. SWANSON: Well, I guess, in general, you
2 know, Staff's answer to a number of these questions,
3 I think, and maybe it's appropriate to -- well, I
4 don't want to -- I'm not going to speak for Mr.
5 Wilson, but my sense is that the very questions
6 related to these Exhibit B agreements are, by their
7 very nature, not necessarily completely concrete.
8 And the facts, as applied to the law, isn't
9 necessarily completely concrete.

10 And so I am skeptical about whether or not
11 Staff's going to be able to come up with an answer,
12 even if -- even if they -- even if the facts were
13 different, they should.

14 As to exactly whether or not, in a
15 particular set of facts, Qwest should resolve all
16 disputes with other CLECs relating to minutes of
17 usage, I think it would depend on the facts. It
18 would depend on -- and it also would depend on what
19 Qwest was seeking to do to make sure that there
20 wasn't undue prejudice or preference or
21 discrimination.

22 JUDGE RENDAHL: Well, I think, as with --
23 you know, this hypothetical, in a sense, is useful in
24 one way, but I think pursuing the issue as to the
25 particular agreements themselves is maybe more

0111

1 useful. I understand what issue you're going
2 towards, Mr. Nazarian. You're asking for a statement
3 of position as to how Qwest should proceed. This
4 seems to follow on 26, so to the extent that you all
5 can work through sort of what the next step would be,
6 you know, there's the opt-in, but you're asking
7 whether there is some other burden on Qwest.

8 MR. NAZARIAN: Exactly, exactly.

9 JUDGE RENDAHL: And for that purpose, I will
10 allow and I will grant this question, 38, but I don't
11 know that we need the -- I think it's somewhat
12 duplicative, 39 through 41, unless you can explain to
13 me how they're not duplicative.

14 MR. NAZARIAN: Well, I guess it's hard to
15 understand whether they're duplicative or not without
16 knowing what the answer to 38 would be. But the goal
17 of 39 through 41 was to say, okay, if we have some
18 obligation now to reach out and settle these other
19 claims, those three requests were designed to try to
20 figure out what the controversy of those obligations
21 are.

22 So I mean, they're not duplicative if the
23 answer is we have some obligations in response to 38
24 to go out and settle other claims.

25 JUDGE RENDAHL: Okay. Now, to the extent

0112

1 that Staff has not taken a position on this issue in
2 its testimony and Staff has not developed a position
3 on this issue, it is fair for Staff to say, I don't
4 know, and then for Qwest to pursue that in its
5 testimony. And so to the extent that there is no
6 response to 38, then I would expect that there's no
7 need to pursue the remainder.

8 MR. NAZARIAN: I think that's fine. I mean,
9 part of what we're, you know, some of the answers we
10 may get are we don't know or no, or there is no
11 position, and if that's the answer, that's the
12 answer.

13 JUDGE RENDAHL: All right. So for 38
14 through 41, I'll grant it based on -- grant the
15 motion based on our colloquy, our discussion this
16 morning.

17 All right. For 42, that seems to just
18 continue this issue. Oh, to matters other than
19 minutes of use.

20 MR. NAZARIAN: Exactly. It's the same
21 concept, but it's a different subject.

22 JUDGE RENDAHL: Well, I guess I'm not
23 following it.

24 MR. NAZARIAN: All right. Let me explain
25 it. Thirty-eight through 41 said -- or asked if we

0113

1 have settled this minutes of usage dispute with CLEC
2 A, what are our obligations to go out and settle
3 other minutes of usage complaints.

4 Forty-two through 44 asked whether that
5 obligation flows more generally. Do we, by virtue of
6 having settled this dispute, are we now obliged to go
7 settle disputes other than minutes of usage disputes.
8 Is it, you know, in other words, is there
9 discrimination that flows from the fact that we
10 settled with one CLEC that requires us, in order to
11 avoid causing this discrimination, to go out and
12 actually settle with others, just because of
13 settling.

14 JUDGE RENDAHL: Well, to the extent that
15 Staff has a response, I'll grant it. Forty-three,
16 I'm going to deny. It has to do with identifying
17 authorities on which Staff relies.

18 I'm going to deny 44. It seems to go
19 towards more legal theories than actual fact or
20 position.

21 As to 45 and 46 and 47, this goes to the
22 issue of harm, which I said you could inquire as to
23 the agreement itself, and unless I'm not capturing
24 that correctly, I'm going to deny the request.

25 MR. NAZARIAN: Yeah, I mean, again, our

0114

1 intention was that the agreement, the hypothetical
2 agreement described before all of these would have
3 given them enough to answer that, but we'll -- we can
4 try to tease that out on specific agreements with Mr.
5 Wilson at deposition

6 JUDGE RENDAHL: All right. So I'm going to
7 deny 46 through 47. All right. Have we finished
8 with this chunk?

9 MR. NAZARIAN: We have, Your Honor.

10 JUDGE RENDAHL: All right. Going back to
11 page 17, this is the second hypothetical. Can you
12 explain your basis for questions 54 through 57?

13 MR. NAZARIAN: Absolutely, Your Honor. It
14 certainly happens, I think all the time, that a Qwest
15 retail customer gets his or her phone bill and finds
16 some charge on there that he or she thinks is
17 inappropriate, calls up customer service and gets a
18 billing adjustment.

19 In this case, you know, just to try and
20 avoid any confusion, we posed a hypothetical Qwest
21 retail customer who has Qwest -- signed up for Qwest
22 both for local and long distance service, and
23 question three disputed long distance calls. So this
24 is a retail customer calling up, saying, I didn't
25 make these calls, and Qwest making the adjustment,

0115

1 even though Qwest feels like it's, you know, if put
2 to it, it could demonstrate that the calls were
3 legitimately billed.

4 They did so, so here's -- here Qwest is
5 making a billing adjustment for one retail customer,
6 and not charging that customer for calls that are, at
7 least according to Qwest's records, legitimately
8 billable. That seems to me another version of the
9 settlement.

10 And the question here -- and we also suspect
11 that the Commission would want Qwest, you know, to
12 liberally construe billing disputes in favor of
13 retail customers. And so this hypothetical was
14 designed to get at whether there's some difference in
15 the minds of the Staff between retail and wholesale
16 customers, the way that Qwest -- and whether the
17 discrimination they're claiming that would arise out
18 of these settlements with wholesale customers differs
19 in some way from -- you know, I suppose, you know,
20 you could argue that the person who lives next door
21 to our hypothetical retail customer who made three
22 long distance phone calls but didn't gripe about the
23 bill ends up paying for them and so therefore suffers
24 discrimination. That's what we're driving at.

25 JUDGE RENDAHL: Mr. Swanson.

0116

1 MR. SWANSON: I guess Staff's position,
2 again, would be these appear to be related to
3 something -- to a position that Staff has not taken
4 at this point and are, in Staff's opinion, far out
5 from the relevant issues in this proceeding, and
6 also, they ask for a legal conclusion, including
7 identifying all authorities that Staff relies on for
8 drawing these conclusions, law or legal theory
9 issues.

10 JUDGE RENDAHL: Well, as to the last phrase
11 in each of these four questions, I would agree with
12 Staff, and so deny the question -- deny the motion as
13 to that portion of the questions.

14 In terms of inquiring as to Staff's and, in
15 particular, Mr. Wilson's position as Staff's witness
16 on this as to what constitutes discrimination,
17 question 54, 55, 56, and 57 are reasonable. And I'll
18 grant as to the position aspect of those, but not the
19 request for legal authority.

20 MR. NAZARIAN: Thank you, Your Honor.

21 JUDGE RENDAHL: So to the extent you're
22 asking for, in a sense, a fact opinion or opinion of
23 a expert on that, that's the basis for granting it in
24 part.

25 MR. NAZARIAN: Okay.

0117

1 JUDGE RENDAHL: All right. Now, turning to
2 23 and 25 on page 19 of your motion, of Qwest's
3 motion, this relates back to the discussion earlier,
4 and I'm forgetting the number of those -- I think it
5 was maybe 11 and 12, questions 11 and 12, relating to
6 characterizing something as a backward looking
7 dispute.

8 I think this is an issue that you all are
9 going to have to argue in your brief and/or in your
10 testimony as to what backward looking disputes are,
11 and I think Staff has, in part, clarified the process
12 for -- under 252, and will be explaining what other
13 process might be involved under state law. So for
14 that purpose, I'm going to deny 23, unless there's
15 something else that I'm missing here, Mr. Nazarian.

16 MR. NAZARIAN: I think if we could get
17 answers to the process questions, we'll get answers
18 for this.

19 JUDGE RENDAHL: All right. And I think the
20 25 will also be -- information will be gained through
21 the process question, as well.

22 MR. NAZARIAN: I think that's right.

23 JUDGE RENDAHL: So I'm going to deny as to
24 23 and 25. All right. Now, moving on to the
25 specific questions as to each agreement. On page 20

0118

1 of Qwest's motion, we start with the Exhibit A
2 agreements, and the first question, 58, was addressed
3 to Agreement Number One of Exhibit A, subpart A, and
4 this may be something that you'll have to go through
5 with Mr. Wilson as to each agreement. Frankly, I
6 believe Staff should have addressed this question to
7 each agreement instead of just to the first, and I
8 think that the subpart A needs more clarification
9 than was provided in the response and needs to be
10 addressed and maybe a specific reference to the
11 particular description of what part -- what the
12 agreement -- why it constitutes an interconnection
13 agreement needs to be fleshed out.

14 And again, that can be done either in
15 deposition or it can be done on paper in a response.
16 I leave that up to the parties as to which is more
17 efficient, but I believe that subpart A and subpart B
18 need to be responded to more directly, and whether
19 that is simply identifying that portion of the
20 testimony in which Staff's position is outlined or
21 which exhibit that date is outlined, then that needs
22 to be done more clearly.

23 As to C and D, if Staff has taken a position
24 on whether something should have been approved or
25 not, then that's worth inquiring about, but at this

0119

1 point, you're asking whether Staff has a position on
2 this, and I'm not sure that's necessarily an
3 appropriate question under the data request rule.

4 MR. NAZARIAN: Okay.

5 JUDGE RENDAHL: So I'm going to deny as to C
6 and D. E should be clarified, as I explained before,
7 and I believe Staff has responded to F, G, H, I, and
8 J and K. To the extent that Staff has more
9 information for each particular agreement, then Staff
10 should supplement its answers to -- and clarify that
11 these refer to 59 through 97, but I would ask that
12 Staff -- grant the motion as to A, B, and E, as to
13 each agreement.

14 MR. NAZARIAN: Thank you, Your Honor.

15 JUDGE RENDAHL: As to -- now moving on to
16 to page 97 of the motion, these relate to -- I'm
17 sorry, page 25 of the motion, starting with question
18 97, these are the Exhibit B questions.

19 I note that Staff -- I think we need to
20 clarify a bit more the -- what Qwest intends in its
21 subpart A. Mr. Nazarian.

22 MR. NAZARIAN: Well, it's another version of
23 the same question, which is, you know, the allegation
24 is we somehow discriminated by not making the terms
25 of the settlement agreements available to other

0120

1 CLECs, at least as we understand the allegation. So
2 this asks for a statement of position that we were
3 required to do so in terms of, you know, what facts
4 about this agreement give rise to that obligation in
5 terms of the obligation itself.

6 JUDGE RENDAHL: All right. So to the extent
7 that there are processes that Staff identifies in
8 response to questions 24 through 26, you're asking
9 for the basis, if there is a publishing requirement
10 --

11 MR. NAZARIAN: Or some other process.

12 JUDGE RENDAHL: -- or some other process,
13 what the basis is for including this agreement in
14 that process.

15 MR. NAZARIAN: Yes, Your Honor.

16 JUDGE RENDAHL: All right. I think it
17 probably makes sense, when you're inquiring in the
18 deposition as to each agreement, to go through this
19 process and to clarify your request. It's a bit
20 unclear to me, based on the previous questions, what
21 you're really asking for, so I'm going to deny the
22 motion as to A, as to the wording in A, but I
23 understand what it is you're seeking and I would
24 allow that kind of questioning in the deposition.
25 Does that make sense?

0121

1 MR. NAZARIAN: It does, Your Honor.

2 JUDGE RENDAHL: All right. B should be
3 responded to for each agreement, so I'm going to
4 grant the motion as to B. For the same reasons I
5 explained for requests 59 through 97, I'm going to
6 deny the motion as to C and D, but E should be
7 responded to for each agreement, so I will grant the
8 motion.

9 MR. SWANSON: Staff -- are you -- Staff did
10 respond, it appears to me, to E. Is there more
11 responses necessary? Is that what the --

12 JUDGE RENDAHL: Well, the question is to
13 each agreement.

14 MR. SWANSON: Okay.

15 JUDGE RENDAHL: And if you believe that your
16 response to E is sufficient, then you all can go
17 through that in the deposition. It seems to me, to
18 the extent you can identify a number and then explain
19 the calculation, it may be repetitive, but it should
20 be done for each agreement. And I believe Staff has
21 responded to F through J, and so I think those have
22 been responded to.

23 So for questions 98 through 122, Staff
24 should respond to whatever question Qwest
25 reformulates for A, as well as B and E, and I think

0122

1 that addresses each of the data request responses and
2 requests that Qwest has posed in its motion; is that
3 correct?

4 MR. NAZARIAN: It does, Your Honor.

5 JUDGE RENDAHL: And is there any further
6 guidance you all need for your deposition beginning
7 tomorrow?

8 MR. SHERR: Judge, this is Adam Sherr. I'm
9 sorry to interrupt. But the statement, the
10 conclusion you just made, you said 98 through 122.
11 Did you mean 97 through 122? Ninety-seven is about
12 Exhibit B, Agreement One.

13 JUDGE RENDAHL: Yes, I was just referring to
14 the list on page 20. So to the extent I
15 mischaracterized it, it should be --

16 MR. NAZARIAN: Probably my typo, Your Honor.

17 JUDGE RENDAHL: That's all right. I was
18 just reading your typo. Ninety-seven through 122.

19 MR. SHERR: Thanks, Judge.

20 JUDGE RENDAHL: Thanks for the
21 clarification. If there's nothing else we need to
22 discuss, I will be available, I will be in the office
23 tomorrow if any issues arise during the deposition.
24 I trust, with the guidance I've given you this
25 morning, that there won't be any phone calls, but if

0123

1 there are, I'll be happy to entertain them.

2 I will be working home on Thursday morning,
3 but unavailable in the afternoon. So I will see if I
4 can line up someone else to address any issues you
5 might have. I'll provide you with my cell phone
6 number, which is area code 253-209-4115, so that you
7 can contact me on Thursday on this number. I'll be
8 at my daughter's swim meet on Thursday afternoon, so
9 to the extent you do call me on that number in the
10 afternoon, it may be a bit disjointed.

11 MR. NAZARIAN: Just as long as you tell us
12 when to cheer, Your Honor.

13 JUDGE RENDAHL: Yeah, right. She's only
14 seven. It's not a big deal.

15 MR. NAZARIAN: I sincerely hope and expect
16 that we will not be bothering you.

17 JUDGE RENDAHL: All right. I just wanted to
18 let you know what my schedule was in the event you
19 needed to contact me. So good luck in the
20 deposition, all of you. And if any other disputes
21 arise, I'd be happy to hear from you. If there's
22 nothing more, we'll be adjourned.

23 MR. SWANSON: Thank you, Your Honor.

24 MR. NAZARIAN: Thank you for resolving this
25 so quickly.

0124

1

JUDGE RENDAHL: No problem.

2

(Proceedings adjourned at 10:42 a.m.)

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25