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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In re Application of)
U S WEST, INC., and QWEST) DOCKET NO. UT-991358
4 COMMUNICATIONS INTERNATIONAL,) Volume XV
INC. for an Order Disclaiming) Pages 1500 - 1623
5 Jurisdiction, or in the)
Alternative, Approving the)
6 U S WEST, INC., - QWEST)
COMMUNICATIONS INTERNATIONAL,)
7 INC. Merger.)

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10 A hearing in the above matter was held on
11 May 23, 2000, at 1:07 p.m., at 1300 South
12 Evergreen Park Drive Southwest, Olympia, Washington,
13 before Administrative Law Judge DENNIS MOSS,
14 Commissioners RICHARD HEMSTAD, WILLIAM R. GILLIS, and
15 Chairwoman MARILYN SHOWALTER.

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17 The parties were present as follows:

18

19 QWEST COMMUNICATIONS INTERNATIONAL, INC., by
GINA SPADE and MACE J. ROSENSTEIN (Mr. Rosenstein via
bridge), Attorneys at Law, Hogan and Hartson, 555
Thirteenth Street Northwest, Washington, D.C., 20004.

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21 U S WEST COMMUNICATIONS, INC., by LISA A.
ANDERL, Attorney at Law, 1600 Seventh Avenue, Suite
3206, Seattle, Washington 98191.

22

23 MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.,
AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.,
NEXTLINK WASHINGTON, INC., ADVANCED TELECOM GROUP,
INC., by DANIEL WAGGONER, Attorney at Law, Davis Wright
24 Tremaine, 1501 Fourth Avenue, Suite 2600, Seattle,
Washington 98101-1688.

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1 MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.,
2 by MARK P. TRINCHERO (via bridge), Attorney at Law,
3 Davis Wright Tremaine, 1300 Southwest Fifth Avenue,
4 Suite 2300, Portland, Oregon 97201.

5 WASHINGTON INDEPENDENT TELEPHONE ASSOCIATION,
6 SBC TELECOM, INC., by RICHARD A. FINNIGAN, Attorney at
7 Law, 2405 Evergreen Park Drive Southwest, Suite B-3,
8 Olympia, Washington 98502.

9 PUBLIC COUNSEL, by SIMON J. FFITCH, Assistant
10 Attorney General, 900 Fourth Avenue, Suite 2000,
11 Seattle, Washington 98164.

12 THE WASHINGTON UTILITIES AND TRANSPORTATION
13 COMMISSION, by SALLY G. JOHNSTON, Assistant Attorney
14 General, 1400 South Evergreen Park Drive Southwest,
15 Post Office Box 40128, Olympia, Washington 98504-0128.

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Kathryn T. Wilson, CCR
Court Reporter

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	EXHIBIT NO.	OFFERED/ADMITTED
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7	459-HC	1621
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1 P R O C E E D I N G S

2 JUDGE MOSS: Let's go on the record. Good
3 afternoon everyone. We are convened here in Olympia,
4 Washington in the Commission's hearing room in Docket
5 No. UT-991358, which is styled In re application of U S
6 West, Inc. and Qwest Communications International,
7 Inc., for an order disclaiming jurisdiction, or in the
8 alternative, approving the merger, and this is, of
9 course, in connection with the application of those two
10 companies to effect a merger.

11 Just briefly to give an overview of our
12 agenda today, the first item of which will be
13 appearances, and I think we probably do have a couple
14 of appearances by telephone and a couple of appearances
15 today that will represent substitution of counsel.
16 Those of you who have previously entered appearances in
17 the proceeding, whether for the party you represent
18 today or another party, need not include your address
19 and so forth information. Just indicate who you are
20 and whom you represent.

21 Among the subject matters we will take up
22 today, and not necessarily in this order, we have
23 pending before us documents that were filed and styled,
24 Notices of Withdrawal. In connection with that, I will
25 simply say that the practice before this Commission has

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1 always been to treat such notices or however they may
2 be styled as requests for at leave to withdraw, and so
3 those do require some action by the Commission, and
4 whether that will occur today or at a future date
5 remains to be seen, but I understand there will be some
6 argument at least from Commission staff with respect to
7 that subject.

8 We have a little housekeeping to take care of
9 today in terms of marking and entering some exhibits
10 into the record. We have a document that I guess has
11 not been filed yet. I was just handed up a revised
12 draft of a document that styles itself Settlement
13 Agreement Draft, which I will describe as a competitive
14 issue settlement agreement document that's been in the
15 works the last couple days. We'll have some discussion
16 about that, including the presentation of a panel of
17 witnesses who are being made available to respond to
18 questions and present the essential elements of the
19 settlement, and we may hear from counsel about that
20 particular Settlement Agreement as well.

21 I'll want to inquire whether there are any
22 other exhibits we need to consider. As I understand
23 the lay of the land, we will need to retire into
24 chambers at one point during the day to consider Public
25 Counsel's challenge to the confidentiality designation

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1 of the Agreement between U S West, Qwest, and AT&T.
2 That has been the subject of considerable discussion
3 through written filings over the past week or ten days,
4 and let me just turn to you now, Mr. ffitch. I have
5 your phone message with respect to the latest Agreement
6 that has been submitted in response to Bench Request
7 No. 2, which involves Level 3 Communications, and ask
8 if you wish to take that argument into chambers or
9 whether you will not be challenging confidentiality on
10 that Agreement?

11 MR. FFITCH: We can take that up in chambers,
12 Your Honor. Other than glancing at the copy that Staff
13 has, I haven't had a chance to look at the Agreement.

14 JUDGE MOSS: We'll talk about that in a
15 minute.

16 MR. WAGGONER: Just a point of information,
17 Your Honor, in terms of the inchambers discussion, I
18 had understood Public Counsel was also challenging the
19 confidentiality of other agreements as well as AT&T of
20 clients that we represent, and perhaps if I could get a
21 clarification as to exactly which ones I'm going to be
22 talking about.

23 MR. FFITCH: Perhaps we can talk a bit more
24 off the record, but I had a discussion with
25 Mr. Trincherro. At this point, we don't have an

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1 objection to confidentiality for the McLeod Agreement.
2 JUDGE MOSS: I've mentioned that we will have
3 our witness panel and inquiry from the Bench and
4 perhaps some others, and then any other business we
5 have to take up today, so that essentially completes
6 our agenda.

7 I have a few preliminary comments to make,
8 and then I believe the order of business that we will
9 follow will begin by retiring into chambers to take up
10 that matter first, and we will announce appropriate
11 procedures at that point in time to insure the
12 continuing protection of claims of confidentiality and
13 highly confidential status under the protective order.

14 My general remarks concern the nature of what
15 we are doing and the nature of some of the matters that
16 are before us today. The word "dynamic" has been used
17 frequently in the chambers of the Commission in the
18 last few weeks and to describe the conduct that has
19 been evidenced in connection with this particular
20 docket. It seems to have changed every day and
21 sometimes several times during the course of a day. As
22 late as 9:00 something this morning, I was receiving
23 documents or a document responsive to Bench Request
24 No. 2, which was issued sometime around the end of
25 April, as I recall. It's a bit puzzling to me why some

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1 of these Agreements have come in as late as they have,
2 given their dates and the continuing nature of Bench
3 Request No. 2. Public counsel, for example, tells me
4 that as of this morning, he had still not seen the
5 Agreement with Level 3, and therefore, that leaves us
6 in something of an awkward situation with respect to
7 Public Counsel's consideration of what that office
8 might need to do in terms of advocating its positions
9 and interests in the case, and there may be other
10 parties similarly situated; I'm not sure.

11 In any event, as far as I know, at this
12 juncture, there have been seven Agreements. Six of
13 these are between U S West and a single intervenor, six
14 individual intervenors in the case. The seventh
15 Agreement is between U S West and Qwest on the one side
16 and AT&T on the other. I'm going to refer to these
17 simply as "Agreements," and that will be one way to
18 keep the record clear today in terms of understanding
19 that we are concerned with matters related to those
20 documents, but we are also concerned today with matters
21 related to what I will call a "proposed Settlement
22 Agreement." I believe I received copies yesterday, and
23 this is the so-called Competitive Issue Settlement that
24 is at this juncture between U S West and Qwest on the
25 one hand and Staff on the other.

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1 The status of the Agreements, the seven
2 Agreements I referred to, and I should mention there is
3 an eighth Agreement, the so-called Interim Line Sharing
4 Agreement that Staff has also has asked to be made an
5 exhibit in this, along with the seven Agreements
6 between the parties. The status of these documents is
7 perhaps varied and certainly uncertain. The U S West
8 and Rhythms Links Agreement, for example, was filed in
9 this docket. It was not, however, filed with a request
10 that the Commission take any action with respect to it.
11 It was, in fact, filed accompanied by a notice of
12 withdrawal by Rhythms Links. That is one document.

13 The remaining Agreements were not filed in
14 this docket but were produced in response to Bench
15 Request No. 2 that was, in fact, promulgated in
16 granting a request by Staff that those Agreements be
17 produced and be made exhibits, and there was some
18 written pleadings back and forth arguing that parties
19 were given an opportunity to object to these Agreements
20 being made exhibits. The one objection received was
21 with respect to the AT&T Agreement. As to the others,
22 no timely objection was interposed.

23 There nevertheless remains some question with
24 respect to the designation of these various documents
25 as being confidential or highly confidential or

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1 including highly confidential material, and we will be
2 discussing that shortly. In distinguishing the types
3 of documents we are concerned with today, I am myself a
4 bit concerned with the characterization of these
5 documents that we have seen in some of the written
6 filings that have been made, and in particular, there
7 is an argument -- I'll call it that -- in one of the
8 U S West-Qwest filings that states in part that the
9 parties went forth and did what the Commission urged
10 them to do and settled the issues between themselves,
11 and now the various intervenors are, as a result or a
12 consequence of that activity, withdrawing from the
13 proceeding.

14 I think it's important to be clear that when
15 the WAC speaks to the Commission's encouraging
16 Settlement Agreements, or when I as a presiding officer
17 at a prehearing conference remind the parties of the
18 existence of that WAC, that WAC in this Commission is
19 not encouraging -- in the context of these public
20 proceedings where intervenors are allowed in to
21 participate in the public interest, the Commission is
22 not encouraging those parties to go out and strike
23 separate settlement agreements and withdraw from the
24 proceeding when those settlements don't have anything
25 to do with the issues in the case as various filings

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1 have represented they do not.

2 What the Commission does encourage in the way
3 of settlement is settlement of the issues in an open
4 and public fashion, and that takes into account the
5 public interest mission that the Commission has, and I
6 believe most of you in this room have participated
7 before this Commission, some of you for many years and
8 many proceedings, and I believe that this is a
9 principle that is very well understood, and it concerns
10 me when I see papers filed that characterize some very
11 different type of activity and agreement and try to
12 pull that within the umbrella of the Commission's WAC.

13 So that is one set of agreements that we are
14 talking about today, and again, I think it's important
15 that we all understand that those are very distinct
16 from the other settlement agreements that we are
17 considering today or will consider in part today, which
18 is of the nature that is appropriate for these
19 proceedings that have considerable widespread public
20 interest, so with those prefatory remarks out of the
21 way, and perhaps the Commissioners may have some
22 prefatory remarks they wish to make, I think the first
23 orders of business we'll take up will be the
24 consideration in chambers of Public Counsel's challenge
25 to two of the designations of confidentiality, so let

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1 me pause and ask if any of the Commissioners wish to
2 have any opening comments?

3 I think we will go ahead and take up AT&T
4 first, and this is designated highly confidential. One
5 consequence of that is as we go into chambers, the only
6 parties who will be allowed to participate will be
7 Public Counsel, Staff, AT&T, and U S West-Qwest. I
8 will ask that all other persons who are present in the
9 room now find a place to make themselves comfortable
10 outside the room, and we will come out and indicate
11 when -- we haven't taken appearances yet so let's hang
12 around for that. Let's go ahead and take appearances,
13 and then we will retire into chambers.

14 MS. SPADE: Thank you, Your Honor. Gina
15 Spade for Qwest.

16 MS. ANDERL: Your Honor, Lisa Anderl
17 representing U S West.

18 MR. WAGGONER: Daniel Waggoner for AT&T,
19 Nextlink, McLeod, and ATG.

20 MR. FFITCH: Simon ffitich for Public Counsel.

21 MS. JOHNSTON: Sally Johnston, Commission
22 staff.

23 JUDGE MOSS: And on the conference bridge
24 line?

25 MR. TRINCHERO: Mark Trincherro on behalf of

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1 McLeod USA.

2 MR. ROSENSTEIN: Mace Rosenstein on behalf of
3 Qwest.

4 MR. DAVIS: And Steve Davis on behalf of
5 Qwest.

6 CHAIRWOMAN SHOWALTER: I don't think we can
7 let you stay on the phone line because it's not secure.

8 JUDGE MOSS: We are going to have to cut off
9 the conference bridge line for purposes of our
10 in chambers discussion, and what we will do is have
11 somebody contact you. Ms. Spade you probably have the
12 numbers, so when we resume our public proceedings after
13 our in chambers discussion, then we will notify you, and
14 I apologize, Mr. Finnigan. With you not sitting at
15 counsel table, I overlooked you.

16 MR. FINNIGAN: Rick Finnigan appearing on
17 behalf of the Washington Independent Telephone
18 Association and SBC Telecom.

19 JUDGE MOSS: I guess we'll just pause here
20 momentarily while we wait for the logistical
21 arrangements to be made on the bridge line.

22 (Pause in the proceedings.)

23 (Following portion to be under seal.)

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1 (The following is not under seal.)

2 JUDGE MOSS: We've had some extended time off
3 the record and in chambers considering the matter
4 previously discussed, and we'll perhaps return to this
5 status later. For now, at least, we are now back in
6 public session, and we have two items of business aside
7 from housekeeping type matters. One is to take up
8 Staff's argument with respect to proposed party
9 withdrawal from the case, and we will do that first
10 and keep that brief, and then we will swear our panel
11 and discuss the proposed Settlement Agreement in this
12 proceeding, so with that, Ms. Johnson, we will ask you
13 to proceed.

14 MS. JOHNSTON: Thank you, Your Honor, and I
15 will be brief. As a matter of both Commission policy
16 and Commission practice, we strongly urge the
17 Commission to not permit the various intervenors to
18 simply depart from this docket. No party to any case,
19 whether here or before a public agency or before the
20 superior court, has an unfettered right to unilaterally
21 disappear from a case, even, for example, in superior
22 court if it's for a nonsuit. Leave of the court is
23 required. Given the unusual and unique circumstances
24 of this particular docket, I think it's all the more
25 important that the various intervenors remain parties

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1 to the case.

2 I was surprised to hear Mr. Waggoner make the
3 statement that several of the intervenors are not
4 asking the Commission to do anything in this case.
5 Well, that may be true today as we sit here in the
6 hearing room, but it was certainly not true several
7 months ago. The intervenors saw fit to prefile written
8 direct testimony based on fitness to participate in
9 lengthy cross-examination hearings on the competition
10 related issues in this case as well as the proposed
11 partial Settlement Agreement which ostensibly addresses
12 the consumer-related issues in this case.

13 Subsequent to that, they saw fit to enter
14 into separate side agreements, and initially, they all
15 viewed those agreements as confidential to the point
16 where Commission staff had to file a motion. They
17 initially refused to provide the documents either to
18 the Commissioners and you, Your Honor, or Commission
19 staff or Public Counsel. We had to file a motion to
20 get those, but that's a separate issue whether or not
21 they will become exhibits in the case.

22 Now, we stipulated that those various
23 Agreements will become exhibits in this case. It makes
24 all the more sense to me that the parties to those
25 various Agreements ought also to remain in the case. I

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1 think it's one thing for a party to give a case to
2 change position in light of recent events or whatever
3 considerations are present, and in some cases even
4 endorse, change position to endorse the merger as we
5 have in this case, but I think it's quite another to
6 attempt to disappear from a docket entirely,
7 particularly so close to closing briefs and concluding
8 of the proceeding itself, so with that, I would
9 conclude and urge the Commission to keep these various
10 intervenors party to this docket.

11 CHAIRWOMAN SHOWALTER: Aside from the reasons
12 that the intervenors stated for getting into the case
13 and aside from the reasons that they want to leave, and
14 even aside from our legal ability to keep them parties
15 in the case, what's the practical effect of keeping
16 parties in the case if they haven't much interest
17 beyond participating? What is the value to us of
18 having them be sort of passive parties, if you will?

19 MS. JOHNSTON: I think just to the extent the
20 Commission either is ordered or elsewhere, or perhaps
21 there will be future dockets down the road where these
22 issues will surface, but in terms of Commission's
23 ability to recount the events of this case and refer to
24 the various Agreements, just as it's important that
25 those various Agreements remain in the record, it would

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1 certainly be no use to show you something and then take
2 it away and say, "Just kidding. Pretend you've never
3 seen it."

4 It doesn't make sense to have active parties
5 granted intervenor status after they petition for
6 intervention and then they are playing the game the
7 entire time and then decide they no longer want to
8 play. They prefiled testimony in the case. At one
9 juncture, at least, the issues were near and dear to
10 their hearts in this docket, and I think there is value
11 in having the parties that took active roles in this
12 case remain parties in this case.

13 CHAIRWOMAN SHOWALTER: What's your view of
14 what happens to the evidence that has been filed by
15 these parties? Is it the testimony and exhibits and
16 these Agreements, do they remain in the record even if
17 we allow the parties to withdraw?

18 MS. JOHNSTON: Yes, they all remain in the
19 record. Everything remains in the record. One
20 important purpose, I believe, is so that you are aware
21 of what transpired in the docket, what led different
22 parties to advocate certain positions, different days,
23 different hours in this docket and paint a complete
24 picture.

25 COMMISSIONER HEMSTAD: I suppose there is a

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1 legal difference, isn't there? If the party withdraws,
2 it's as if it were never a party. In contrast, all
3 parties to a final order are bound by their order, the
4 consequence of which are hard to predict for an
5 intervenor, but at least as a party, they are bound by
6 the proceeding. I think that would be the legal
7 decision.

8 MS. JOHNSTON: I believe you are right.

9 JUDGE MOSS: Do you think it should impact in
10 any way our view of the evidence presented that a party
11 chooses to withdraw for reasons that are independent of
12 the evidence it has put on in the case and the advocacy
13 it has undertaken in the case?

14 MS. JOHNSTON: Your Honor, unless you force
15 me to respond to that question, I'd prefer not to.
16 Commission staff has entered into the proposed
17 Settlement Agreement, comprehensive Settlement
18 Agreement both on the consumer retail related issues
19 and now as well as the competition related issues for
20 your consideration, and we are asking that you adopt
21 and approve the terms and conditions set forth in each
22 of those Agreements.

23 JUDGE MOSS: I certainly am not going to
24 force the issue given the point that you've made, but
25 before we leave this, and I am mindful of the hour, but

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1 I do have a question nagging at me that I would like to
2 put to you, and I will put it in a manner that is
3 entirely abstract so that it does not implicate your
4 support for this settlement.

5 Let's suppose for half a moment that two
6 private parties -- let's call them Joe and Sue -- have
7 a dispute between themselves over a piece of real
8 property, and perhaps it's an ownership boundary
9 dispute of a piece of real property, and let's suppose
10 they can't have some meeting of the minds so Joe goes
11 to court, but Joe sues his adversary not on a cause of
12 action that sounds real property disputes but for some
13 entirely unrelated matter, trespassing on another piece
14 of property or something like that, and thereby gains
15 leverage, and then they resolve their boundary dispute,
16 and he agrees to drop his lawsuit on the unrelated
17 matter. Has anything improper happened there, in your
18 view?

19 MS. JOHNSTON: I think that I would just
20 harken back to Chairwoman Showalter's observation that
21 in the context where you have two private litigants
22 trying to resolve a single private issue between the
23 two of them that that circumstance differs dramatically
24 from when we have a public agency or public body in
25 findings and determinations as to whether something is

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1 or is not consistent with the public interest.

2 JUDGE MOSS: I don't want to spend the time
3 to try to elaborate the point so we will go on.

4 Ms. Johnston has made some points with respect to
5 withdrawal, and I suppose we should open the floor if
6 anyone wishes to have an opportunity to respond. Mr.
7 Waggoner appears to be reluctant to join in the debate.

8 MS. JOHNSTON: I'd like to hear from
9 Mr. Waggoner, please.

10 JUDGE MOSS: We won't compel him to speak any
11 more than we compelled you to speak, but I do want the
12 opportunity to be offered if anyone wishes to respond.
13 Mr. ffitch?

14 MR. FFITCH: I just want to say that Public
15 Counsel believes that the parties should not be allowed
16 to withdraw at this point. We believe the Commission
17 has the discretion to permit withdrawal or to deny
18 withdrawal, and in this case, for the reasons
19 enumerated by Ms. Johnston, I don't believe withdrawal
20 is appropriate, and in addition, Mr. Hemstad, I think,
21 made an additional valuable point with regard to having
22 the parties remain in the case for purposes of the
23 applicability of the order.

24 JUDGE MOSS: I appreciate that.

25 CHAIRWOMAN SHOWALTER: Did all of the

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1 attorneys who are seeking to withdraw have notice that
2 we were going to raise this issue today?

3 JUDGE MOSS: The notice for this proceeding
4 today expressly mentioned several points. I'm not sure
5 I have it here with me, but I do recall carefully
6 writing a sentence there that said, Any other business
7 pertinent to our proceedings may be taken up, so yes,
8 the notice is legally sufficient for to us take up any
9 business that we wish to take up today, in my view.

10 CHAIRWOMAN SHOWALTER: Is it appropriate to
11 allow some period of time, a few days during which if
12 somebody wanted to write in an argument about why we
13 should permit withdrawal? It may or may not have been
14 anticipated that there be an objection to withdrawal
15 and an argument presented. They could have been here
16 to answer the argument, but insofar as they aren't....

17 JUDGE MOSS: Perhaps we should take that
18 under advisement. If we decide further process is
19 appropriate, then we can notice that.

20 MR. WAGGONER: The only reason we asked to
21 withdraw is because we agreed we asked to withdraw, and
22 that's why we ask to withdraw.

23 JUDGE MOSS: I don't think we need to spend a
24 lot more time on this today, and time is becoming a
25 little short; although, I think it is still adequate

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1 for our needs. So having said that, we have a couple
2 of our panelists seated up here. Mr. Barkett, are you
3 going to join us up here? We have Mr. Davis. Are you
4 still with us on the telephone?

5 MR. DAVIS: Yes.

6 JUDGE MOSS: What I'm going to do is I'm
7 going to ask all the panel witnesses to rise and raise
8 their right hands, and I'm going to swear you all in as
9 a group.

10 (Witnesses sworn.)

11 JUDGE MOSS: Just so the record is complete,
12 we have Mr. Reynolds for U S West, and we have
13 Mr. Barkett and Mr. Davis for Qwest, and we have
14 Dr. Blackmon for the Commission staff, and those are
15 our four panelists today, and I ask if counsel has any
16 opening or whether we should just turn to our witnesses
17 and ask them to make statements following the
18 traditional format -- it's become a tradition, I should
19 say, in the last six months as I think this is the
20 third or fourth one of these I've done, and this is the
21 way we've done it in each case, so do counsel have
22 anything to say in the way of opening remarks?

23 MS. ANDERL: Just very briefly, Your Honor,
24 mindful of the hour, we are very pleased that we are
25 able to present this Settlement Agreement to the

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1 Commission today. We are appreciative of the
2 Commission's willingness to accommodate the parties'
3 desires, to have the panel convene expeditiously, and
4 we wanted to thank Staff and all the parties with whom
5 we did negotiate to reach one level of resolution or
6 another, we are pleased that we believe we can
7 represent to the Commission there are no longer
8 contested issues.

9 JUDGE MOSS: Public Counsel has determined
10 not to be a signatory, at least as of this moment?

11 MR. FFITCH: That's correct, Your Honor.

12 MS. JOHNSTON: I have nothing to add, Your
13 Honor.

14 JUDGE MOSS: In prior proceedings, we have
15 given the panelists an opportunity to speak to the
16 elements of the Settlement Agreement, and I don't know
17 if you all have worked out anything in advance or if we
18 should just go down the line. Dr. Blackmon?

19 DR. BLACKMON: I'll start and then give the
20 two companies a chance to add anything.

21 I want to start by explaining in general
22 terms why Staff believed from the beginning that any
23 approval of this merger needed to address the
24 competition issues and why this particular settlement
25 meets that need. As you know, we've reached an

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1 agreement on the consumer or retail issues that we
2 believe will cause U S West and Qwest to be serious
3 about the level of service they provide to retail
4 customers and will go a long way towards addressing
5 some of the problems that we've seen in the past. Even
6 where there wasn't necessarily a problem in the past,
7 it will make sure that we have a baseline so that we
8 don't have problems in the future.

9 The danger with stopping at that point is
10 that it could then focus the Company's attention on
11 those retail customers and those retail relationships,
12 and that the same base of consumers and businesses in
13 Washington would find that if they wanted to get
14 service from a competitive company and that competitive
15 company needed to use the U S West network that they
16 wouldn't have that opportunity, that they would be
17 deprived of the opportunity to use a CLEC if it
18 involved some aspect of the U S West network.

19 So we have looked for parity on terms of any
20 incentives that we are trying to create here for U S
21 West to provide good service to consumers, whether they
22 go to U S West directly or whether they choose to go
23 through a CLEC. So that's what we tried to do with this
24 Agreement is set in place a series of requirements and
25 incentive mechanisms that will give U S West and Qwest

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1 the obligations and incentives to provide good service,
2 regardless of exactly how the consumer ends up coming
3 to the U S West network.

4 In the Retail Agreement, we have a provision
5 to clear the existing backlog of held orders. We have
6 a similar provision here that on the competitive side,
7 U S West will undertake that obligation. The dates are
8 a little different. That reflects the fact that we
9 have entered into this Agreement a couple of months
10 later, and so U S West is going to be on a slower time
11 line for that part of it.

12 We also in the Retail Agreement have credits
13 in place for individual customers who don't get the
14 level of service that they expected or deserved. Here
15 we also have a series of credits for CLEC's that place
16 orders and if they aren't filled on a timely basis, and
17 then finally, we have on the retail side 20 million
18 dollars that's at risk for U S West and Qwest service
19 performance measures, and in the Wholesale Agreement
20 before you today, we also have 20 million dollars at
21 risk, so a fewer number of measures.

22 There are a couple of specific categories
23 which seemed most important to sort of focus the
24 attention of the Company's management, and we've
25 concentrated the money on those two particular

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1 elements, but it's comparable in size and that's what
2 is most important in our view. So because of that, we
3 believe that you put these two Agreements together, and
4 you have a comprehensive package of commitments and
5 incentive mechanisms that in Staff's view are
6 sufficient to let the merger go forward. Thank you.

7 JUDGE MOSS: Mr. Reynolds, I guess we will
8 turn to you next.

9 MR. REYNOLDS: I guess the one thing I would
10 add to Dr. Blackmon's statements is that U S West was
11 pleased to incorporate into this Agreement some more
12 robust forecasting requirements. We find it very
13 difficult to try to provide good service to our
14 competitive customers when we don't have adequate
15 information to be able to determine where we are going
16 to invest in order to provide that service, and one
17 thing this Agreement incorporates is some pretty robust
18 forecasting language, and that will make it easier for
19 us to meet the commitments we've made in conjunction
20 with this Agreement.

21 There is also included in the Agreement a
22 loop conditioning program which allows us to provide to
23 competitors loops that have already been conditioned to
24 provide data services. Data services is the new rage
25 in telecom these days, and most of our customers that

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1 are buying unbundled loops are interested in providing
2 data services, so we have incorporated a loop
3 conditioning program where the Company has committed a
4 certain amount of resources to condition a number of
5 loops in over 47 central offices to make these loops
6 available for digital services. Now, that benefits U S
7 West as well, but we are on kind of a level playing
8 field there where our unbundled loops will also enjoy
9 the benefits of having conditioned loops. That's it.

10 JUDGE MOSS: Thank you, Mr. Reynolds.
11 Mr. Barkett?

12 MR. BARKETT: Thank you, Your Honor. I'll
13 defer to Mr. Davis on the telephone, please.

14 JUDGE MOSS: Mr. Davis?

15 MR. DAVIS: The only thing I will add is that
16 as we get closer and closer to get this merger
17 completed, and I think we are getting very close, I've
18 become more and more convinced that it is the right
19 thing to do, and it will bring very substantial
20 positive benefits to our customers, whether wholesale
21 and retail customers.

22 I think that this Agreement, as the Retail
23 Agreement before it, contains commitments and service
24 guarantees that we as a company should and are willing
25 to step up to and then see that they live up to the

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1 terms of both Agreements, so it's really, I think, a
2 good Agreement, something that's logical for us to sign
3 up for, and I will be anxious to actually proceed to
4 bring it before the Commission, the permanent service
5 quality standards for its consideration review that
6 will eventually replace these.

7 JUDGE MOSS: Thank you, Mr. Davis. I
8 believe we are ready for questions from the Bench. In
9 the past, we have simply proceeded through a page at a
10 time, and I suppose we can just follow that same format
11 today, and I guess I will work off of the revised
12 draft, or maybe we should work off the prior draft.

13 CHAIRWOMAN SHOWALTER: I'm happy to be
14 working off the draft I was given yesterday, but it
15 looks as if there are very few changes, so we seem to
16 be making an error because we are looking at last
17 night's draft. Maybe you can just correct us. I don't
18 have any corrections on the changes.

19 MS. ANDERL: We will.

20 JUDGE MOSS: The smartest thing for me to do
21 as the master of ceremonies is to look at the revised
22 with the changes shown and then I'll make sure not to
23 miss anything either way. I'm just going to go through
24 the pages and skip Page 1, as to which I assume there
25 are no questions. Perhaps the same with Page 2, it

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1 just appears to be background, but as we get to Page 3,
2 perhaps we have some questions.

3 CHAIRWOMAN SHOWALTER: Maybe we should go in
4 order of the topics. I don't have anything on A or B.
5 I have a question on C. It says that the parties agree
6 that this Agreement on an interim basis satisfies the
7 requirement for an AFOR. Is that really what this is
8 or not? What is this?

9 DR. BLACKMON: The legislature this year
10 amended the Alternative Regulation Statute, and one of
11 things that they added to that statute was a
12 requirement that if a company is to enter into an
13 alternative regulation plan, it has to have an approved
14 carrier-to-carrier service quality program, and so we
15 are not saying that this Agreement is an AFOR.

16 There was some discussion about that on the
17 retail side, but I don't think there is even a question
18 about that here on the wholesale side, but we are
19 saying that we, these essentially two parties, the
20 applicants and the Staff, agree that on an interim
21 basis, i.e., for the two-year duration of this
22 Agreement, this would meet that legislative requirement
23 of a service quality mechanism.

24 CHAIRWOMAN SHOWALTER: So if there arises in
25 the next two years an AFOR proceeding, this merely says

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1 that the Staff and U S West-Qwest agree that this
2 Agreement satisfies their view of what the new AFOR
3 statute requires for carrier to carrier?

4 DR. BLACKMON: Yes, and it's for the duration
5 of this Agreement, not beyond that. One of the
6 questions that is almost sure to come up would be if
7 you entered into the longer-term agreement, what would
8 you do for carrier-to-carrier provisions at the back
9 end of the alternative regulation plan? We haven't
10 tried to address that here one way or the other.

11 CHAIRWOMAN SHOWALTER: Thanks.

12 JUDGE MOSS: Then D. Turning to Page 4,
13 Roman Numeral 2, loop conditioning program.

14 CHAIRWOMAN SHOWALTER: My question on that
15 one was, is this Roman numeral subject to any
16 enforcement, or is this just basically a statement of
17 an intent to develop a program?

18 MR. REYNOLDS: I think it's more in terms of
19 a statement. There is no reporting requirement
20 included later on in the reporting requirements. I
21 guess the one thing that would hold our feet to the
22 fire is the sentence about halfway through the
23 paragraph where it says that we will complete the
24 project within nine months after the close of the
25 merger. We can certainly at that point in time file a

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1 report.

2 CHAIRWOMAN SHOWALTER: But the project itself
3 is not required to meet any goals or measurements.
4 There aren't specifics that are required by this
5 document.

6 MR. REYNOLDS: That's correct. Other than
7 what's included in the paragraph, it kind of explains
8 the types of loops that would be included in the
9 program, and that is loops that are 18 kilofeet or less
10 in length.

11 COMMISSIONER GILLIS: I have a question on
12 that same paragraph. Are the 47 Washington central
13 offices a complete inventory of U S West central
14 offices in Washington at the moment?

15 MR. REYNOLDS: No, they are not. There is
16 approximately 112 U S West central offices, so it's
17 about half of them.

18 COMMISSIONER GILLIS: How are the 47
19 determined?

20 MR. REYNOLDS: I honestly don't know that. I
21 was not a part of the team that determined exactly
22 which 47 would be included in the program. I can tell
23 you though that they are the central offices that I
24 believe serve the majority of access lines in U S West.

25 COMMISSIONER GILLIS: I don't know

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1 procedurally how we would do it, but that's not
2 something you are keeping private in negotiations, and
3 we could have a list of those 47 offices?

4 MR. REYNOLDS: Yes, I believe that's
5 available.

6 JUDGE MOSS: We can handle that as an oral
7 Bench request and ask that the Company provide that.
8 What's a reasonable time, Ms. Anderl?

9 MS. ANDERL: Tomorrow or the next day, Your
10 Honor. I have it in my office. It's just a matter of
11 making sure it leaves my office and comes here.

12 JUDGE MOSS: Let's make it by Friday.

13 COMMISSIONER GILLIS: The other question I
14 have in that paragraph is referring to the meeting with
15 the CLEC's that developed priorities. I suppose that
16 means within the 47 offices, the deployment schedule
17 you are talking about?

18 MR. REYNOLDS: Yes, it does.

19 COMMISSIONER GILLIS: What happens if the
20 CLEC's don't agree?

21 MR. REYNOLDS: We had a similar meeting with
22 the CLEC's on our Line Sharing Agreement, and we were
23 able to come to agreement with a great number of them.
24 I believe some probably did drop out of that discussion
25 because their needs were not met, but we would attempt

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1 to meet the need of the greatest during this meeting.

2 COMMISSIONER GILLIS: It looks like at the
3 end of the paragraph is to complete the 47 offices this
4 discussion would be over the order of completion; is
5 that right?

6 MR. REYNOLDS: That's correct. It would
7 complete within a nine-month period, so I don't know
8 that you would have too much resistance.

9 JUDGE MOSS: Let me follow up. I want to
10 direct this question to you, Ms. Johnston. In terms of
11 the question about enforceability of provisions, let's
12 assume that this goal stated here was not met, that the
13 Company did not implement this program in 47 Washington
14 central offices within nine months after closure of the
15 merger. Would the Company then be in violation of the
16 Commission order, assuming there was a Commission order
17 in place, approving and adopting this settlement as a
18 resolution of the issues in this case?

19 MS. JOHNSTON: That's exactly right.

20 JUDGE MOSS: That probably brings us to Roman
21 3 on Page 4. That provision carries over in multiple
22 subparts to Page 5. Were there any questions there on
23 5?

24 COMMISSIONER GILLIS: Just a general
25 question. What is the rationale for distinction

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1 between high-density zones and low-density zones?

2 MR. REYNOLDS: We tend to have more
3 technicians, more resources, more facilities available
4 in high-density zones, so we can actually provision
5 them faster. We do have different plant personnel and
6 facilities available in Metro Seattle than we do in
7 Yakima, and we can essentially meet dates faster, and
8 that's the reason.

9 COMMISSIONER GILLIS: I didn't see the term
10 defined anywhere, high density, low density. Does
11 everybody understand what that means?

12 MR. REYNOLDS: It's actually as described in
13 the Service Interval Guide that's referenced above, and
14 unfortunately I don't have it with me, but it
15 specifically identifies high-density zones and low
16 density, and we can certainly make that available as
17 another part of that Bench request.

18 JUDGE MOSS: Ms. Anderl, did you get that
19 down? I think you were maybe distracted during part of
20 that exchange, and it looks like we are on the verge of
21 another oral Bench request. Maybe Mr. Reynolds can
22 summarize quickly what he's going to furnish in
23 response to the Bench's inquiry.

24 MR. REYNOLDS: We are going to provide what
25 is included in high-density versus low-density zones as

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1 is included in the Service Interval Guide that's
2 referenced in Section 3 of this Agreement.

3 JUDGE MOSS: Again by Friday.

4 MS. ANDERL: Less time than that.

5 JUDGE MOSS: That's a deadline, so you can
6 furnish it earlier if you wish. What does ICB stand
7 for?

8 MR. REYNOLDS: Individual case basis. There
9 is not an interval that is stated, and it's something
10 that's negotiated between the Company and the customer.

11 JUDGE MOSS: That's because of the number of
12 lines involved being significant?

13 MR. REYNOLDS: That's correct. It takes on
14 the status of what we've classified as a project, so we
15 need to negotiate that for the resources.

16 JUDGE MOSS: Thanks. Page 6 and 7 and then 8
17 and 9, we get into a new provision, which is Roman 4,
18 having to do with held-order standards for
19 interconnection facilities. Do we have questions
20 there?

21 CHAIRWOMAN SHOWALTER: I just want to make
22 sure that date at the very bottom, in B, it says, The
23 Company may petition the Commission by August 1, 2000,
24 to relieve the obligation. And that's the date that's
25 intended? The only reason I was confused is it looks

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1 as if the Company shall by December 31, 2000, clear all
2 connection facilities of held orders. I guess you must
3 know what that all means, but it sounded to me as if
4 you might want to be relieved at a point later than
5 August 1. You must know.

6 MR. REYNOLDS: There is a similar provision
7 on the retail side, and what the intent is, we are
8 going to clear orders that were held as of April 30th,
9 2000, and in our evaluation of those orders, to the
10 extent that we determine that there are some
11 extraordinary orders that would be unreasonably
12 expensive to complete, we would be allowed until August
13 1st to petition the Commission and to be relieved of
14 having the obligation to clear those particular held
15 orders. We have until December 31 to clear all the
16 orders, but in order to give the Commission an adequate
17 amount of time to address as to whether those are
18 really extraordinary circumstances or not, we decided
19 to give you some time.

20 COMMISSIONER GILLIS: On B, about the term
21 "unreasonably expensive," what does that mean? Is
22 there an agreement on that?

23 MR. REYNOLDS: I don't think there is, but I
24 heard on the retail side we would know it when we saw
25 it.

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1 COMMISSIONER GILLIS: We know it when we see
2 it.

3 CHAIRWOMAN SHOWALTER: But that will be up to
4 the Commission then.

5 MR. REYNOLDS: Yes, it will. We will propose
6 and the Commission will dispose that.

7 JUDGE MOSS: That brings us into Roman 5, I
8 think.

9 CHAIRWOMAN SHOWALTER: One point on this, you
10 mentioned about forecasting and more robust
11 forecasting, but am I right that there is no
12 requirement in here, per se, that CLEC's forecast?
13 It's just that the sanctions that apply to you only
14 apply if they've done a reasonable forecast, and so by
15 that means there is indirect encouragement for CLEC's
16 to do reasonable forecasting.

17 MR. REYNOLDS: That is correct, and I believe
18 too that the customer remedies are tied to the
19 reasonable forecasting so they do have a direct
20 interest in the adequate forecasting. Not only to have
21 these orders included for assessment under the payments
22 section but also under the customer remedy section, and
23 I believe there is a provision in here that requires us
24 to send out adequate notification of this program along
25 with an offer to provide them with some Company

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1 information on the particular wire centers they may be
2 interested in.

3 CHAIRWOMAN SHOWALTER: I have a question on 2
4 as well. Dr. Blackmon or Ms. Johnston, can you just
5 remind me of what the expedited proceeding entails for
6 resolving disputes? By agreeing to do it through the
7 expedited process, what are we agreeing to do?

8 MS. JOHNSTON: I can't recall. Can you
9 recall, Dr. Blackmon?

10 DR. BLACKMON: It's a 90 day. We were going
11 to call it rocket docket. Essentially, it uses the
12 existing administrative procedure at intervals but
13 always picks the shortest possible time whenever there
14 is discretion to try to get the whole thing done in
15 about 90 days.

16 JUDGE MOSS: I happen to have the WAC here in
17 front of me, and this is the Petitions for Enforcement
18 of Interconnection Agreements WAC that was added, as I
19 recall -- well, the statutory authority is effective in
20 '98. I think the WAC was effective sometime in '99.
21 The date of my publication here says February 10th,
22 '99, so it's fairly recent.

23 MR. REYNOLDS: I believe it gives quite a bit
24 of authority to the administrative law judge too up to
25 their discretion as to whether to hold a hearing or

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1 whether they have adequate evidence based on that -- to
2 come to a quick determination.

3 JUDGE MOSS: While we're on this section, I
4 had a couple of questions, and it follows up on your
5 comments, Mr. Reynolds, in the beginning. You talked
6 in terms of robust forecasting, which is something on
7 the one hand that the CLEC's are responsible to do;
8 yet, as I read the provision, it does appear to me that
9 there is actually an exchange of what I'll call useful
10 information provided for so that there would be some
11 mutuality to the obligation to insure that the
12 appropriate body of information was available to all
13 concerned in effecting the forecasting. Is that
14 essentially correct?

15 MR. REYNOLDS: That is correct. In fact,
16 that's been a huge push by the competitors to get
17 better information and better access into U S West's
18 operating support system so that they can determine
19 what type a market is in any central office, how many
20 loops qualify for the types of services they want to
21 offer, and actually, they've gotten some relief just
22 recently in the remand order for to us provide a batch
23 data to them so they can assess entire centra offices
24 as of a certain date, and some of these provisions
25 speak to that type of data being available to them at

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1 this Web site.

2 JUDGE MOSS: Does any of this information go
3 beyond what in U S West's view is minimally required by
4 statute to be provided?

5 MR. REYNOLDS: Not having reviewed the
6 requirements of the UNI remand, I know that in the
7 FCC's UNI remand order, there are some very explicit
8 requirements for the type both breadth and depth of
9 data that we must allow them to access, and I believe
10 that it's pretty much encompassed here. I don't know
11 varying degrees of how much above or below this is of
12 that requirement.

13 JUDGE MOSS: I can perhaps come a little more
14 directly to the point in this way. The CLEC's were not
15 parties to these negotiations, I take it, and so I'm
16 concerned that this is to assist the CLEC's in part,
17 and I want to feel comfortable that their interests
18 have been taken adequately into account, so the
19 question really goes to the concern about whether this
20 meets what they are telling you their needs are, what
21 you are hearing from them in various context outside
22 this specific negotiation.

23 MR. REYNOLDS: Yes, and I think I can answer
24 that. In the other settlement negotiations I've been
25 involved in with the competitive providers, this is the

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1 type of information that they have been asking for,
2 both in the context of proceedings like this and before
3 the FCC. That's the order that came out of the FCC, so
4 it's very consistent with the type of information that
5 they are requiring and that we are actually including
6 in company-to-company agreements and interconnection
7 agreements with them.

8 JUDGE MOSS: Dr. Blackmon, Staff, based on
9 its regular, daily, I might say, involvement with
10 CLEC's and ILEC's and all the other types of LEC's
11 there may be in the world, would have a pretty good
12 idea if there were any piece of information missing
13 from this list of -- well, I don't know what letter of
14 the alphabet H is, but this list of information that's
15 going to be provided, and it's your view then, I take
16 it, that this list is sufficiently comprehensive to
17 promote availability that it is intended to promote.

18 DR. BLACKMON: We believe it is. The benefit
19 to the CLEC's is not just that they can do better
20 forecasts, but they can also have access to the same
21 type of information that U S West does in terms of
22 knowing where to deploy resources most effectively, and
23 we believe this does cover the list of information
24 items that we've heard about that we have heard them
25 say they need. If there is more, then it's not too

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1 late for them to express that view to the Commission,
2 but we've done the best we could given the amount of
3 participation from the CLEC's that we had.

4 JUDGE MOSS: I think we may want to follow up
5 on that last point about opportunity for participation
6 before the Commission with respect to the Settlement
7 Agreement. Ms. Johnston, we'll come back to you on
8 that at the end to see -- we'll no doubt have to
9 consider what further process, if any, is required
10 beyond today in order for the Commission to take this
11 whole matter under advisement and reach determination,
12 so we will return to that point, but let's go on with
13 our settlement review, and I'm still stuck back on Page
14 11, I guess, but maybe it's time to move on.

15 COMMISSIONER GILLIS: On Point 6, the
16 confidentiality, there is a reference to the statement
17 to safe harbor obligations. Does that have provisions
18 to insure that the competitive retail side of U S
19 West-Qwest would not have information available to it
20 that the other competitors would not have available to
21 them?

22 MR. REYNOLDS: Yes, that's exactly what it
23 addresses. It's sort of an explanation of what we call
24 the fire wall between the wholesale side of the
25 business and retail.

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1 COMMISSIONER GILLIS: So only the wholesale
2 side of the business is going to have this forecast
3 data?

4 MR. REYNOLDS: Yes.

5 COMMISSIONER GILLIS: And there is some sort
6 of an agreement that safe harbor agreements or
7 obligations that insures that your retail side of your
8 business doesn't have access to that?

9 MR. REYNOLDS: Yes.

10 JUDGE MOSS: That brings us to Page 12.

11 CHAIRWOMAN SHOWALTER: I have a question. I
12 want to understand better how No. 2 works. I
13 understand No. 1. If 80 percent of customer orders
14 were provisioned within the required intervals, then it
15 seems to me there is a quarterly payment due of a
16 million dollars; is that right?

17 MR. REYNOLDS: Yes.

18 CHAIRWOMAN SHOWALTER: What is No. 2? Does
19 that interact with No. 1, or is that separate from No.
20 1?

21 MR. REYNOLDS: No. 2 just explains how you
22 would calculate the seven percent; that is, you would
23 take the total number of orders that fall within the
24 provisioning guidelines that have been explained as
25 under this type of payment structure and divide it by

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1 the total number of orders for the services that are
2 discussed, so you would come up with a percentage that
3 fall within the required guidelines and you would
4 compare that to the schedule and determine on a
5 quarterly basis which payment.

6 CHAIRWOMAN SHOWALTER: So No. 2 tells you how
7 to calculate the percentage that you need to find in
8 No. 1.

9 MR. REYNOLDS: That's correct.

10 CHAIRWOMAN SHOWALTER: Maybe the reason I was
11 misled is the last sentence there says the maximum
12 allowed is 10 million, so that's just an overall lid on
13 how No. 1 and 2 work together?

14 MR. REYNOLDS: That's right, and really, it's
15 just an explanation if you add four quarters below 57
16 percent, you arrive at the 10 million for the annual,
17 the total liability.

18 CHAIRWOMAN SHOWALTER: Okay, I see. Thanks.

19 COMMISSIONER GILLIS: I had some questions on
20 this section. It's probably for Dr. Blackmon. The
21 87.5-percent threshold would appear to be a B grade,
22 and you've signed off on this, and apparently you
23 believe it's fair, so maybe you could explain to me why
24 it's a fair threshold to expect rather than a higher
25 threshold.

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1 DR. BLACKMON: We don't have a lot of
2 experience with this sort of performance and intervals
3 that should be expected on the wholesale side, so
4 without that sort of baseline, we really just had to go
5 by what would seem to be a reasonable level, and so
6 during the course of the negotiations, there were
7 various proposals made, and we were able to reach
8 agreement on this as a reasonable level.

9 We like the fact that it is very specific and
10 that it's graduated in its applications. As things get
11 worse, the payments go up, and we don't think there is
12 any one schedule of payments that's right or wrong. We
13 just thought this was reasonable.

14 COMMISSIONER GILLIS: On the issue of the
15 cap, 10 million dollars, again, it's a question of if
16 things got so bad with the Company that we reached a
17 cap. Why should we accept any cap, and that suggests
18 terrible service quality because up to 10 million
19 dollars, and what's the justification for us accepting
20 an agreement that has a cap?

21 DR. BLACKMON: I think Paragraph 4 on that
22 page is what becomes important at that point. It's
23 only a cap on that particular mechanism. It's not a
24 cap on the Commission's overall ability to enforce
25 service quality standards.

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1 COMMISSIONER GILLIS: So other service
2 quality standards would apply.

3 DR. BLACKMON: To the extent we have them.
4 We may not have a specific standard for provisioning
5 and meeting the provisioning intervals. We could be
6 falling back on the more general obligation of the
7 Company to provide service and keep its commitments,
8 things like that.

9 COMMISSIONER GILLIS: A more general question
10 along those lines, and I'm not suggesting any malice or
11 ill intent on the part of the Companies, but I always
12 look at the economic incentives of structures like
13 this. If the Company doesn't follow the incentive,
14 they are not being responsible to their shareholders.
15 When we set a threshold where there is no payment that
16 applies at a threshold, 87.5 or whatever, isn't there
17 an economic incentive to live somewhere around the cap?
18 That strikes me as a problem. How do you react to
19 that?

20 DR. BLACKMON: I guess I would agree that if
21 they thought the best they could do under any
22 circumstance was 57 percent, I would agree that this
23 mechanism by itself provides no incentive for them to
24 reach 57 percent. They would be just as well off to
25 stay at 30 percent or 20 or 10 percent, so that's where

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1 some other mechanism has to come in.

2 COMMISSIONER GILLIS: I was looking at the
3 other end of the spectrum, the top of the spectrum in
4 that there is no payment that applies until you reach
5 87.5 percent, so in other words, what is the economic
6 incentive to maintain 95 percent?

7 DR. BLACKMON: There are customer-specific
8 remedies that the Company is not going to be
9 collecting, recurring charges, if it can't meet
10 commitments on an individual basis. Beyond that, this
11 mechanism by itself doesn't provide any incentive
12 there, and I think in that regard, it's quite parallel
13 to what we have on the retail side where any company,
14 not just U S West, isn't violating our rules if they
15 have five percent or six percent or even 9.9 percent
16 level of held orders, because our rules only require a
17 certain level of performance, and going beyond that,
18 there is no legal requirement that they do better.

19 COMMISSIONER GILLIS: Are there any standards
20 of this structure or type that CLEC's have been
21 involved in negotiating that you are aware of in other
22 states, that thresholds that are established here, 87.5
23 percent in this case, is something they've accepted as
24 adequate?

25 DR. BLACKMON: I don't have specific

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1 knowledge about that.

2 MR. REYNOLDS: My understanding is the
3 Minnesota Agreement also includes 87.5 percent.

4 COMMISSIONER GILLIS: Were the CLEC's
5 involved in that?

6 MR. REYNOLDS: No, they were not, just the
7 agency.

8 COMMISSIONER GILLIS: That's all I have.

9 MS. ANDERL: Your Honor, I know there wasn't
10 a question directed here, but I happen to have all of
11 the Agreements before me, and I would just direct the
12 Commission's attention relevant to Commissioner
13 Gillis's question to the Rhythms Agreement where there
14 were thresholds agreed to 82.5 percent and 58 percent.

15 JUDGE MOSS: On Page 13, we've got a
16 carryover section there with No. 2, 3, and 4, and then
17 we are into D.

18 CHAIRWOMAN SHOWALTER: I have a question on
19 D, and I think it probably might go to the attorneys,
20 but what is our authority for ordering payments to the
21 Washington State Treasury? As a corollary, if the
22 Company failed to make the payment, what would be our
23 authority to enforce that?

24 MS. ANDERL: I see this question appears to
25 be directed to me.

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1 MS. JOHNSTON: Actually, I anticipated this
2 question. I reviewed RCW 80.04.400 and RCW 80.04.405,
3 and both of those statutory sections make reference to
4 payments to the treasury of the state, and so as far as
5 Subsection D on Page 13 of the Settlement Agreement
6 goes, it's entirely consistent with state law. These
7 other statutory sections, however, provide for the
8 treasurer of the state to credit any such payments to
9 the public service revolving fund.

10 CHAIRWOMAN SHOWALTER: I don't have that
11 statute in front of me, but does that pertain to
12 penalties upon a finding of a violation, or does that
13 statute allow for broader authority to order money to
14 be paid? Is it for a violation for a finding?

15 MS. JOHNSTON: They do both reference fees,
16 fines, and or penalties and forfeitures, so I think
17 that there is a contemplation then of the penalty or
18 the assessment would be for a failure to act.

19 CHAIRWOMAN SHOWALTER: Does that mean would
20 we have to have a proceeding, or could U S West-Qwest
21 demand a proceeding saying, Well, we did meet the
22 threshold, or no, you didn't meet the threshold, before
23 this kind of payment was owed, or is there some kind of
24 automatic trigger that operates?

25 MS. JOHNSTON: It was my understanding that

01590

1 it was, per se, liability automatic, financial
2 liability.

3 MS. ANDERL: I think the provision for
4 challenging the payment calculation are related to
5 whether orders were correctly included in the payment
6 calculation. With regard to this provision, I think
7 that's one of the beauties of these settlement
8 agreements in that the parties consent to provision
9 that the Commission otherwise could not order, which is
10 a prospective penalties type or payments type of a
11 provision.

12 I believe the Commission's authority to order
13 the Company to make payments is fairly narrowly
14 circumscribed by the public service laws in penalty and
15 fine statutes and that those would not authorize an
16 independent order of this nature, but when the parties
17 consent to it, of course, it can be a provision of an
18 agreement that the Commission then adopts or approves
19 in a Commission order.

20 CHAIRWOMAN SHOWALTER: So you are saying the
21 Commission is approving the Agreement whereby the
22 parties, U S West-Qwest, agrees to pay this amount? I
23 guess my question is, is this related to this penalty
24 provision or not? What if the Agreement says you will
25 pay to the treasury of France? In other words, you

01591

1 agreed to pay the treasury of France and we approved
2 the Agreement, so you make the payment to France, or
3 does this need to relate back to this statute somehow?

4 MS. JOHNSTON: In my view, I think it needs
5 to be grounded in statute somehow. I think the
6 Commission needs to have independent authority, and
7 this financial assessments, whether they call them
8 fines or payments or penalties or credits or whatnot,
9 there must be some basis in state law. You couldn't,
10 for example, order a company to build houses or make
11 charitable contributions. I don't know that I'm
12 disagreeing with Ms. Anderl entirely, but I think that
13 this provision which provides for these payments for
14 the provisioning intervals and held orders, these need
15 to be payable to the Washington State Treasury is
16 consistent with state law.

17 CHAIRWOMAN SHOWALTER: Where are you reading?
18 I do have the statute in front of me right now.

19 MS. JOHNSTON: Do you see the reference to
20 treasury of the state?

21 CHAIRWOMAN SHOWALTER: Which RCW?

22 MS. JOHNSTON: 400 in the middle section
23 there.

24 CHAIRWOMAN SHOWALTER: It's interesting
25 because the previous two sentences are about actions to

01592

1 recover penalties under this title shall be brought in
2 the name of the State of Washington. In all such
3 actions, the procedures and rules of evidence shall be
4 the same as in an ordinary civil action except as
5 otherwise provided, and then it says, All fines and
6 penalties recovered by the state under this title shall
7 be paid, so all of that is about penalties, and then it
8 says, provided, and usually a provided is a
9 qualification on the proceeding. It's a subset of
10 whatever proceeding, provided that all fee and
11 penalties collected are assessed by a district court
12 because of a violation of law shall be permitted as
13 provided in this chapter.

14 What I'm asking is, is this authority that
15 you've cited really only penalty authority, and
16 penalties being penalties imposed after a proceeding as
17 opposed to -- well, our general regulatory authority,
18 we certainly have the authority to order the Company to
19 respond to a request for a new line within five days,
20 that kind of thing, so I guess I'm just looking for why
21 this fits either within our penalty authority of that
22 kind of authority or our general authority to regulate
23 companies in the public interest.

24 MS. ANDERL: My position is what I said
25 earlier that it doesn't, and that's the beauty of it.

01593

1 We've agreed as parties to do something which we do not
2 believe the Commission could independently order, and
3 that is one of the clear benefits of this Agreement.

4 CHAIRWOMAN SHOWALTER: What gives us the
5 authority to approve this Agreement and enforce it?

6 MS. ANDERL: I don't think that the Agreement
7 necessarily has to only contain provisions which you
8 would have independent authority to order. I think the
9 Commission just needs to look at the Agreement and
10 consider if in the overall it satisfies the
11 Commission's concern that the Agreement itself is in
12 the public interest and the approval of the merger is
13 in the public interest, and you can go forward and
14 approve what the parties have agreed to do between each
15 other.

16 COMMISSIONER HEMSTAD: I agree with that. I
17 don't see why the Company cannot commit itself to take
18 certain actions as part of the overall agreement of
19 settlement and we then approve.

20 CHAIRWOMAN SHOWALTER: And enforce?

21 MS. ANDERL: Yes.

22 COMMISSIONER HEMSTAD: It's akin to a
23 contract, and the Company is agreeing to impose terms
24 upon itself as part of the larger context and agreeing
25 that it's enforceable.

01594

1 MS. ANDERL: Let's me go back to the
2 beginning of the arbitrations under the Telecom Act in
3 the '96, '97 time frame when we were all just figuring
4 this out with arbitrations under the Act. Many of the
5 CLEC's advocated strenuously for interconnection
6 agreements that had liquidated damages, but there were
7 self-executing penalty provisions in there, and we
8 opposed those, and I think part of our advocacy was
9 that the Commission has no independent authority to
10 require that either under the state law or under the
11 Telecom Act.

12 I don't exactly recall what the basis for
13 each individual arbitrated decision was in Washington,
14 but I know no decision opposed those liquidated
15 damages, but that doesn't mean we couldn't have as a
16 product of negotiation with one or more of those
17 carriers agreed to liquidated damages provisions and
18 then submitted an agreement to the Commission under the
19 Telecom Act that the Commission could have approved as
20 a negotiated interconnection agreement.

21 CHAIRWOMAN SHOWALTER: So if you fail to make
22 a payment to the treasury, as Staff thinks you should,
23 in your view, what is the remedy?

24 MS. JOHNSTON: It's a violation of Commission
25 order.

01595

1 MS. ANDERL: Somebody could claim that, sure.

2 CHAIRWOMAN SHOWALTER: It's a violation of
3 Commission order. Then what do we do?

4 MS. ANDERL: An enforcement proceeding. The
5 Commission could open an investigation or issue a
6 complaint.

7 CHAIRWOMAN SHOWALTER: And then we could
8 compel that payment to the treasury plus maybe a fine
9 for violation?

10 MS. ANDERL: Don't make me go that far.

11 COMMISSIONER HEMSTAD: Just as a commentary,
12 you don't have to have precisely every answer to every
13 conceivable hypothetical, but surely the Company here,
14 if it agrees to these arrangements, then it's subject
15 to further process from this Commission to carry out
16 its agreement.

17 MS. ANDERL: Sure. We think parties can
18 enforce this Agreement through complaint to the
19 Commission, and the Commission has the statutory
20 authority it has to impose fines and penalties for
21 whatever things it is allowed to impose fines and
22 penalties, including violation of Commission rule or
23 order.

24 MS. JOHNSTON: I think the key is that the
25 merged company is acquiescing to these terms and

01596

1 conditions that we are proposing to you.

2 CHAIRWOMAN SHOWALTER: Okay.

3 JUDGE MOSS: If that completes our discussion
4 of 5-D, then we can move onto 6, which is also, in my
5 version, on Page 13, or begins there and then carrying
6 over to Page 14, and we pick up Part B of 6, and
7 perhaps we can move to Roman 7 on Page 14, recording
8 requirements. No questions there. Page 15. We pick
9 up Part 8, which is a general provisions section, and
10 that carries over to Page 16, at which point we are
11 upon the signature page.

12 CHAIRWOMAN SHOWALTER: I have a general
13 question that's not specific to the Agreement, but it's
14 just about the interaction of this Agreement and the
15 Retail Agreement. At the time the Retail Settlement
16 Agreement was filed, there was concern among the
17 CLEC's, primarily, that somehow the dollar commitments
18 there would go into dollars that might otherwise go to
19 competitive issues, and I just would like to hear from
20 Dr. Blackmon, primarily, as to whether you think that
21 that imbalance, if it ever was an imbalance, is
22 addressed by this complementary agreement.

23 DR. BLACKMON: We think it is addressed. The
24 way I had heard the concern was not so much that the
25 Retail Agreement would sort of use up all the Company's

01597

1 resources, which was a concern that we had, but it's
2 just not one that I heard the CLEC's propose, but they
3 did seem to be concerned that we were somehow precluded
4 from asking for other things on the competitive side.

5 The CLEC's seemed to have that concern, and I
6 think it's obvious by the existence of this Agreement
7 that that was not the case and that we do have
8 investment commitments on both sides and we do have
9 performance commitments on both sides, and neither of
10 them is at the expense of the other.

11 JUDGE MOSS: That gets back to your concern
12 about there being balance between the two sides is the
13 thought that, for example, if the penalty obligations
14 or payment obligations on the wholesale side were two
15 or three times as high as those on the retail side,
16 that might encourage the Company to focus its resources
17 at the expense of the other.

18 DR. BLACKMON: That's correct.

19 JUDGE MOSS: Do you have any sense of how
20 that might play out, Dr. Blackmon, in terms of the fact
21 that the Company is entering into similar agreements in
22 other jurisdictions that provide for penalties that are
23 of a significantly higher magnitude than those in this
24 Agreement? I think, for example, the Minnesota
25 Agreement where the penalty for violations of some of

01598

1 these same standards are four and five times as great
2 as provided in this Agreement. Is there any concern
3 that there will result in a diversion of Company
4 resources to those states where the higher penalties
5 place the Company at greater risk?

6 DR. BLACKMON: I think it's hard not to have
7 that sort of concern. My experience is that it's also
8 very hard to compare provisions that on their face seem
9 to be similar from different states; that many times an
10 agreement that in one state may seem to be more -- I
11 guess I'm speaking more to the comprehensive rather
12 than it being bigger on any one particular issue; that
13 while one state's agreement may look different or
14 tougher than another's, that could well be because they
15 were starting at a different point where they have
16 different substantive problems in their state compared
17 to ours, so I found that it's very hard to make those
18 comparisons.

19 I also think that specifically with the
20 Minnesota Agreement that the question we asked
21 ourselves was whether the provisions that we have are
22 sufficient, and we believe that they are. Whether it
23 would be better to have more money at risk, maybe it
24 would. I can't be sure, but for us, it's basically a
25 question of whether this is good enough to go forward.

01599

1 JUDGE MOSS: I didn't mean to imply any
2 judgement by that with respect to the penalties
3 provided, payments provided here being adequate,
4 inadequate, relatively or absolutely, but rather just
5 the broader concern that seems to be inherent to the
6 Agreement struck that there be some balance.

7 I'm not concerned about the magnitude but
8 simply about the difference and the fact that because
9 of this imbalance, there might be the tendency that I
10 inquired about to divert resources to the one state
11 versus the other, and maybe it's not possible to have
12 any insight on that, or maybe Mr. Reynolds would like
13 to respond to the point as well.

14 DR. BLACKMON: If I could just add, again,
15 that sort of difference in incentive levels across the
16 states is something that Staff intends to keep its eye
17 on, and there may not be anything explicit here that
18 requires that sort of parity across states, but we will
19 certainly be on the lookout for it as we go forward.

20 JUDGE MOSS: I'm impressed by your comment
21 that Staff's views these as adequate for Washington
22 state purposes. Mr. Reynolds?

23 MR. REYNOLDS: I would say you have to look
24 at some of the other provisions. In Minnesota, for
25 example, the penalty payment is split between an

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1 infrastructure fund, so the funding actually comes back
2 to the Company. It's directed by a team of, I think,
3 Commissioners and administrative law judges and other
4 industry members. So you have to look at all the
5 provisions in Washington. If it's an absolute penalty
6 paid out, we probably won't see it again, so there are
7 different incentives there as well, so when you look at
8 the magnitude of some of the penalties in other states,
9 you need to look just beyond the penalty structure and
10 look at where the funding is going and what's happening
11 with the money.

12 JUDGE MOSS: It's an interesting mechanism
13 and brings to mind the mess Judge Barefoot Sanders got
14 himself into down in Texas. He had been running the
15 Texas prison system for about 25 years, and now as a
16 result of that kind of retention of enforcement
17 authority.

18 I believe that brings us to the substantive
19 parts to a conclusion. Are there any other points of
20 general inquiry from the Bench? I have none. Anything
21 the parties needs to accomplish while this panel
22 remains on the stand?

23 MR. FFITCH: Your Honor, I have a couple of
24 questions. The first one follows up on the last line
25 of questions from the Bench, and I just want to inquire

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1 for the record of both the Staff and Company witnesses
2 whether there are any provisions in this Settlement
3 Agreement, referring to the Competitive Settlement
4 Agreement, which in any way negatively impact or
5 undermine or supersede any of the provisions of the
6 Retail Settlement Agreement. I'll start with you,
7 Dr. Blackmon.

8 DR. BLACKMON: No.

9 MR. REYNOLDS: Not to my knowledge.

10 MR. BARKETT: Not to my knowledge.

11 MR. FFITCH: Thank you. The second question
12 relates to Section 271 of the Federal
13 Telecommunications Act. I think maybe I'll start with
14 you, Dr. Blackmon, but I guess I'd like to hear from
15 the Company and Staff on this. The Agreement clearly
16 does not address Section 271 obligations or
17 restrictions; isn't that fair to say?

18 DR. BLACKMON: That it doesn't....

19 MR. FFITCH: It does not address the Section
20 271 restrictions that Qwest is under if the merger goes
21 through.

22 DR. BLACKMON: No, it doesn't, and the
23 obligations U S West is under today, no it doesn't.

24 MR. FFITCH: But those are, in fact,
25 competitive issues, are they not?

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1 DR. BLACKMON: Section 271 sets out a series
2 of steps that U S West or Qwest, as its successor,
3 would have to accomplish in market opening steps if
4 they choose to enter the long-distance business, so
5 competition issues are involved or relevant in any
6 Section 271 proceeding, and they are in this merger
7 proceeding.

8 MR. FFITCH: That really wasn't meant to be a
9 trick question, but just to note that that is another
10 piece of the competitive picture here should this
11 merger go forward; isn't that correct? That's not my
12 main question. I think that's just sort of a given.

13 DR. BLACKMON: It's a given that we are going
14 to have 271 ahead of us no matter what.

15 MR. FFITCH: What 271 is about is
16 competition; isn't that right? Again, this isn't a
17 trick question. I thought I was going to breeze past
18 this and get on to my basic point.

19 DR. BLACKMON: 271 is about competition, yes.

20 MR. FFITCH: It's about competition in the
21 long-distance market, isn't it?

22 DR. BLACKMON: It's about competition in both
23 the local exchange market and the long-distance market.

24 MR. FFITCH: Thank you. And again, as you've
25 stated, this is an issue that's not addressed in this

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1 Agreement, and I just wanted you to address briefly for
2 the Commission's benefit and for my benefit for the
3 record how the Section 271 restrictions are going to be
4 addressed for purposes of this merger.

5 DR. BLACKMON: This merger won't affect the
6 restrictions that U S West is under today. They cannot
7 provide interLATA telecommunications service. Qwest as
8 an acquiring company provides that service today, and
9 they will have to stop providing interLATA service, and
10 to do that, just to sort of back out of that business,
11 they are sort of shuffling that part of their business
12 around internally so that all of their interLATA
13 business in the State of Washington is in one operating
14 company called Tele-Distance (phonetic), which as part
15 of the transaction to close this merger, they will sell
16 that interLATA business to Touch America, so it's not
17 part of this merger proceeding. It's necessary for
18 them to accomplish this merger without violating
19 federal law.

20 MR. FFITCH: How is it going to be determined
21 that the merging companies in this proposed merger with
22 Qwest is in compliance with federal law with respect to
23 Section 271?

24 DR. BLACKMON: I believe the Federal
25 Communications Commission will make that determination.

01604

1 MR. DAVIS: Could I add something? Just to
2 note, what we've done is we filed a plan with the FCC
3 in '99. We filed a report with the FCC on March 10th
4 the details -- it's a 100-page report not counting all
5 the attachments with all the agreements detailing how
6 we would divest our interLATA reaching business to
7 Touch America. The FCC last accepted comments and
8 reply comments on that draft and has indicated that it
9 will issue an order approving the divestiture as being
10 271 compliant before the merger can be completed.

11 MR. FFITCH: Thank you. Dr. Blackmon, are
12 there any proceedings separate from this proceeding in
13 Washington state that are taking a look at the Qwest
14 compliance with the Section 271 restrictions?

15 DR. BLACKMON: No, there aren't. If I could
16 go back, this issue has been brought up in the merger.
17 The CLEC conditions that are in Exhibit 184 and two
18 other exhibits, one of them was that the CLEC's
19 proposed was that there be some sort of a compliance
20 check on Qwest's interLATA exit and that they file
21 reports with this Commission demonstrating that they
22 aren't providing interLATA service anymore.

23 Staff in its testimony in Exhibit 453
24 recommended against having that provision in this
25 merger settlement, so that was a CLEC proposal that

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1 Staff recommended against, and our settlement today is
2 entirely consistent with our position, which is that we
3 don't think that there is any need for this Commission
4 to enforce that long-distance prohibition on Qwest.

5 If it turns out later that we feel that Qwest
6 is offering interLATA service in violation of federal
7 law, we can do something about it then, either complain
8 against it here or ask the FCC to take some action, but
9 we don't see any need within this merger to set up any
10 sort of a compliance or reporting requirement on that
11 issue.

12 JUDGE MOSS: Let's take a five-minute recess.
13 (Recess.)

14 JUDGE MOSS: Do you have some more questions?

15 MR. FFITCH: Yes, Your Honor, but I'm just
16 trying to reduce it to one question at this point.
17 Dr. Blackmon, we've just been sort of reviewing the
18 interplay between this merger review proceeding and the
19 fact that Qwest, if the merger is approved, is going to
20 have to comply with Section 271. That's essentially
21 being reviewed at the federal level.

22 I think my summary question is, can you
23 state -- and I'd like also to hear from the Companies
24 on this -- can you state in 25 words or less why the
25 Commission can be comfortable proceeding with the

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1 merger approval only with the condition that we have
2 here and without addressing Section 271 compliance by
3 Qwest after the merger?

4 DR. BLACKMON: We don't have any particular
5 mechanism in place today to make sure that U S West
6 complies with the prohibition on providing interLATA
7 service, and Staff doesn't believe that we need a
8 mechanism like that for Qwest on a going-forward basis.
9 I agree that this merger could increase the likelihood
10 of some sort of an interLATA effort by Qwest simply
11 because they have been doing it in the past, and it
12 might be hard to root out every interLATA offering of
13 service they have, but we believe that those issues are
14 adequately addressed by the plan that they've filed
15 with the FCC, and the compliance effort that the FCC
16 has is sufficient to meet that concern.

17 MR. FFITCH: Does U S West or Qwest agree
18 with that statement?

19 MR. REYNOLDS: I think I would? Is Steve
20 Davis still on? I would defer to him.

21 MR. DAVIS: I couldn't hear the very last
22 part, but what I heard is the FCC is reviewing it, and
23 I don't know beyond that. I'm sorry.

24 JUDGE MOSS: Mr. ffitch, do you want to
25 restate your question briefly for Mr. Davis's benefit

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1 so you can get a response from joint applicants?

2 MR. FFITCH: I think the question essentially
3 was why should the Commission be comfortable not
4 addressing 271 compliance as a condition of this
5 merger?

6 MR. DAVIS: Okay. What I would suggest is
7 that first of all, it's a federal act that the FCC has
8 been enforcing since the Telecom Act was passed in '96
9 but also long before that beginning in January 1984.
10 They are very familiar with it. They have a large
11 staff dealing with these issues. Secondly, the FCC has
12 required us to provide agreements --

13 JUDGE MOSS: Mr. Davis, I'm sorry to
14 interrupt you, but I detected our reporter was losing
15 pace with you. You need to slow down, please.

16 MR. DAVIS: The FCC has had comment on it.
17 They will issue a report. They will advise us, quite
18 frankly, if there are places where they think we are
19 not in compliance. They will issue a report or an
20 order indicating whether we are or are not.

21 In addition, the FCC is requiring us to have
22 independent audits performed annually for three years,
23 I believe, showing through the independent audit that
24 we are in full compliance with the divestiture report
25 and requirements of Section 271, and we will be happy

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1 to share any of that information with the Commission.

2 MR. FFITCH: Mr. Davis, is Qwest in the
3 process of filing any applications with this Commission
4 with regard to divestiture of its interLATA business in
5 Washington or engaged in any other proceedings of any
6 kind that would give the Commission a window into the
7 compliance in the state?

8 MR. DAVIS: I don't know the exact status in
9 Washington. I would have to defer to Mr. Rosenstein,
10 but we did create a separate company
11 called Tele-Distance (phonetic) and had it certified to
12 provide service transfer the assets to Tele-Distance
13 and have, I believe, approval of a transfer of that
14 company to Touch America.

15 MR. FFITCH: It's my understanding for
16 anybody on the panel also that there has been
17 interaction with the Commission staff regarding the
18 notice to the Qwest customers who may be moving to
19 Touch America; is that correct?

20 MR. DAVIS: I believe we've had discussions
21 with Staff as to the adequacy of that notice and making
22 certain that people have an opportunity to make a
23 choice that they do not want to go to Touch America for
24 whatever reason without having to pay the change
25 charge.

01609

1 DR. BLACKMON: If I could add, those issues,
2 which really are the same issues that would come up
3 when for whatever reason Qwest might choose to transfer
4 part of its business to another company, and so they
5 are not really specific 271. 271 is motivating it, but
6 the issues would be there no matter what the motivation
7 was. Those are in a separate proceeding here that will
8 be on the open meeting of May 30th.

9 At this point, Staff anticipates that we will
10 recommend approval of the Company's registration
11 petition, competitive classification. We've worked out
12 all the notice issues and are satisfied that the
13 arrangements that Qwest and Touch America are making to
14 keep this a smooth transition for the customers. Those
15 are not merger issues, though the merger at this point
16 is precipitating the filing of those applications, but
17 in terms of that open meeting in a little over a week,
18 it would be just like any other application that you
19 would see here and the transfer of business to the
20 Company.

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

23 JUDGE MOSS: Thank you, very much. Do we
24 have any other business to conduct while our panel is
25 still impaneled?

01610

1 CHAIRWOMAN SHOWALTER: I just have one
2 question. Obviously, this questioning today is really
3 questions of first impressions since we have had very
4 little time to digest this Agreement, so another one
5 that occurred to me since I finished asking was back on
6 the forecasting issue. Am I correct that there is
7 essentially a standard of reasonableness in this
8 forecasting; that is, U S West is not held to certain
9 requirements unless there is a reasonable forecast on
10 the part of the CLEC; am I right so far?

11 DR. BLACKMON: Yes, that's correct.

12 CHAIRWOMAN SHOWALTER: But determining what
13 is reasonable in the first instance is up to U S West,
14 is it not? That is, there is no independent mechanism
15 to determine, Yes, this is a reasonable forecast, or
16 no, this is not a reasonable forecast; that there is
17 just a general condition in this Agreement of
18 reasonableness, and it would come out later, wouldn't
19 it, if U S West failed to meet a deadline and said, We
20 didn't because they didn't have a reasonable forecast.

21 Then later, we might get into a dispute over
22 whether the forecast was reasonable or not, but we
23 don't have any particular way at the outset to approve
24 a forecast as reasonable or not or decide that it is
25 reasonable or not. It's just part of doing business.

01611

1 Am I right on that?

2 MR. REYNOLDS: I think that's a good
3 observation. We have no way to insure in this
4 Agreement against unreasonable forecasts at each and
5 every central office just to insure that the CLEC has a
6 bid in for facilities, and that essentially their bet
7 is hedged by overforecasting, and I think in situations
8 like that, that's why it also includes a challenge
9 provision that we could bring situations like that
10 before the Commission and present our case and be heard
11 on it.

12 CHAIRWOMAN SHOWALTER: Would you say this
13 isn't reasonable, or later on, Well, we didn't fulfill
14 this order because, frankly, we had a history with this
15 company, and they kept up with forecasts and finally
16 they cried wolf too many times and we didn't believe
17 them so we didn't do it. How is this reasonableness to
18 be determined and at what stage?

19 DR. BLACKMON: It would be determined at the
20 time that these payments are being calculated, so it's
21 not, as you were suggesting, it's not that a CLEC would
22 submit a forecast and then U S West would build to meet
23 that forecast unless they determined it was an
24 unreasonable forecast, because there is not a specific
25 obligation to build in this Agreement. Instead, there

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1 is a higher level performance standard, so if we had an
2 obligation to build, then I think we would have had an
3 escape valve there so the Company wouldn't have to
4 build if it was an unreasonable forecast, but instead,
5 what we are measuring performance is at the level of
6 whether they get the orders filled on time, and it's at
7 that point that you can then, if necessary, go back and
8 look to see whether U S West got a reasonable forecast
9 from the CLEC.

10 CHAIRWOMAN SHOWALTER: So you are saying that
11 at the surface level, you are going to assume the
12 reasonableness, and you did or didn't make certain
13 deadlines according to the forecast. Then as a
14 secondary reaction, you might say, It wasn't reasonable
15 to meet that, and that's why it shouldn't go into the
16 calculation, so this is really when you sit down with
17 Staff as to what should or shouldn't be in the
18 calculation?

19 MR. REYNOLDS: That's correct. That's what
20 was envisioned, yes.

21 JUDGE MOSS: Okay. I believe that completes
22 the inquiry from the Bench, so with that, we can
23 release our witnesses from the stand and with our
24 appreciation for their participation today with respect
25 to this proposed Settlement Agreement, and it does seem

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1 to me that the next order of business to take up would
2 be to consider anything the parties might have to offer
3 in terms of where our process goes from here.

4 MR. FFITCH: Your Honor, maybe I could just
5 state for the record at this time that Public Counsel
6 does not object to the adoption by the Commission of
7 the Competitive Settlement Agreement.

8 JUDGE MOSS: Let me just go on in this vein.
9 I had mentioned earlier that the notice for today's
10 proceeding does include a nice encompassing statement
11 to the effect that other business related to the
12 Commission's determination of the issues in this
13 proceeding may be conducted at that time and place,
14 referring to here and now, and so while I believe that
15 is legally sufficient to provide latitude to do pretty
16 much what we feel we want to do in terms of further
17 process, I am mindful too that at the time that notice
18 was written and issued, we did not have before the
19 Commission the Settlement Agreement as to which we have
20 just had our panel presentation nor did we have before
21 us some of the other matters we've taken up today, so I
22 have that concern in my mind as we discuss here -- I
23 want the Commissioners to remain on the Bench for the
24 discussion as we consider what further process, if any,
25 is required to permit the Commission to fairly consider

01614

1 the two pending Settlement Agreements that would
2 together represent, I suppose, a comprehensive
3 settlement of the issues pending in this case.

4 Ms. Johnston, I believe you have something to say.

5 MS. JOHNSTON: You had earlier indicated the
6 possibility that would enable to afford the intervenors
7 additional process so as to enable them to weigh in on
8 this competition related settlement agreement which is
9 proposed, and Commission staff would oppose that. The
10 intervenors had notice that there were several issues
11 wide and varied that would be addressed today, and also
12 I think it's significant that the various intervenors
13 in the case have sought to withdraw from the docket in
14 its entirety and thus presumably are taking no position
15 on either the proposed Settlement Agreement, and I am
16 aware -- I think Ms. Anderl can confirm -- that all the
17 intervenors were served with the Agreement yesterday.

18 MS. ANDERL: That's true. As well, I
19 followed up with telephone calls to all of the counsel,
20 except I failed to check off Art Butler. I must have
21 overlooked him as counsel for Rhythms, but all the
22 other attorneys got direct calls from me and either I
23 spoke with them or left them voice mail messages
24 advising them of what we were going to be doing today.

25 JUDGE MOSS: So the parties were fully

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1 apprised?

2 MR. FINNIGAN: Your Honor, if I might, I did
3 receive a phone call from Ms. Anderl telling me the
4 document was coming. I received it after close of
5 business so I was not able to get it to my client until
6 by fax this morning, and my client has not had the time
7 to react one way or the other, and that's what they
8 told me the last time I talked to them 10 minutes
9 before I came here at one o'clock, that they simply had
10 not had time to react one way or the other to the
11 document given that sort of events.

12 JUDGE MOSS: Mr. ffitich, do you have any
13 comment on what further process, if any, the Commission
14 ought to entertain before taking this matter fully
15 under advisement for decision?

16 MR. FFITCH: It would not be unreasonable in
17 my view to allow a short period of time for written
18 comment from other parties, given the very short time
19 frames here that have brought this in front of the
20 Commission. On the Agreement itself and other issues
21 that we haven't talk about yet, it may be kind of a
22 speak now or forever hold your piece sort of a
23 deadline.

24 JUDGE MOSS: I suppose that we can confer up
25 here briefly and decide on the basis of the input we've

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1 had.

2 (Discussion off the record.)

3 JUDGE MOSS: What we will do to insure that
4 our process is completely fair and open and gives
5 everybody an opportunity to have their say, which I
6 think is in all parties' interest as well as in the
7 interest of the Commission, is I prepare an issue of
8 notice tomorrow, it being nearly 5:00 now and too late
9 to do it today, that will provide for an opportunity
10 until one week from Wednesday, one week from
11 tomorrow -- tomorrow being the 24th, I guess that will
12 actually be the 31st then for parties to file any
13 written comment they wish to file with respect to the
14 proposed Settlement Agreement of the competitive
15 issues. We've already offered that opportunity on the
16 so-called Retail Settlement for parties to speak their
17 peace on that.

18 As to these other matters, I think they were
19 fully noticed before the Commission today and well
20 presented, and we've offered the opportunity for
21 written argument with respect to these matters of
22 exhibits and confidentiality, so it should be limited
23 to the proposed Settlement Agreement of the competitive
24 issues. I will issue that notice and provide that
25 opportunity, and with that body of information and

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1 everything else that we now have before us as of today,
2 subject to any need for Bench requests or whatnot that
3 might come out, and of course, we are expecting some
4 responses to Bench requests this Friday, then the
5 Commission will be able to take this Settlement
6 Agreement, along with other matters under advisement,
7 and reach a decision and publish that.

8 With respect to the pending request for leave
9 to withdraw, I think it's probably best, given the hour
10 too, that that be taken under advisement. The
11 Commission will in due course issue an appropriate
12 determination with respect to those matters. As to the
13 exhibits, do I understand correctly that the U S West
14 and Level 3 confidential status matter has been
15 resolved in favor of waiving that claim so that that
16 document should be treated as public?

17 MS. ANDERL: That's correct, Your Honor.

18 JUDGE MOSS: So that will obviate the need
19 for a further in chambers session this afternoon.

20 MR. FFITCH: That's correct, Your Honor.

21 JUDGE MOSS: And the request then is that
22 these eight documents, the seven agreements and the
23 so-called Interim Line Sharing Agreement, all of which
24 have been requested to be made exhibits. Unless
25 someone else on the Bench wants to discuss that matter

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1 further, I would be prepared to mark and enter those.

2 CHAIRWOMAN SHOWALTER: I guess I just want to
3 observe that with respect to the MetroNet and McLeod,
4 this Commission has made no determination on
5 confidentiality because confidentiality was asserted
6 and not challenged.

7 JUDGE MOSS: I suppose another aspect of that
8 is it is conceivable that that could be challenged
9 under some other statute. Were that to happen, of
10 course, the Commission might be put in a position of
11 making some determination in that connection, so
12 nothing that has occurred here today should be taken as
13 conclusive of that matter insofar as it may come up in
14 another way. I'm thinking, for example, under 4217.
15 Ms. Anderl, did you have something?

16 MS. ANDERL: Just when you do mark the
17 exhibits, I would note that the Covad Agreement is no
18 longer confidential either by stipulation of the
19 parties, and the preliminary exhibit list that we have
20 distributed does have that as confidential, but it's
21 not.

22 JUDGE MOSS: That's an oversight on my part.
23 I knew that. Is there any other business we need to
24 take up today, because I'm going to take care of these
25 housekeeping matters without making the Commissioners

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1 sit through that, so is there any other substantive
2 business we need to take up today?

3 MS. ANDERL: Your Honor, do we want to
4 address the briefing schedule? Currently, there was
5 one in existence by order of the Commission.

6 JUDGE MOSS: Perhaps it's the late hour, but
7 I guess I had thought that by implication the further
8 opportunity that we are providing for comment with
9 respect to proposed Settlement Agreements would
10 supplant the need for briefing now. Of course, in the
11 event that the Commission should ultimately determine
12 to not approve the Settlement Agreements as a fair,
13 just, and reasonable resolution of the issues in this
14 proceeding, then we will have to come back and put some
15 further process in place, but for now, at least, we do
16 have a set of settlement agreements that would resolve
17 all of the issues, so that's the first order of
18 business, and we will not have briefs on that unless
19 some further process is indicated.

20 MS. ANDERL: Thank you, Your Honor. It was
21 just my preference that it be explicit.

22 JUDGE MOSS: Let's go ahead and take care of
23 our housekeeping matters on the record that we do need
24 to attend to. I did predistribute the last pages of
25 the exhibit list, Page 13 and 14 of the exhibit list in

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1 this docket, and I had already commended those to give
2 numbers to these various exhibits. I'll just run
3 through that quickly. The Exhibit 456-HC is the
4 Agreement between U S West/Qwest and AT&T and that, of
5 course, has currently been designated as highly
6 confidential, and we've had discussion about that today
7 and we will resolve that in due course. Exhibit 457 is
8 the Agreement between U S West and Rhythms Links.
9 Exhibit 458 is the Agreement between U S West and
10 Covad. Exhibit 459-HC, meaning highly confidential,
11 the Agreement between U S West and MetroNet Services.
12 460-HC is the Agreement between U S West and McLeod
13 USA. 461 is the U S West and Nextlink Agreement. 462
14 is the Agreement between U S West and Level 3
15 Communications.

16 463 is the Interim Line Sharing Agreement
17 that Staff had requested be made an exhibit. Then I
18 skipped a number and went to 465, which is the U S
19 West/Qwest and Staff proposed Settlement Agreement
20 concerning competitive issues. When is that going to
21 be filed? Are you going to file it outside of the
22 submission through this record?

23 MS. ANDERL: Yes. We are going to file a
24 signed copy and getting signatures tomorrow or the next
25 day, no later.

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1 JUDGE MOSS: I'm going to further identify
2 that exhibit by the date on which it is filed, and I
3 will make the filed copy the formal exhibit so we have
4 a place holder in that sense.

5 The matter of objections having been resolved
6 with respect to the various exhibits I have identified,
7 they will be made exhibits of record, and I may have
8 already asked if there are any other exhibits. Oh yes,
9 wait a minute. I know there are some other exhibits.
10 Let us back up a moment to Exhibits No. 454 and 455,
11 which consist of public comments that were submitted
12 during the course of the proceeding, some in connection
13 with the various public comment hearings we held around
14 the state. Public Counsel presented those exhibits,
15 and they have been previously marked with the numbers
16 454 and 455. Is there any objection? Hearing no
17 objection, those will be admitted as marked, and now I
18 can ask if there are others. I don't think there are.

19 MS. ANDERL: Your Honor, the Bench requests
20 that we are going to file on Thursday?

21 JUDGE MOSS: I think that's uncontroversial
22 type of stuff, so let's go ahead and make that 466.
23 How many were there, two or three?

24 MS. ANDERL: There were two, and the first
25 one would be Bench Request No. 3.

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1 JUDGE MOSS: So Bench Request No. 3, the
2 response to that will be made Exhibit 466, and Bench
3 Request No. 4 -- and these were both oral Bench
4 requests. The Response to No. 4 will be Exhibit 467,
5 and I will make those of record being no objection, I'm
6 sure. Anything else?

7 MR. FFITCH: Will you be issuing another
8 final exhibit list then, Your Honor?

9 JUDGE MOSS: Probably I'll just send you a
10 couple of amended pages because this one is kind of
11 lengthy, and I hate to kill off another forest, so we
12 will get out the revised Pages 13 and 14.

13 MR. FFITCH: Those are very much appreciated
14 for our purposes.

15 JUDGE MOSS: Any other business we need to
16 conduct today?

17 MS. JOHNSTON: Your Honor, I'm hopeful that
18 this situation won't present itself, but depending on
19 what is filed from the various intervenors one week
20 from today, Commission staff may seek leave to file a
21 reply.

22 JUDGE MOSS: Obviously, I wouldn't preclude
23 that up front. If there is something filed and a party
24 feels a need to file something responsive, probably the
25 best way to handle that would be to give me a call and

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1 I'll announce to you some process and then I'll
2 announce it more formally, but we want to keep things
3 moving along at this stage. We will ask for a pretty
4 quick turnaround on that sort of thing. Any other
5 business then? Thank you all very much. We did manage
6 to finish by five o'clock, somewhat to my surprise.
7 (Hearing concluded at 5:00 p.m.)

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