

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
2 COMMISSION

3 NEXTLINK WASHINGTON, INC.,)
 4)
 5) Petitioner,)
 6)
 7) vs.) DOCKET NO. UT-990340
 8) VOLUME II
 9 US WEST COMMUNICATIONS, INC.,) Pages 55 - 92
 10)
 11) Respondent.)
 12 -----

13 A hearing in the above matter was held on
 14 August 25, 1999 at 10:20 a.m., at 1300 South Evergreen
 15 Park Drive Southwest, Olympia, Washington, before
 16 Chairwoman MARILYN SHOWALTER, Commissioners WILLIAM R.
 17 GILLIS and RICHARD HEMSTAD.

18 The parties were present as follows:

19 US WEST COMMUNICATIONS, INC., by LISA A.
 20 ANDERL, Senior Attorney, 1600 Seventh Avenue, Suite
 21 3206, Seattle, Washington 98191.

22 NEXTLINK WASHINGTON, INC., by GREGORY J.
 23 KOPTA, Attorney at Law, Davis Wright Tremaine, 1501
 24 Fourth Avenue, 2600 Century Square, Seattle, Washington
 25 98101.

26 THE WASHINGTON UTILITIES AND TRANSPORTATION
 27 COMMISSION by SHANNON SMITH, Assistant Attorney
 28 General, 1400 South Evergreen Park Drive Southwest,
 29 Post Office Box 40128, Olympia, Washington 98504.

30 Also Present: Thomas L. Wilson, Glenn
 31 Blackmon.

32 Kathryn T. Wilson, CCR
 33 Court Reporter

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

2 CHAIRWOMAN SHOWALTER: We're going to resume
3 our open public meeting of the Washington Utilities and
4 Transportation Commission on August 25th for the
5 purpose of hearing oral arguments in Docket No.
6 UT-990340, which is a petition by Nextlink. Before we
7 begin, perhaps we should take appearances beginning
8 with Ms. Anderl.

9 MS. ANDERL: Thank, Your Honor. Lisa Anderl
10 representing US West Communications, Inc., 1600 Seventh
11 Avenue, Room 3206, Seattle, Washington, 98191.

12 MR. KOPTA: Gregory Kopta of the law firm
13 Davis Wright Tremaine, LLP, on behalf of Petitioner
14 Nextlink Washington, Inc., 2600 Century Square, 1501
15 Fourth Avenue, Seattle, Washington, 98101-1688.

16 MR. BLACKMON: The Commission staff is here.
17 We're not a party here. We're advising the Commission.
18 Glenn Blackmon, assistant director of
19 telecommunications, and Tom Wilson, who is a
20 telecommunications policy adviser.

21 CHAIRWOMAN SHOWALTER: And if it's important
22 for the record, I'm Marilyn Showalter, Chairwoman of
23 the Commission, and also with me are Commissioners Dick
24 Hemstad and Bill Gillis.

25 I thought what we would do is give each side

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1 half an hour -- and if you want to reserve part of that
2 let me know -- beginning with US West, and then
3 Mr. Kopta, and then 10 or 15 minutes from Staff, and if
4 you want to reserve some time for comment after that,
5 let me know, so Ms. Anderl, what would you like to do?

6 MS. ANDERL: Why don't I use half now and
7 half later. I don't know that I have that much to say,
8 but sometimes it gets away from me.

9 CHAIRWOMAN SHOWALTER: We may be asking a lot
10 of questions.

11 MS. ANDERL: Point well taken. Good morning,
12 Commissioners. We're here today before you on an
13 initial order or recommended decision by the
14 Administrative Law Judge addressing for the very first
15 time a number of very significant issues for this
16 Commission and for maybe the fifth or sixth time, a
17 very, very significant issue, the issue of compensation
18 for ISP traffic. That issue, of course, has been
19 addressed by the Commission already, and I'll be
20 talking about that in a moment. The issue of the
21 proper application of the Commission's new rule, WAC
22 480-09-530, for expedited handling of interconnection
23 disputes is a matter of first impression, and we do
24 wish to address the appropriate application of that
25 rule briefly in our comments today, and then, of

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1 course, the issue of 252(i) and the FCC's Rule 809, I
2 believe, are issues of first impression before the
3 Commission today; although there are some
4 contemporaneously pending dockets that might ask for
5 resolution of some of those issues as well.

6 The first issue I'd like to talk to you about
7 is the issue of ISP traffic and the local or nonlocal
8 nature of that traffic and the appropriateness of
9 having reciprocal compensation payments due for that.
10 As I think everyone in the room is well aware and the
11 recommended decision points out, the Commission has
12 looked at this issue in the past and is likely, we
13 believe, looking at it again in a soon to be issued
14 order in the general docket, but in presenting this
15 oral argument to you today, I have to believe that just
16 because you have faced the issue in the GTE cases does
17 not mean that it is decided for US West, and I believe
18 that we are presenting to you arguments and fact and
19 analysis that have not been presented before.

20 I believe that our petitions and pleadings in
21 this docket show that the analysis and the conclusions
22 in both of the GTE cases was flawed and inconsistent
23 with the FCC's decision, and we're here to ask you
24 today to consider again as a matter of first impression
25 between US West and Nextlink, is this traffic local,

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1 and the answer is no, and is this traffic for which
2 reciprocal compensation is due, and the answer to that
3 is also no.

4 CHAIRWOMAN SHOWALTER: Just so I can be
5 clear, you're not, at least at this stage of your
6 argument, saying there is something distinctive about
7 your agreement or your arrangement that's different
8 than the GTE cases. You're saying that if we adopted
9 the same analysis as we did in GTE, it would be the
10 same outcome in your case but that we made an incorrect
11 decision in GTE?

12 MS. ANDERL: Yes. I don't know for certain,
13 but I suspect that the ISP traffic is terminated from
14 GTE to a CLEC, ELI, or WorldCom is the exact same type
15 of traffic that we're talking about here.

16 The basis for the Commission's decisions in
17 the US West cases, which there is one, of course, the
18 MFS case and the reciprocal compensation provision that
19 Nextlink seeks to "opt" into, the entire basis for that
20 decision was the acceptance of MFS's argument that the
21 traffic was local in nature. That premise is
22 completely gone now as a basis for a decision. It has
23 been swept aside by the FCC's Order, which was
24 determined both, I believe, a matter of fact and law
25 that the traffic at issue is nonlocal interstate

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1 traffic, and no analysis or conclusion calling it local
2 interstate traffic can prevail in the face of the FCC's
3 clear language on that issue.

4 Did the FCC say that the states could still
5 decide reciprocal compensation wasn't appropriate as an
6 interim mechanism? Yes, they did. I'm not here to
7 tell you they didn't or that you couldn't do that, but
8 the analysis that is required for that conclusion to be
9 reached is an analysis that involves determining
10 whether or not A, the Parties agreed to reciprocal
11 compensation in the context of their agreement, and
12 we're here to tell you that we've never agreed to it,
13 and I think the record supports that, and then B, are
14 there other contractual principles or contractual
15 bases, or are there any other legal or equitable
16 principles upon which to order reciprocal compensation,
17 and I don't believe that there are. I don't believe
18 that Nextlink has alleged that there are. I don't
19 believe the record can support there are contractual
20 considerations or a legal or equitable basis on which
21 to order reciprocal comp.

22 To the extent that the WorldCom/GTE Order
23 engaged in a legal analysis of the statute, 252, and
24 concluded that the continuation of the existing access
25 charge regime mandated that this traffic be treated as

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1 local, because there were three carriers involved in
2 the access charges, and it had to be one or the other,
3 I think that is simply an incorrect analysis. In our
4 comments that we filed last week, we've demonstrated
5 that access charges can easily pertain in a situation
6 where two carriers are involved and that reciprocal
7 compensation for local traffic can also easily be due
8 in a situation where there are three carriers involved.

9 Additionally, the FCC has said that the
10 reciprocal compensation requirements of Section
11 251(b)(5) of the Act do not govern intercarrier
12 compensation for the traffic, so it is not necessary to
13 impose reciprocal compensation on ISP-bound traffic in
14 order to either comply with the Act or continue the
15 existing access charge regime.

16 The analysis engaged in the ELI Order seems
17 to suggest that the nature of the call to an ISP is
18 still one that enables it to be characterized as a
19 local call because of it being "terminated" to the
20 CLEC. That is essentially the two-call theory that was
21 addressed and rejected by the FCC, and I don't believe
22 that is factually or legally sustainable basis on which
23 to rest a conclusion that reciprocal compensation is
24 still due. These calls simply do not terminate at the
25 CLEC either as a matter of fact or law.

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1 CHAIRWOMAN SHOWALTER: When the FCC said, We
2 think the jurisdictional purposes of these calls are
3 interstate, but we're not precluding the states from
4 doing something on contractual or legal or equitable
5 basis, you're saying there is no contractual basis
6 because, in fact, you didn't agree, although maybe
7 another person might say there is an ambiguity there.
8 The FCC must have been anticipating there could be a
9 legal basis out there, so what would it be? Because I
10 understand you to say there can't be a legal basis
11 because the FCC said it was interstate, so they can't
12 both preclude it legally or allow it legally in the
13 same order.

14 MS. ANDERL: I don't know that I'm convinced
15 that the FCC thought that there must be. I think they
16 might have just said, If you can find one, that's fine.
17 Maybe there are some legal bases under state laws. I
18 don't think there is necessarily one in the Act.

19 CHAIRWOMAN SHOWALTER: But it wouldn't be
20 legally precluded by the very order of the FCC in which
21 it said it's legally permissible somehow.

22 MS. ANDERL: My only point is it is legally
23 precluded as local. You can't conclude that it's local
24 and order reciprocal compensation for it because the
25 FCC said it is not local. There may be some other

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1 legal basis, and I don't think there is one, to tell
2 you the truth. Not to say I've analyzed all the laws
3 in all the 50 states, but only that there is a legal
4 basis in Washington law or under the Act. That's not
5 to say there isn't in some other state.

6 COMMISSIONER HEMSTAD: I'd like to go back to
7 the US West/MFS Agreement, the arbitration. The FCC,
8 you agree, said that on an interim basis it could be
9 okay if there was an agreement. Your position there
10 was not an agreement because it was an arbitration.

11 MS. ANDERL: That's correct.

12 COMMISSIONER HEMSTAD: And the arbitration
13 would not meet that agreement?

14 MS. ANDERL: That's correct. I believe that
15 when the FCC described how Parties might continue to
16 pay reciprocal comp for ISP traffic and described that
17 in the one instance they may have agreed to exchange
18 compensation for that traffic, I believe they used the
19 word "agreed" in the traditional sense of the word,
20 which is meeting of the minds as opposed to have an
21 agreement which requires it, but where one party has
22 been legally compelled to enter into the agreement.

23 Other states are starting to realize that the
24 ISP compensation is really just a regulatory anomaly;
25 that reciprocal comp for ISP traffic doesn't enhance

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1 competition. It doesn't benefit the incumbent. It
2 doesn't benefit the customers in the state, and that it
3 is simply a regulatory or a governmental construct
4 which inordinately benefits CLEC's and ISP's and should
5 be done away with.

6 As the Massachusetts Commission said, and we
7 quoted it in our comments, but I think it bears
8 repeating: "Where an increase in income results from a
9 regulatory anomaly rather than from greater competitive
10 efficiency in the market place, the regulator is well
11 advised to take his thumb off the scale." We do so
12 today. Massachusetts Commission, much as the
13 Washington Commission, had previously determined that
14 reciprocal compensation was due for ISP traffic on the
15 basis that that traffic was appropriately treated and
16 characterized as local. Upon being faced with the
17 issue again subsequent to the FCC's decision, the
18 Massachusetts Department of Telecommunications and
19 Energy characterized their prior decision as one that
20 is premised on a mistake of law; i.e. the inappropriate
21 characterization of that traffic as local, and they
22 reversed their decision.

23 COMMISSIONER HEMSTAD: Other states have done
24 away with that too.

25 MS. ANDERL: Yes, absolutely. I assume

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1 Mr. Kopta will address that as well.

2 CHAIRWOMAN SHOWALTER: I want to make sure I
3 get in my question on the pick and choose to you within
4 your time, and that is you make the argument that it
5 doesn't make sense to have a pick and choose that
6 applies after the contract is agreed upon because
7 otherwise, what does a contract or agreement mean, but
8 my question to you is if the agreement itself says in
9 it that 252(i) applies, then doesn't that mean it has
10 to apply somehow after the date of the agreement?
11 Otherwise you wouldn't have had that provision in
12 there.

13 MS. ANDERL: Right, and my response to that
14 goes to the issue that we brought up about the
15 subsequently approved agreements or subsequently
16 negotiated agreements and that my view is the 252(i)
17 would allow the CLEC, who is party to an existing
18 "binding agreement" to still avail themselves of more
19 favorable terms that were subsequently negotiated
20 after --

21 CHAIRWOMAN SHOWALTER: In a subsequent
22 agreement.

23 MS. ANDERL: Yes.

24 CHAIRWOMAN SHOWALTER: Then why would you
25 need to put that in the existing agreement, because

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1 wouldn't that always be the case whenever you get
2 around to a new agreement, the world is open?

3 MS. ANDERL: Our view initially in the
4 arbitrations was that you didn't need to have a 252(i)
5 clause in the contracts, but the CLEC's and arbitrators
6 felt it was important for it to be in there. The FCC
7 has said that 252(i) applies whether you've got that
8 provision in your contract or not, so I tend to agree
9 with you that it may not be necessary to have a 252(i)
10 clause in there, but it is in there. I don't think it
11 means anything extra.

12 CHAIRWOMAN SHOWALTER: Thanks.

13 MS. ANDERL: How am I doing?

14 CHAIRWOMAN SHOWALTER: You've got a couple of
15 minutes.

16 MS. ANDERL: And to understand the regulatory
17 anomaly that's present in terms of compensating CLEC's
18 for ISP traffic that US West's carriers terminate to
19 it, I think it's good to bear in mind where we are in
20 the big picture here. This is traffic which would
21 otherwise be subject to access charges. If not for the
22 FCC's actions 10 or 15 years ago, these ISP's would be
23 treated as carriers, and they would be paying both the
24 CLEC and US West access charges for using their
25 networks to carry that call.

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1 The FCC said -- creating another regulatory
2 anomaly, of course, but that doesn't mean two wrongs
3 make a right -- Hey, look, we want to promote
4 competition here. We want to benefit these information
5 services providers. We see some future there, and if
6 they have to pay access charges, this industry could be
7 prematurely stifled or not given the chance to grow.
8 So they said, Look, US West, CLEC, neither one of you
9 gets any money other than what you get from your
10 end-user customers. CLEC, if you want to have an ISP
11 behind your switch, fine, but the ISP will pay you for
12 whatever service you provide. US West, if your
13 customers want to call an ISP who happens to be behind
14 a CLEC, you'll get your local rate.

15 Now, in a lot of states, local service is
16 measured, so it's not even so bad. If somebody wants
17 to make a lot of calls or calls that last a long time
18 is a little different in a state in Illinois or New
19 York where you've got local measured service, but here
20 in Washington, it's a mandatory flat-rated service, so
21 we've got a situation where US West charges its local
22 service rate to its end-user customers. They get to
23 make all the calls to the ISP's they want. Nextlink
24 charges whatever rates it charges for the services and
25 facilities it provides to the ISP's that take service

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1 from it and no access charges apply, and that's where
2 the FCC left it.

3 CHAIRWOMAN SHOWALTER: I want to let you know
4 you've used 15 minutes, but you've got more.

5 MS. ANDERL: Thank you for letting me know.
6 Now, to overlay on that a situation where instead of
7 receiving money for the use of its network, which
8 US West would have if access charges had applied, and
9 instead of being at zero dollars, which is where we
10 were after the FCC gave the ISP a waiver of access
11 charges, we are all the way down below the line on the
12 scale and paying out money. We went from positive
13 through zero to negative on this, and there is
14 absolutely no cost basis to justify the payment by
15 US West of terminating charges for calls that its
16 end-users place to an ISP who sits behind a Nextlink or
17 a TCG or an MFS switch.

18 It's a regulatory anomaly to require
19 reciprocal compensation for these calls. It benefits
20 the ISP's and the CLEC's in a way that is unrelated to
21 either their skill or competitive savvy or the benefits
22 that they confer on society, and we believe that at the
23 very least, the Commission ought to do what the FCC
24 did, which is say, Look, no money gets exchanged for
25 this traffic, and ought to order that ISP traffic is

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1 not local, which the FCC has clearly held and ought to
2 say that from here forward, until the FCC acts to
3 determine whether any compensation mechanism is
4 appropriate that this traffic will be exchanged on a
5 bill and keep basis, which is essentially what the FCC
6 had ordered by ordering zero access charges.

7 On the 252(i) issues, we have addressed that
8 a little bit. I just have a couple of points I want to
9 make. I agree with the Supreme Court that the FCC's
10 rule does track Section 252(i) fairly directly. I also
11 agree with the suggestion in the Supreme Court Order
12 that does appear to do violence to any concept of
13 negotiations that might exist between the Parties, and
14 it certainly seems to me that the initial order or the
15 recommended decision in this case will totally
16 obliterate any obligation on the part of the CLEC to
17 negotiate at all, much less negotiate in good faith,
18 because the application of 252(i) and Rule 809 as set
19 forth in the recommended decision I think is just way
20 too broad.

21 I understand the CLEC's have an awful lot of
22 rights under this regime, more so now that the FCC Rule
23 809 is effective, but I do believe that the FCC's rule
24 should be applied in a way so as to give meaning to the
25 language in the FCC Order that allows only for

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1 provisions from subsequently negotiated agreements to
2 be selected, which would preclude Nextlink from
3 selecting the MFS reciprocal comp --

4 CHAIRWOMAN SHOWALTER: Where is it that the
5 language allows only subsequently?

6 MS. ANDERL: It's in Paragraph 13-16 of the
7 FCC Order, and I quote it. I don't know which of the
8 pleadings you have on the Bench, but let me just tell
9 you. US West filed an answer on Section 252(i) issues,
10 which was dated July 8th, 1999. It's on Page 4 of that
11 document.

12 CHAIRWOMAN SHOWALTER: We have that.

13 MS. ANDERL: "Requesting carrier may avail
14 itself of more advantageous terms and conditions
15 subsequently negotiated by any other carrier for the
16 same individual interconnection service or element once
17 subsequent agreement is filed with an approved by state
18 Commission." The recommended decision characterizes
19 the use of the word "subsequent" here as just, I
20 believe, illustrative of the rights a party might have.
21 It seems to me that the FCC used the word "subsequent"
22 twice. I think they meant what "subsequently" means,
23 which is something that came after.

24 CHAIRWOMAN SHOWALTER: Do you think they
25 meant to exclude other possibilities that is only

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1 subsequent or that you may do subsequent?

2 MS. ANDERL: I think if they had meant more
3 than subsequently, they would have said that. Yes, I
4 think they meant to exclude other possibilities, and
5 this isn't in the FCC rule; that's true. But I think
6 we need to look at the FCC Order as guidance to
7 interpreting the Rule.

8 What is in the FCC Rule 809(c), I believe, is
9 the requirement that terms and conditions only be made
10 available for a reasonable period of time, and US West
11 has made the MFS Agreement available for what it
12 believes to be more than a reasonable period of time;
13 however, it was available when Nextlink opted into the
14 TCG Agreement, and we don't believe that terms and
15 conditions ought to be available from agreements that
16 are more than two-and-a-half years old, which is what
17 Nextlink is attempting to do here. I think the term in
18 the Rule, reasonable period of time, needs to be
19 interpreted to mean something; however, I think the
20 recommended decisions and interpretation really reads
21 that requirement virtually out of existence.

22 The only other issue on 252(i) is I don't
23 think that 252(i) ought to be read to overrule the
24 sections of 252(a), which is the provision that gives
25 the incumbent LEC and the CLEC the right to negotiate

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1 and enter into a "binding agreement." What does
2 "binding" mean if a carrier can pick and choose any
3 provision from any other agreement at any time, and the
4 question I asked the Commission in my comments that I
5 filed last week and that I would ask again today is if
6 somehow US West were to obtain a large ISP customer and
7 get every single one of Nextlink's customers to call
8 that ISP all the time and reverse the balance of
9 traffic so that Nextlink were paying US West reciprocal
10 compensation, could Nextlink come before the Commission
11 the following week and say, We'd like to opt into the
12 bill and keep arrangements from another agreement.

13 That will be the result if this initial order
14 or decision is affirmed. I don't think that that's
15 what the Act could have meant or they wouldn't have
16 said a binding agreement. It's got to mean something.

17 COMMISSIONER HEMSTAD: Do you think the first
18 imposition of the court stay and then its subsequent
19 lifting cuts across this area at all? In other words,
20 now that the court stay has been lifted and the FCC's
21 original pick and choose arrangement is now reinstated,
22 should Nextlink or its equivalent have the opportunity
23 to exercise it?

24 MS. ANDERL: Kind of a fresh look thing?

25 COMMISSIONER HEMSTAD: Yes.

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1 MS. ANDERL: I agree that my argument would
2 be much stronger if this rule had been in effect for
3 the full two-and-a-half years, and I don't know what to
4 tell you on that except that contracts with reciprocal
5 comp in them were available at the time that Nextlink
6 opted into the TCG Agreement, so it seems to me that it
7 has been available for a reasonable period of time.

8 I would like to save some time for rebuttal.
9 I did bring up in prior pleadings that we filed the
10 issue of the requirement of 480-09-530 that Parties
11 negotiate with one another prior to the filing of a
12 petition for enforcement of interim connection
13 agreement. We continue to believe that the discussions
14 that the Parties had did not constitute a negotiation,
15 but beyond that, I don't believe that I need to discuss
16 that any further.

17 CHAIRWOMAN SHOWALTER: You have about seven
18 minutes left. Mr. Kopta?

19 MR. KOPTA: Thank you, Your Honor. Nextlink
20 is largely in agreement with the initial order, and so
21 I would like to rest on the comments that we had,
22 unless the Commission has any questions about those
23 issues, and focus our comments on the response to what
24 US West has said and the order in which those points
25 were raised.

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1 ISP traffic seems to be at the heart of
2 US West's concerns over the initial order, and I think
3 a little history is in order. US West, of course, is
4 now using the FCC's designation of ISP traffic as
5 jurisdictionally interstate to claim it's no longer
6 considered local traffic, but back in 1996 when we were
7 arbitrating these agreements, US West was not claiming
8 that ISP was not local traffic. US West was saying it
9 should be exempted because of the unique nature of it,
10 but they weren't saying it wasn't local traffic; and,
11 in fact, the provision that US West quotes from the
12 order in the MFS case, nowhere in the summary of
13 US West's position is there any indication that US West
14 said, This isn't local. Rather, this shouldn't be
15 subject to reciprocal compensation.

16 So if you look at the contract, the
17 contemplation is that ISP traffic is going to be
18 treated like local traffic. It's routed over local
19 interconnection trunk groups just like any other local
20 traffic to an ISP that's given a seven-digit phone
21 number, just like any other end-user customer, so there
22 is a requirement in the agreement that there be
23 segregated trunk groups for different types of traffic.
24 There isn't a separate trunk group for ISP traffic, and
25 I doubt that US West could even identify which of its

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1 traffic is ISP traffic because they don't segregate it.
2 It's mixed in with other local traffic, the seven-digit
3 telephone numbers within a local calling area.

4 So the contract, both in its definition of
5 local traffic and in its requirements for trunking,
6 contemplates that ISP traffic will be treated the same
7 as local traffic. It's only when it comes to
8 reciprocal compensation that US West is now trying to
9 back that out and at the time that we're trying to back
10 that out and say, That shouldn't be included for
11 compensation purposes.

12 So when US West says there is no contractual,
13 legal, or equitable basis for treating this like any
14 other local traffic, they are just flat wrong. From a
15 contractual standpoint, it is treated like local
16 traffic, and from an equitable standpoint, Nextlink
17 incurs costs to terminate that traffic. That's
18 something that Mr. Reynolds testified to in the generic
19 cost docket. US West has never claimed that it's not
20 imposing costs on CLEC's by delivering this ISP traffic
21 to CLEC's for delivery to an ISP provider. US West is
22 now saying that somehow everybody is going to be okay
23 if we just don't pay anybody, but that's a far cry from
24 US West's position in other dockets in which it's
25 insistent on being compensated for costs that it incurs

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1 that CLEC's impose on ILEC's or that end-user customers
2 impose on US West.

3 So I think what's sauce for the goose is
4 sauce for the gander. If US West is imposing cost on
5 CLEC's, US West should compensate the CLEC's for those
6 costs. That's not only an equitable consideration.
7 There are Washington statutes that require that
8 companies that incur costs to serve customers are
9 entitled to compensation, fair, just, and reasonable
10 compensation for providing a service to either other
11 companies or end-users, whoever you're providing
12 service to. These are customers, and as such,
13 Washington statutes require that there be fair, just,
14 and reasonable compensation for that.

15 As far as what other states have done,
16 US West, of course, would like to point to the two
17 states that have broken ranks from other states. I
18 think in the ELI proceeding, there was provided a list
19 of citations for Commissions and Courts that have,
20 prior to the FCC order, uniformly determined that ISP
21 traffic is subject to reciprocal compensation, and even
22 after the FCC ordered the vast majority -- I think the
23 latest count, somewhere in the nature of 15 different
24 Commissions have held that ISP traffic should continue
25 to be subject to reciprocal compensation at least until

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1 such time as the FCC is going to do whatever it's going
2 to do. So I think the other state commissions, with
3 two exceptions, have agreed that from a contractual or
4 legal or equitable basis, ISP traffic should be subject
5 to reciprocal compensation, and that it's only
6 jurisdictionally that the FCC has determined that ISP
7 traffic is interstate, and that in and of itself does
8 not determine how ISP traffic should be treated for
9 reciprocal compensation purposes.

10 As far as the comment from US West that ISP's
11 are really only carriers that have somehow gotten a
12 great deal from the FCC, I think that oversimplifies
13 what the FCC has done. Certainly they have tried to
14 foster competition in the growth of the Internet and
15 access to those types of services that are available
16 through ISP's, but I think the FCC itself recognized in
17 its latest order that based on its policy to date, that
18 compensation for ISP traffic is something that should
19 be provided; that they certainly are wanting to assert
20 jurisdiction over that, which is not unusual for the
21 FCC to decide they want to assert jurisdiction over a
22 particular matter, but at the same time, they recognize
23 that everything they've done up to this point would be
24 consistent with providing reciprocal compensation for
25 ISP traffic. So it's not just an anomaly, as US West

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1 would say. I think there are unique aspects of ISP's.
2 Certainly the FCC has recognized those, and that based
3 on those anomalies, the FCC has taken certainly policy
4 directions, but none of those directions have indicated
5 at all that reciprocal compensation should not be paid
6 when ISP traffic is exchanged between co-carriers.

7 As far as Section 252(i) is concerned, kind
8 of in response to Chairwoman Showalter's question,
9 US West -- I don't know what their contracts with
10 vendors say, but certainty in the normal private
11 marketplace, most favored nation provisions are common
12 in contracts, and it only makes sense. If you are in a
13 contractual relationship with someone else, and you're
14 providing each other services or money for services,
15 it's natural for someone to say, Hey, I want to make
16 sure I get the best deal, and if you make a better deal
17 with somebody else, then I want to be able to get that
18 deal too.

19 That's just good business for someone to
20 insist on that. It depends on the relative bargaining
21 strength of the parties as to whether they are going to
22 get a provision like that, but certainly no court that
23 I'm aware of has struck down a most favored nation
24 provision in a private agreement with the argument that
25 somehow that does violence to the concept of the

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1 binding agreement.

2 COMMISSIONER HEMSTAD: What about the
3 backwards look? In other words, the most favored
4 nation would be better deals cut subsequent to the
5 agreement then you can opt in, but this is going the
6 other way.

7 MR. KOPTA: There are two different responses
8 to that. The first is sort of the generic. There are
9 going to be cases in which circumstances change. It
10 may be that you've decided, Gee, at first I wasn't
11 going to offer resold services, but in an effort to
12 serve more customers, I don't have facilities in a
13 particular area. I want to be able to get services for
14 resale from US West.

15 If your agreement didn't include that, what
16 do you do? Do you wait for two years until the
17 agreement expires, or should you be able to take the
18 resale provisions from somebody else's agreement because
19 you've decided to resale?

20 CHAIRWOMAN SHOWALTER: What if it's an
21 alternative to something that is an agreement? Isn't
22 the result of your interpretation, which may be the
23 FCC's and the Supreme Court's interpretation, that this
24 really isn't an agreement in the normal sense? It's a
25 notification procedure that if a CLEC wants to take

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1 something new or old, it simply notifies the LEC that
2 it wants to do that and then comes to us and gets it
3 approved? Isn't that really what you're saying the law
4 requires?

5 MR. KOPTA: That is what the law requires.

6 CHAIRWOMAN SHOWALTER: If that's the case,
7 are these agreements in any way that we normally think
8 of agreements as voluntarily negotiated agreements?

9 MR. KOPTA: I think you have to realize that
10 what Congress set up was a common situation to unique
11 circumstances. Generally when you have a contract, you
12 have a willing buyer and a willing seller, and they
13 come together and negotiate something that's going to
14 be mutually beneficial. In this circumstance, we have
15 a very willing buyer, the CLEC, and a very unwilling
16 seller, the ILEC, and so in order to try to balance the
17 relative bargaining strength, which is all in the
18 incumbent and none in the CLEC in most instances, then
19 I think 252(i) was Congress's way of saying, If
20 somebody else can come in and get a better provision,
21 then you ought to be able to have that provision
22 available for any other carrier.

23 Now, obviously on a subsequent basis, that's
24 what probably is going to happen most often, but there
25 are going to be circumstances in which circumstances

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1 change. This is an evolving market. At first, a lot
2 of people thought resale was the way to go, and now as
3 things have developed, not many people are pursuing a
4 resale option just because the economics didn't add up
5 or whatever. So I think you have to take into
6 consideration that Congress and the FCC both recognized
7 that things are in a state of flux and they are going
8 to change, so if you have a two- or three-year
9 agreement and your business plan changes or the
10 environment changes and somebody else has something and
11 they were maybe better able at anticipating the market,
12 then you should be able to make sure that you get the
13 same thing they got.

14 CHAIRWOMAN SHOWALTER: What if you had just
15 executed a two-and-a-half year agreement, and two
16 months later you say, I think I changed my mind. I
17 like that provision that already was available but I
18 kind of passed up the first time. Do you think the
19 CLEC's should be able to do that? Not "should" but
20 legally can.

21 MR. KOPTA: I think if you look at the
22 language of both the Statute and the Rule as well as
23 the intent, then it is to be able to provide a CLEC an
24 opportunity to do that, but I think you have to realize
25 that in a practical sense, that's not going to happen

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1 very often if it happens at all, because this is a very
2 practical business. CLEC's have always said, We want
3 certainty. We want to be able to know what the terms
4 and conditions and rates are with our relationship with
5 the ILEC, and they are not going to willy-nilly go in
6 and change things around because they have to change
7 their billing systems, their operational systems to
8 accommodate any change in the agreement, and that's not
9 something that you just do at the drop of a hat. There
10 has got to be a reason for you to do that, either a
11 change in your business plan or a recognition that the
12 market is going in a different direction than you had
13 originally anticipated, or when you actually implement
14 some language that perhaps you negotiated with the
15 ILEC, it turns out that you have a different
16 interpretation of that language than the ILEC has so
17 the provision that you thought meant one thing now is
18 interpreted to mean something else, and I think that
19 one of the real important aspects of 252(i) and Rule
20 809 are to make sure that everybody has the opportunity
21 to get the same terms and conditions so that there
22 isn't an opportunity to play one side off against the
23 other, and it also allows, the whole negotiation
24 process also allows carriers that have a legitimate
25 difference in their business structure or their intent

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1 or their target market or whatever to be able to
2 negotiate different terms and conditions that better
3 fit their business model as well as include those
4 provisions that other carriers have that are going to
5 be the same.

6 So, for instance, if you both want to offer
7 unbundled loops, then you'd want the same rates, terms,
8 and conditions for the provisioning of unbundled loops,
9 but if you're not going to offer resale, you don't care
10 what another carrier does in terms of resale
11 provisions, so it does both things. It allows carriers
12 to have access to common terms and conditions and to
13 negotiate or arbitrate different terms and conditions
14 that better suit the way they do business.

15 As far as the reasonably available -- and
16 this also goes to your question, Commissioner Hemstad,
17 I think, as well as your comment to counsel for
18 US West -- we are dealing here with unique
19 circumstances, because from the date of the Eighth
20 Circuit's decision until it issued its mandate in June
21 lifting that mandate, 252(i) was not available in its
22 present form. It was an all or nothing kind of
23 opportunity, so for US West to say, Well, the MFS
24 Agreement was available when TCG Agreement was also
25 available to Nextlink. You could have picked either

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1 one.

2 At the time, based on a review of both
3 agreements, Nextlink determined to go with the TCG
4 Agreement because it was an all or nothing kind of
5 thing. It wasn't one of those opportunities that they
6 can say, Well, we want these provisions from TCG and we
7 want these provisions from MFS. That simply was not an
8 option, so it was an all or nothing kind of choice, and
9 now things are different.

10 CHAIRWOMAN SHOWALTER: I just want to make
11 sure. It was not an option because.... Do you feel you
12 had any obligation to assert it as some option or
13 preserve this ability now later to go back and say, Now
14 that the stay has been lifted, I want to pick and
15 choose in a way that I didn't?

16 MR. KOPTA: There is a couple of things.
17 First is preserve with whom? There wasn't any
18 proceeding. The whole reason that a company comes in
19 and opts into another company's agreement is because
20 they don't want to have to go through all the expense
21 of having to arbitrate their own agreement. The TCG
22 Agreement was arbitrated. The MFS Agreement was
23 arbitrated. The AT&T Agreement was arbitrated, and
24 those are the three most commonly opted into agreements
25 in the state of Washington with US West, and not

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1 surprisingly because it's very expensive to arbitrate
2 your own agreement.

3 Carriers that are trying to get into the
4 market as quickly as they can and minimize their
5 expenses, which are already enormous with everything
6 else they have to do, are often in the position of
7 opting into a single agreement, and that's the only
8 choice that they were given by US West and the other
9 ILECs during the pendency of the effectiveness of the
10 Eighth Circuit's order. I don't know if it was
11 incumbents to reserve their rights. In fact, under
12 applicable leave of precedent, it's supposed to be
13 retroactively effective, so I suppose we could say,
14 Gee, since it really was in effect at the same time,
15 even though it wasn't, then there is some kind of
16 obligation, but then you start getting into issues that
17 are how many angels can dance on the head of a pin,
18 because it doesn't reflect reality.

19 And the other aspect of it is at the time,
20 there was no reason to believe that the traffic between
21 US West and Nextlink would be out of balance, and
22 that's certainly the contemplation of the TCG
23 Agreement, that traffic would be in balance, and
24 therefore, bill and keep would be an appropriate
25 measure of compensation. It was only when in November

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1 of last year that Nextlink discovered that there was a
2 significant imbalance of traffic; that there even
3 needed to be any kind of addressing of something other
4 than a bill and keep compensation, and this Commission
5 recognized when it adopted bill and keep as a default
6 mechanism that that was only going to be appropriate if
7 the traffic was only in balance, so we're in a
8 situation now where the TCG Agreement contemplates that
9 there will be some other form of compensation, but it
10 doesn't specifically set out the terms and conditions
11 for that alternative compensation, so we're left with,
12 What do we do?

13 We've taken various legal positions, but what
14 happens is you use 252(i) to take someone else's
15 reciprocal compensation provisions to fill in that hole
16 that was left in the TCG Agreement, so it's not so much
17 a question of trying to swap things out wholesale and
18 not being happy with the agreement as what do you do in
19 a circumstance where the agreement doesn't address the
20 issue, and we can talk about sort of 252(i) and 809 in
21 a global sense and what kind of situations could we
22 possibly be in with different carriers, but what it
23 comes down to and what we're dealing with here are the
24 circumstances of this particular case, and under these
25 circumstances, I think that the initial order properly

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1 applies 252(i) and Rule 809.

2 I think the rest of our position has been
3 adequately set out in the briefs that we filed, so
4 unless the Commission has any other questions, that
5 would conclude my remarks.

6 CHAIRWOMAN SHOWALTER: Any other questions?
7 Mr. Blackmon, do you want to say something now?

8 MR. BLACKMON: I don't know that we have
9 anything to add.

10 CHAIRWOMAN SHOWALTER: Back to you,
11 Ms. Anderl. I've got a question that Mr. Kopta's
12 comments prompted. Back on the FCC's order that if you
13 can find contractual or equitable or legal reasons to
14 do this, go ahead. Is the fact that the Parties didn't
15 understand that pick and choose was available at the
16 time that they negotiated the agreement but that now we
17 know that it is, is that an equitable reason to go back
18 and allow the picking and choosing on a retroactive
19 basis?

20 MS. ANDERL: It's perhaps an equitable reason
21 to order just the opposite, because to the extent that
22 Parties would have known at the time they negotiated or
23 arbitrated an agreement that each provision would be
24 available on a discreet basis, the incumbent might not
25 have been willing to trade off certain things for

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1 others; however, knowing that the agreement would stay
2 an integrated whole may have led the incumbent to say,
3 As long as they get this whole agreement, we can live
4 with that, because -- and this is hypothetical because
5 this isn't what happened in the MFS Agreement -- we can
6 live with that loop rate because we think they are
7 going to be doing resale and we negotiated a pretty
8 darn good discount. We can live with the reciprocal
9 comp because we got certain interconnection
10 arrangements in terms of physical construct of the
11 networks that make the reciprocal comp something that's
12 desirable for us.

13 The fact that carriers thought at the time
14 that all a party could get was all or nothing makes it
15 even more compelling from an equitable standpoint, not
16 only to start slicing and dicing those agreements up
17 now.

18 CHAIRWOMAN SHOWALTER: Go ahead; you've got
19 some more time.

20 MS. ANDERL: Thanks. On that same issue,
21 Mr. Kopta suggested that perhaps US West failed to make
22 the argument previously that this traffic wasn't local;
23 that the MFS Agreement, he says, that US West didn't
24 raise the argument that, Oh, this isn't local. They
25 said that it wasn't exempted because of the unique

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1 nature of traffic.

2 That's the exact same thing. They are flip
3 sides of the same coin. It was exempted from access
4 charges because of the unique nature of the traffic,
5 but the fact that it could be exempted from access
6 charges meant that it wasn't local, because if it was
7 local traffic, the FCC wouldn't even have jurisdiction
8 to exempt it from access charges, so I think implicit
9 in our argument and very clearly in arguments
10 subsequent to the Commission's decision in MFS to the
11 Court, we've been explicit that we did believe that
12 that traffic was nonlocal, and I believe that's the
13 position we've taken all along.

14 Maybe Nextlink does incur costs to terminate
15 that traffic. I wouldn't dispute that, but that
16 doesn't mean that reciprocal compensation pertains.
17 The New Jersey Commission when faced with that same
18 question, said, Gee, what are we going to do with this
19 poor CLEC who might incur costs for terminating traffic
20 to an ISP said, Well, that CLEC has end-user customers
21 and has the ISP as a customer. We assume they'll cover
22 their costs through rates charged to their end-users
23 and the ISP's.

24 Remember, the CLEC, unlike US West to a large
25 degree, has a choice over who its customers are. If

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1 they don't feel they are able to charge ISP's enough
2 money to recover their costs or if the rates are wrong,
3 they are free to negotiate something new or not serve
4 those customers at all. It simply should not be an
5 issue that because there may be some small level of
6 costs associated with terminating ISP traffic by the
7 CLEC that US West should pay those costs.

8 As I said, it's simply 180 degrees from what
9 the access charge regime would have imposed. The
10 regulatory compensation mechanism for that type of
11 traffic is the access charge mechanism. The FCC has
12 waived that and said, No money ought to flow in any
13 direction, and we believe that's the way it ought to
14 stay until the FCC rules on it again.

15 Mr. Kopta did suggest there is a legal basis
16 in Washington statutes requiring fair, just, and
17 reasonable compensation for the costs that they incur.
18 I don't think that there are any Washington statutes
19 that address compensation for interstate traffic.
20 Obviously, Washington State law is only going to apply
21 to intrastate traffic, and that's not the ISP traffic.
22 We understand that the CLEC's and the ISP's desperately
23 want to hang onto this compensation stream, and they
24 will struggle mightily before they have to give it up,
25 and we don't blame them. That is a very rational

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1 economic tack to take. As a business, you see money
2 coming in. You don't want it to stop, but it's simply
3 not supported by the law in this state.

4 With regard to the MFN, I think the Bench
5 raised a good point. I think most favored nations
6 provisions in private contracts do really only apply
7 prospectively. I don't know that they apply
8 retroactively. To the extent that they did, I would
9 imagine that that would be in a situation where both
10 parties voluntarily agreed to it and consented to it,
11 set some parameters up around it. Here, what is
12 happening is it's a unilaterally imposed MFN provision,
13 Mr. Kopta's description of why a carrier might want to
14 avail itself of previously negotiated provisions as
15 opposed to just subsequently I think is very telling.
16 He said, Maybe the CLEC sees that the market is going
17 in a different direction than it originally thought and
18 needs to opt into a different provision.

19 This is exactly what I think we've been kind
20 of saying all along, which is the Act should not
21 protect CLEC's from making bad business decisions. The
22 Act is supposed to foster competition, and one of the
23 inalienable rights people have in a competitive
24 environment is the right to make a bad business
25 decision, go out of business if need be. That's what a

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1 vibrant, vital, competitive market is, is people
2 starting up businesses; people going out of business.
3 But I think that if you're going to conduct business
4 and you're going to enter into an agreement that
5 purports to be binding for both sides, the concept of a
6 binding agreement has to mean something, and that
7 means, I think, at a minimum that you oughtn't be able
8 to say, Oh, I've changed my mind. That other
9 provision, even though it was available to me at the
10 time and didn't look good then looks good now.

11 CHAIRWOMAN SHOWALTER: I think your time is
12 up.

13 MS. ANDERL: Thank you. That concludes my
14 remarks.

15 CHAIRWOMAN SHOWALTER: Any other questions,
16 comments? Thank you very much, and I think that
17 concludes our open meeting.

18 (Hearing concluded at 11:15 a.m.)

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