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

2 JUDGE MOSS: Good afternoon, everyone. We
3 are reconvened in our hearing in Docket Number UT-991358
4 concerning Qwest's Petition for Modification of our
5 Ninth Supplemental Order in this proceeding and also for
6 mitigation of credits for year 2001. We had two
7 witnesses yesterday, and I see Dr. Blackmon is ready for
8 us on the stand, so if you will rise and raise your
9 right hand.

10

11 Whereupon,

12 GLENN BLACKMON,
13 having been first duly sworn, was called as a witness
14 herein and was examined and testified as follows:

15

16 JUDGE MOSS: Thank you, please be seated.

17 I have pre-marked as Number 514 the
18 supplemental testimony of Dr. Blackmon that was filed
19 today, and I understand that has been distributed to all
20 counsel, and the Bench also has copies.

21 So with that, Ms. Johnston, your witness.

22 MS. JOHNSTON: Thank you, Your Honor.

23

24

25

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1 D I R E C T E X A M I N A T I O N

2 BY MS. JOHNSTON:

3 Q. Dr. Blackmon, please state your full name for
4 the record and spell the last.

5 A. Glenn Blackmon, B-L-A-C-K-M-O-N.

6 Q. Is your microphone on, sir?

7 A. No.

8 Q. Are you the same Glenn Blackmon that prepared
9 and offered testimony and exhibits previously in this
10 merger docket?

11 A. Yes.

12 Q. And your position with the Commission is that
13 of assistant director for telecom?

14 A. Yes.

15 Q. Did you pre-file written direct testimony and
16 exhibits in this phase of the proceeding?

17 A. Yes.

18 Q. In preparation for your testimony today, did
19 you predistribute what's been marked for identification
20 as Exhibits 507, 508, 509, and 514-ST?

21 A. Yes, as long as 514-ST is that supplemental
22 testimony that was filed today.

23 Q. That's correct.

24 A. Yes.

25 Q. Are there any revisions, additions, or

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1 corrections to either your testimony or exhibits?

2 A. No.

3 Q. Are those exhibits true and correct to the
4 best of your knowledge?

5 A. Yes.

6 Q. Were they prepared by you or under your
7 direction or supervision?

8 A. Yes.

9 Q. If I were to ask you the questions set forth
10 in Exhibits 507 and 514-ST today, would your answers be
11 the same?

12 A. Yes.

13 MS. JOHNSTON: Your Honor, I move the
14 admission of Exhibits 507, 508, 509, and 514-ST.

15 JUDGE MOSS: And hearing no objection, those
16 will be admitted as marked.

17 MS. JOHNSTON: Dr. Blackmon is available for
18 cross-examination.

19 JUDGE MOSS: Thank you, Ms. Johnston.

20 I believe, well, I should ask actually, would
21 the company prefer to go first, or, Mr. ffitch, did you
22 have any questions for this witness? I believe you said
23 you did not.

24 MR. FFITCH: Your Honor, in light of the
25 supplemental testimony, I might have one or two

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1 clarifying questions. I would be happy to wait until
2 after the company has crossed.

3 JUDGE MOSS: Ms. Anderl.

4 MS. ANDERL: That would be fine. I'm
5 prepared to go ahead, thank you, Your Honor.

6

7 C R O S S - E X A M I N A T I O N

8 BY MS. ANDERL:

9 Q. Good afternoon, Dr. Blackmon.

10 A. Good afternoon.

11 Q. Do you have a copy of the settlement
12 agreement that we're discussing in this proceeding
13 before you?

14 A. Yes.

15 Q. Are you one of the individuals who negotiated
16 the agreement on behalf of Commission Staff?

17 A. Yes.

18 Q. Now discussing the mitigation portion of
19 Qwest's petition, do you believe that any service
20 improvements that Qwest might be able to demonstrate
21 between 1999 and 2001 are relevant in considering
22 whether mitigation should be granted?

23 A. Only in the very broadest sense and probably
24 more as a negative than a positive.

25 Q. Could you clarify the second part of your

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1 statement?

2 A. I think that if a mitigation petition
3 otherwise seemed to have merit but was filed in the
4 context of an overall deterioration in service, then the
5 Commission might consider that overall context and deny
6 the mitigation petition.

7 Q. Do you believe those circumstances are
8 present in this case today?

9 A. No, I think that neither of those two are
10 present today.

11 Q. With regard to the mitigation portion of the
12 petition, is it fair to say that your position on that
13 is that the company, i.e., Qwest, essentially made a
14 deal and should just live under the terms of the deal?

15 A. It's fair to say that. That doesn't capture
16 the whole position, but that's certainly fair, yes.

17 Q. Fair to say that that's at least a portion of
18 your view of the case?

19 A. Definitely.

20 Q. Okay. Take a look, Dr. Blackmon, at page 7
21 of the settlement agreement, paragraph Arabic numeral 5.

22 A. I have that.

23 Q. The --

24 MS. JOHNSTON: I'm not there yet, just a
25 moment, please.

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1 Okay, thank you.

2 BY MS. ANDERL:

3 Q. That paragraph that I directed your attention
4 to contemplates mitigation of credit amounts that might
5 otherwise be due and owing, doesn't it?

6 A. Yes.

7 Q. And so under the deal that the company made,
8 the company is permitted to bring a petition such as
9 this one; isn't that right?

10 A. Yes.

11 Q. Okay. When Staff entered into this
12 agreement, can you tell me whether you had in mind
13 circumstances that might be considered to be unusual or
14 exceptional which might form a basis for a mitigation
15 petition?

16 A. Certainly have certain types in mind. It was
17 not in any way exhaustive.

18 Q. Let's take a look at the service standard
19 that we're discussing here today, Dr. Blackmon, and that
20 is the out of service repair standard, and I believe you
21 will find that on attachment B, page 2, also Arabic
22 numeral 5.

23 A. Yes, I have that.

24 Q. You would agree, wouldn't you, that before
25 the calculation is performed under that standard,

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1 certain trouble reports are excluded?

2 A. Yes.

3 Q. Can you give me an example of what you would
4 believe to be an unusual or exceptional circumstance
5 that would justify mitigation that is not already
6 captured in the exceptions under the definition of the
7 service standard?

8 A. I don't know. You know, I will offer one up,
9 and then you will probably show me that it's already
10 covered, but I will try it anyway, and that is that if
11 the company experienced some sort of equipment shortage
12 that all other parts of the industry also experienced
13 and so it rendered it unable to get the materials
14 necessary to restore service.

15 Q. Would you consider that to be a disruption of
16 service caused by persons or entities other than the
17 local exchange company?

18 A. No, I wouldn't, because the equipment vendors
19 out there don't disrupt the service. They supply the
20 materials that the company would use to restore the
21 service.

22 Q. What type of circumstance can you think of
23 that would produce an equipment shortage such as the one
24 you've just identified?

25 A. Oh, you know, it could be that the government

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1 put some sort of, you know, found some hazardous element
2 of fiber optic glass, and therefore all the
3 manufacturers had to reformulate their product.

4 Q. And under those circumstances, you might
5 suggest that mitigation of the credit amounts would be
6 appropriate if failure to meet the repair intervals was
7 caused by that?

8 A. I think that's certainly a possibility. We
9 would look at that petition and the facts that the
10 company brought forward and try to be fair about it.

11 Q. With regard to the mitigation of the credit
12 amount, is there any provision in the settlement
13 agreement that identifies where the mitigated dollar
14 amount would go if the Commission grants mitigation?

15 A. I believe there is, yes.

16 Q. Where is that?

17 A. I believe it's the paragraph immediately
18 preceding the one you showed me. It's on page 6,
19 paragraph B.4.

20 Q. Okay, let me restate the question. The
21 question I had is, if the Commission grants mitigation
22 of the credit amount, is there any provision in the
23 settlement agreement that identifies where those
24 mitigated dollar amounts, in other words the non-paid
25 credits, would go?

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1 A. I --

2 Q. Would you like me to restate the question
3 again?

4 A. Yeah, because I don't understand the
5 question.

6 Q. If the Commission grants Qwest's petition
7 today and mitigates \$667,000 of the \$1 Million credit
8 that's owing, is there any provision in the settlement
9 agreement that identifies where that \$667,000 should go
10 after the Commission grants the mitigation petition?

11 A. No, there is no provision in the merger
12 settlement that says if Qwest doesn't have to pay the
13 money what it should do with the money it doesn't have
14 to pay.

15 Q. Is there a reason why Staff did not address
16 that particular circumstance in the settlement
17 agreement?

18 A. Yes, there's plenty of reasons. I mean it's
19 -- the first one would be that it's absurd. I mean I'm
20 sorry but it's -- if the company doesn't have to pay a
21 credit, then it's money that the company has available
22 to do with whatever it wants to, and we shouldn't
23 address it in a settlement agreement in any way, just as
24 we shouldn't address how it spends the other billions of
25 dollars that go through the company's coffers every

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1 year.

2 Q. Speaking of both the mitigation proposal and
3 the modification proposal to change the standards on a
4 going forward basis, let me just ask you generally as a
5 matter of public policy, do you think it is a good
6 standard to include within performance standard
7 liability for -- to a company for circumstances that are
8 beyond the company's reasonable control without
9 identifying at this point whether we would agree on what
10 those circumstances are?

11 A. I think that in a perfect world you would not
12 do that.

13 MS. ANDERL: I don't believe I have any more
14 questions, although I may follow up if there are others
15 from the Bench. Thank you.

16 JUDGE MOSS: All right, Ms. Anderl, thank
17 you.

18 Mr. ffitch, did you have a question or two?

19 MR. FFITCH: Thank you, Your Honor.

20 This may be a legal question, in which case
21 all the lawyers can object.

22 JUDGE MOSS: Nothing like setting yourself
23 up, Mr. ffitch.

24 MS. ANDERL: Thank you for the warning.

25

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1 C R O S S - E X A M I N A T I O N

2 BY MR. FFITCH:

3 Q. If I can direct you to page 1 of your
4 supplemental testimony, which I think has been marked
5 Exhibit 514, and at lines 7 and 8, you characterize the
6 Qwest use of the customer credit amount that's been
7 suggested by Ms. Jensen's testimony as a modification of
8 the petition for mitigation, correct?

9 A. Yes.

10 Q. Isn't it also the case that the request could
11 be categorized as a request to actually modify the
12 merger agreement itself? Do you understand the
13 question?

14 A. I do, and I -- because the -- it's a -- it's
15 a form of relief that's not contemplated, not addressed
16 by the merger order and the settlement itself, I think
17 one could argue that under the terms of the -- without
18 changing the merger order, the Commission would have to
19 either give the money to the customers or let the
20 company keep the money and that there is no middle
21 ground.

22 MR. FFITCH: Thank you. If I may just have
23 one other moment, Your Honor, just to scan this
24 testimony.

25 I don't believe I have any other questions,

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1 but -- I don't have any further questions, thank you,
2 Your Honor.

3 JUDGE MOSS: All right, are there questions
4 from the Bench?

5

6 E X A M I N A T I O N

7 BY CHAIRWOMAN SHOWALTER:

8 Q. Yes, I have several, but I think I will just
9 pick up with Mr. ffitich's question and ask our lawyer
10 here, lawyer Blackmon, it strikes me that the, on the
11 question of whether Qwest either can be ordered or could
12 substitute the mitigation dollars, it's at this point
13 Qwest is proposing to use the money in some way, and why
14 would it be a change in the settlement agreement if we
15 agreed to mitigate the amount of the credit on the
16 understanding that Qwest had agreed I will just say to
17 donate it to charity? It's not that we could order it
18 to be sent to charity, but that if those are the
19 circumstances that present us, why isn't that one more
20 fact that we are looking at, whether wise or not to look
21 at, in Qwest's request for mitigation?

22 A. I think one could look at it that way, and I
23 think that's probably closer to the way we interpreted
24 the proposal that came yesterday.

25 Q. Okay. I'm going to ask a few questions on

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1 your testimony now, your original testimony, and on page
2 2, on lines 14 -- excuse me for not being able to
3 identify the exhibit.

4 JUDGE MOSS: 507.

5 Q. 507, all right. You characterize our order
6 as saying that credits are due, and I'm now going to
7 quote at the end of line 14:

8 Only subject to a petition for
9 mitigation based on demonstrable unusual
10 or exceptional circumstances that the
11 company, that USWC will have the burden
12 to show.

13 And I wondered if we might turn to page 11 of
14 our order, and let's see, I think the language is there
15 in sub paragraph 9.

16 MS. JOHNSTON: Excuse me, Chairwoman
17 Showalter, may I approach the witness, I don't believe
18 Dr. Blackmon has this.

19 CHAIRWOMAN SHOWALTER: Okay, I'm sorry.

20 THE WITNESS: Okay.

21 BY CHAIRWOMAN SHOWALTER:

22 Q. All right, this appears -- this is our
23 summary of what is in the agreement, but I would like
24 you now to turn two pages back to page 9, and it's in
25 paragraph 28, the last sentence, excuse me, I'm sorry,

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1 page 9 of the merger order, I'm sorry, our order. I
2 think this is the document we didn't have yesterday, and
3 maybe we got donated one.

4 JUDGE MOSS: This is the Ninth Supplemental
5 Order Approving and Adopting Settlement Agreements and
6 Granting Application. It's dated June 19th, 2000.

7 Q. Well, in there is our comment that to the
8 extent of any arguable deviation in our summary from the
9 terms of the agreements, we intend that the agreements
10 will control. I raise this because I -- it is perilous
11 in our orders approving agreements for us to summarize
12 them, and we are more or less put to the choice of not
13 saying anything and saying that agreement over there is
14 approved or discussing in general terms why we are
15 approving an agreement, and generally that includes
16 discussing what the terms are. And we always, if I can
17 help it, put in a caveat that where there's a
18 difference, the agreement controls, or lately, where
19 there's a difference, the agreement controls unless we
20 expressly provide that our language is controlling.
21 That's a general comment.

22 But getting to my question, I wonder if
23 everybody hasn't put themselves in a straight jacket
24 here assuming that the only basis or bases for
25 mitigation is a showing of exceptional or unusual

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1 circumstances. Is that your understanding of what the
2 agreement requires?

3 A. No, I don't understand it to require that. I
4 think that the agreement strongly points the Commission
5 in that direction. It sets out the consideration that's
6 to be given. But it doesn't say that the Commission
7 must find unusual or exceptional circumstances in order
8 to -- that that's the one and the same as the public
9 interest.

10 Q. Well, then to that extent of the
11 qualification you just made, do you qualify your
12 testimony on page 2 of 507, is it?

13 JUDGE MOSS: Yes, ma'am.

14 A. Well, at line 7, I believe the way -- I still
15 go by what I said, that UTC would consider whether
16 Qwest's level of preparedness and response was
17 reasonable.

18 Q. I'm looking at lines 14 through 18.

19 A. I guess I would agree that the more accurate
20 statement is to say that the Commission can do it based
21 on a finding of public interest. And that in doing
22 that, it's to consider whether the company has
23 demonstrated that unusual or exceptional circumstances
24 are present and that the company's level of preparedness
25 and response was reasonable.

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1 Q. Okay. And then turning to the settlement
2 agreement itself, page 7, paragraph 5, which is the
3 paragraph that we're concerned about here, what I wonder
4 is whether simply being close to the mark should be a
5 grounds for mitigation. An analogy might be, you know,
6 if you're caught speeding 5 miles over the limit, that's
7 different than 15 or 20, and sometimes the penalties are
8 different. But should we even consider in a petition
9 how close to the goal or the standard, the 100%
10 standard, the company was?

11 A. Yeah, I think that the Commission would be
12 better off if the mechanism had not been set up so that
13 you fall off a cliff when you get too close.

14 Q. And that's the forward looking issue that we
15 will get to in a minute, but here we have the agreement
16 in front of us.

17 A. But given that it is set up the way it is, I
18 think that if you fall off the cliff, then you fall off
19 the cliff, and that the Commission should not use the
20 mitigation as a substitute for a more gradual underlying
21 mechanism that would have been superior.

22 Q. And I guess the question is why. The
23 existing agreement has a cliff. It also has a
24 mitigation section. So it anticipates some forms of
25 mitigation, which the parties seem to feel is limited to

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1 unusual and exceptional, and maybe there is a basis
2 there. But I guess I'm asking if simply you are hanging
3 on by your fingertips to the cliff and you fell off, is
4 that something that this agreement before us
5 legitimately allows us to take into account?

6 A. The reason I think that you shouldn't is
7 because if you do that, it's not fair to customers.
8 It's not symmetrical between the customers and the
9 company if you do that. The company, Qwest, in April
10 and May of last year on a different measure, how quickly
11 they answered a telephone when you called customer
12 service, they were aiming for a target of 80%. They hit
13 24%, 32%, numbers that were grossly below the standard.
14 They are not going to pay anything more than the exact
15 amount that was called for in the agreement because they
16 went way below. In other words, they didn't slip off
17 the cliff, they went off it running full speed, but they
18 don't suffer anything extra because of that.

19 And so because there's not the lack of
20 symmetry where if the company can mitigate because they
21 got close, therefore customers ought also to be able to
22 ask for the penalty to be doubled up, the credit to be
23 doubled up where the company in fact didn't get close at
24 all, then I think we need to stick with a precise
25 measurement of their performance relative to the

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1 standards.

2 I think another reason for doing that is that
3 this is intended to be a largely self executing
4 mechanism that doesn't have a lot of uncertainty or, you
5 know, having to come back every year and see what the
6 commissioners think about how you're doing. It's just
7 the company and the customer having a relationship with
8 each other and the company making certain commitments
9 that if it doesn't keep they have already said how they
10 will make it right for the customers.

11 Q. Let me continue with my questions here. All
12 right, I think I am ready to look forward now to any
13 proposed measures, and I think as I stated yesterday,
14 we're not starting from scratch. There is an agreement,
15 so there's some kind of threshold to get over before
16 entertaining proposals to change the agreement versus if
17 we were starting out from scratch drawing up an
18 agreement, but we will get to the threshold later.

19 I want to get to it, but assuming we are over
20 that threshold and now we are actually asking the
21 question of what's a better way, and you have addressed
22 some of that in your testimony, on page 6 on lines 16
23 and 17, you say, as structured, the measure, which is
24 the out of service repair measure, does not provide an
25 incentive to restore any particular customer quickly.

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1 Why do you say that?

2 A. Typically once the company has, you know,
3 early in the month there may -- the measure may still be
4 in play so that it's not known whether the company is
5 going to make or miss the standard for that month. Also
6 the same way at the end of the month, if things are
7 going well, then they could, depending on how it's
8 structured, they could end up like under their 99 1/2%
9 standard, realizing that they could coast for a few
10 days, and so there's not an incentive potentially at
11 either end to restore an individual customer.

12 Q. So if they have already fallen off the cliff
13 or they're well back of the cliff at the end of the
14 month, there's no incentive, because they know they will
15 -- either must pay a fine or a credit or they will not
16 have to?

17 A. Exactly. And also to some extent when we
18 talk about this, we assume that everybody knows
19 everything in real time, and that's part of it too, that
20 the individual employees can't know what -- if you do
21 any sort of an aggregate percentage standard, whether,
22 you know, are we close, are we far away, how hard should
23 I work. On the other hand, if you say it's X amount
24 every time you fail to restore the target time, you
25 don't have to know what the other guys are doing.

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1 Q. Right. But wouldn't you -- whatever kind of
2 incentive is or whatever kind of standard is set,
3 wouldn't you expect the company to send out general
4 instructions that on an individual basis people are
5 supposed to get their work done quickly, otherwise
6 collectively the workers stand to throw the company off
7 the cliff every month, and that that would be a general
8 directive and a general incentive?

9 A. And I agree, I think I said that it is a
10 general incentive, that it establishes that this is a
11 priority for the company. The mere fact that there's \$1
12 Million at risk provides some incentive, an incentive
13 that I think would be weakened if the company succeeds
14 in getting it mitigated.

15 Q. And I'm really not on the mitigation idea
16 now. I'm looking forward to whether this should be
17 amended in any way, the agreement. And still on page 6
18 at line 22, you say that merely moving the trigger point
19 to 99.5% doesn't change that weakness, and I wonder if
20 that's true. Because there's almost no hope for the
21 company meeting the 100% standard. They're much more
22 likely to fall off that cliff every month. But
23 depending on how many exceptions there are and other
24 things, the 99.5% or something less than 100% seems
25 possible to achieve in any month and maybe most months.

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1 So why isn't making the standard less than 100% an
2 effective mechanism to get the company to try to stay
3 there as opposed to always falling off the cliff and
4 then it doesn't matter how far?

5 A. It -- I think that it -- it -- to some
6 extent, it could have that effect of making it more
7 realistic and therefore more powerful as a motivator.
8 Though again, it doesn't always do that. I mean again,
9 at the end of the month if you know you're at 99.9, then
10 your incentive dries up, and the -- you still have this
11 sort of edge effect, you know. Wherever you put the
12 edge, you're always going to have the fact that the
13 ideal place to have put that edge if you're going to
14 have one will vary over time and probably is going to
15 vary based on whether the sun is shining or the snow is
16 falling. You just can't put it in the right place, and
17 so therefore you're better off not to try to put it
18 anywhere.

19 Q. And I recognize that you have an alternate
20 proposal which is totally graded, but as between the
21 100% standard and a 99.5% standard, if you were starting
22 all over and there had been no agreement, do you still
23 think the 100% standard is preferable to a 99.5%
24 standard?

25 A. Well, I would hate to find myself with only

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1 those two choices, and if I did, I just can't really say
2 which one I would favor. I think you really lose
3 something if you have -- if you work off a standard like
4 99 1/2% when, in fact, the books, the rule books that
5 the Commission itself adopts says you need to do all
6 within two working days, and then you go have an
7 agreement where the company in fact gets that half a
8 percentage point of slippage. I think that in itself
9 could send the wrong signal to the company. And a lot
10 of this really is about sending signals. I mean \$1
11 Million sounds like a lot of money, but to a company
12 with \$1 Billion of revenue in this state alone, it's not
13 that much.

14 Q. Okay. Can you turn to page 7 of your
15 testimony.

16 A. Yes.

17 Q. And on line 8, you object that the company's
18 requested exclusions are ill defined and open ended, and
19 I think this raises the question of principle versus
20 application. The principle that the company is putting
21 forth is they shouldn't be held responsible for things
22 beyond their control, and I think the objection that
23 you're raising is, well, how do we determine that.

24 So first on the principle. If there was a
25 well defined and definite exception that got at this

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1 principle more fully than the current exclusions of
2 events beyond the company's control, would you agree as
3 a matter of principle that that's a reasonable type of
4 exception?

5 A. Yes, I do, I think that if you could, in a
6 perfect world, if you could measure everything, then you
7 would -- you would target it to the area where the
8 company can control the outcome or at least influence
9 the outcome.

10 Q. But if it's difficult to define and state
11 precisely, why then isn't that type of thing suitable
12 for mitigation as opposed to an exception? When we talk
13 about unusual or exceptional circumstances, usually by
14 definition they're kind of hard to define, and why isn't
15 it appropriate to look at some of them after the fact
16 and not change the standard, but entertain the idea as
17 one of mitigation?

18 A. I think that one could do that. I don't
19 think Qwest has done that here, but I think that that
20 could be done. I mean the company has said that every
21 customer miss is one that should be excluded from the
22 standard. It's not that they have said, you know, look,
23 here's an unusual one where the customer gave us
24 inaccurate information, and that's what caused us to
25 miss the performance standard.

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1 Q. Well, if the company were to put forward
2 examples that were beyond its control but it had not
3 defined in an exception to the standard, but that on a
4 case-by-case basis, for example, it actually was beyond
5 the company's control, do you think that kind of case or
6 trouble ticket is suitable for mitigation?

7 A. I think it would be. I think to some -- it's
8 hard to look at this in the abstract without having the
9 whole mechanism defined, but at least in principle, I
10 think that that's the sort of thing that either ideally
11 would be defined away before the fact, or the second
12 best choice would be to have it mitigated away after the
13 fact.

14 Q. Okay.

15 A. And I might note that one of the two
16 proposals that we have offered up have, you know, one of
17 the advantages of using the second status here is the
18 MR-3 report is that it comes to us pre-defined with the
19 customer misses excluded, and I think that's a
20 legitimate benefit of that particular measure.

21 Q. Can you just define customer misses for the
22 record here.

23 A. It's where the customer -- where it's
24 classified by the company as a miss due to the customer
25 not being -- where access is required and the customer

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1 doesn't provide that access.

2 Q. All right. Staying on line 7, excuse me,
3 page 7, you say incidents, this is line 10:

4 Incidents that Qwest does not report to
5 the UTC as a major outage and that
6 generate as few as one trouble ticket
7 apparently would nonetheless be defined
8 by Qwest as a major cable outage.

9 And can you explain that?

10 A. Yes, the company even after their second
11 round of testimony still hasn't defined a major cable
12 outage. They say a major cable outage is a major cable
13 outage on which the company works for 24 hours a day
14 until it's fixed. A major outage is something that's
15 defined in our rules, but apparently a major cable
16 outage is not a subset of these major outages.

17 Q. All right. Then on line 17 of that same
18 page, you say:

19 A measure that is narrowly applied and
20 has a high per occurrence payment is
21 generally better than a measure that is
22 widely applied and has a low per
23 occurrence payment.

24 Can you explain why?

25 A. Because it focuses the company's efforts, it

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1 focuses the incentive on things that are within the
2 company's control or influence. In other words, if we
3 have a certain amount of money that is at risk based on
4 the company's performance, we're better off to use that
5 money to target it to those circumstances where the
6 company can control or influence the outcome. And by
7 having fewer units in the denominator, that means that
8 we can have a larger per occurrence amount that the
9 company either pays when they miss or the company avoids
10 when they succeed.

11 Q. I'm not sure I understood it. Maybe it's in
12 what you mean by narrowly applied.

13 A. Well, for instance, whether the question of
14 whether to include customer misses in the -- as a -- to
15 count those against the company. Let's just assume for
16 the moment that, in fact, there's never any doubt about
17 whether the customer caused the company to miss, that
18 the technicians record that information faithfully,
19 everything in the system works, then we could
20 essentially choose between having the company pay \$500
21 every time it fails to restore an outage within two
22 working days including those where the customer -- where
23 customer access was required and not provided. Or we
24 could have it be \$700, and it would apply when the
25 company missed, but we excluded the instances where

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1 customer access was required.

2 Q. Okay. So I think what you mean by narrowly
3 applied is narrowed as much as possible to the purposes
4 that you are aiming at?

5 A. Yes.

6 Q. It doesn't necessarily mean a narrower group
7 of customers or types of work, et cetera. It just means
8 you try to exclude as much as possible things that are
9 inconsistent with the principle behind the measure?

10 A. Exactly.

11 Q. Okay. Then I have two more questions. Could
12 you turn to Exhibit 509, the last page.

13 A. I have that.

14 Q. And I'm looking at the bottom table, and so
15 this is your idea of a very graduated approach to the
16 credits, that is \$25 per violation with violation to be
17 determined by a 24 hour period; is that correct?

18 A. That's correct, and with the exclusions that
19 are listed in Exhibit 508.

20 Q. Right. And I guess the question I have on
21 this, I understand the principle behind it, is whether
22 with this construct we would narrow the application if
23 we did include customer misses?

24 A. Can you say what you mean by to include
25 customer misses?

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1 Q. Well, I really mean exclude, exclude customer
2 misses.

3 A. And this does exclude customer misses.

4 Q. Okay, I think I didn't understand that.

5 A. And if we could flip back to 508.

6 Q. All right.

7 A. It's shown as page 50 because it's an excerpt
8 from a larger document, under exclusions it says trouble
9 reports coded as follows, and that first set is what
10 applies here, that the ones coded to customer action,
11 non-Telco plant, et cetera.

12 Q. All right. But is this a substitute then for
13 the company's proposal to exclude, well, what their term
14 for customer misses is, but is this one and the same
15 type of exclusion, or is this a slightly different cut
16 at it and a more established one?

17 A. The trouble is that it differs in several
18 ways, some of which make it better, and some of which
19 depending on what you think is important might make it
20 worse, or it might not make a difference. But if the
21 issue of excluding customer misses is important to you
22 rather than it being -- I mean essentially as far as
23 we're concerned, it's just part of the noise in the
24 measurement, and it's reflected in the \$500 amount
25 proposal. If you were to take that noise out, you could

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1 just bump the number up to \$700 and produce the same
2 result, though we are concerned about them, the
3 reporting aspect of that. But anyway, if you believe
4 that finding some way to exclude the customer caused
5 misses is important, then using this MR-3 measure has
6 the advantage that it does that. It comes to you with
7 those exclusions already in place.

8 Q. Okay. And you mentioned the \$500 per miss,
9 and on your exhibit 509 it's the \$25 per miss that
10 mentions the MR-3. So just wondering, is it applicable
11 to either or both? Could it be applicable to either or
12 both, the \$500 method versus the \$25 method?

13 A. I'm sorry, I'm not following you.

14 Q. Well, when I started out, I was asking you
15 about Staff alternative B.

16 A. Yes.

17 Q. Which is \$25 per miss and uses the OSS
18 measure MR-3, which I think we just looked at.

19 A. Yes.

20 Q. But when you were answering a question, you
21 put it in the context of the \$500 per miss.

22 A. What I was trying to explain is that one of
23 the differences between what's listed on here as
24 alternative A versus alternative B is that in
25 alternative B customer caused misses are excluded.

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1 Q. Okay.

2 A. And they're not under alternative A.

3 Q. If that's the case, I have forgotten, there
4 must be another reason why alternative A is \$500 per
5 miss and B is \$25 per miss, because you have excluded
6 more things in the alternative B.

7 A. Yes, by far the biggest difference is that
8 you're measuring over a shorter interval in alternative
9 B.

10 Q. Right.

11 A. 24 hours versus two working days, which on
12 average is about 60 hours. 24 hours is just a far
13 shorter interval. We also think that's actually a plus
14 for alternative B too, because it's an interval that the
15 company actually manages to, whereas the two working day
16 measure is not. The closest that we could come to that
17 would be a 48 hour interval, but there's no existing
18 data series that captures out of service conditions over
19 48 hours.

20 Q. Okay. My last area of inquiry is the one of
21 threshold, that is why should we be entertaining
22 proposed amendments to this settlement agreement. And I
23 guess one of my questions has to do with that this
24 agreement needs to last for two more years, and maybe
25 more. So a question is how flawed or imperfect should

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1 it be before we change it? If we all agree it's a
2 better approach, should we just change it anyway, or is
3 there value in saying, well, this is the agreement, it's
4 not that much money, it can be accomplished, so let's
5 just live with it? How do we make that choice?

6 A. I agree with you that that's the choice you
7 need to make, and I believe that the Commission should
8 in general honor the settlement agreement itself and the
9 Commission's order. I don't know of any specific
10 standard that it takes to modify that settlement
11 agreement, but I do think it's important to honor the
12 fact that it was negotiated by the parties in the case.
13 And if, for instance, if U S West or Qwest at the
14 hearing where the settlement was presented had said, oh,
15 actually, we don't want to do it the way we agreed to,
16 and we want to make this modification with these two
17 exclusions and knock it back to 99 1/2%, under the terms
18 of the settlement agreement, Public Counsel and Staff
19 could have walked away at that point and said, you know,
20 we're not bound by the other parts of it.

21 And so I think that it's really important
22 that in general that you either find that there is
23 something significantly wrong with the existing
24 mechanism, or you look and see what the other parties
25 think about it. So really the only reasons that we

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1 offered our alternative proposal was in case you decided
2 that this thing was really broken or in case -- the
3 other possibility was that when we offered it up that,
4 in fact, the other parties would say, yeah, that looks
5 pretty good, let's do that.

6 Q. Is another alternative to use some of these
7 concepts for mitigation? Say that the credit amount is
8 \$1 Million, but if you calculate this a different way,
9 let's say \$25 a miss with the MR-3, it comes out to
10 \$652,000, and we will use that as a factor to consider
11 along with the unusual circumstances, which was not an
12 exclusive list, we will use this as a factor to consider
13 and mitigate, you know, \$348,000?

14 A. I think there's a circularity problem there.
15 The amounts that we came up with, the \$25 and \$500, we
16 started with the fact that in 2001 the company owed the
17 customers \$1 Million, and we wanted to reduce that some
18 in order to -- so that the end result would be something
19 that would benefit the company. If they performed just
20 as well in the future as they did in 2001, they would
21 pay less money, and they could do even better if they
22 were to improve their performance.

23 Q. Do you mean 2001, aren't we talking about
24 2001?

25 A. Well, but the revised measures going forward.

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1 Q. Oh, I see.

2 A. So in other words, if their performance in
3 2001, I mean 2002 exactly matched 2001, then they would
4 be better off, because they would be paying roughly
5 \$700,000 instead of \$1 Million.

6 Q. I see.

7 A. And if they improved their performance, they
8 could bring it down even from that level. But the
9 starting point was that they owed \$1 Million, and that's
10 what produced the unit amount, whether it's \$500 or \$25.
11 So I don't think that it can be used then to figure out
12 what a mitigation amount would be, because the
13 mitigation effectively changes the \$1 Million that was
14 your starting point.

15 Q. You might have misunderstood me. I think I
16 was saying, if you are correct that the agreement is not
17 broken, the agreement should stand, not be changed, then
18 would any of these other ways to look at the performance
19 of the company be legitimate when we consider mitigation
20 under the existing agreement?

21 A. So I'm -- I don't see how, but --

22 Q. All right. The last question I have is
23 whether we should anticipate or be concerned that the
24 telecom rules may address some of the factors in this
25 agreement and whether it would be appropriate, this may

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1 be premature to ask you, whether it would be appropriate
2 to entertain amendments to the agreement when those
3 rules are adopted, and maybe another, the obverse of
4 that, is maybe it's premature to entertain amendments
5 before they are adopted.

6 A. I certainly think that it's premature to
7 anticipate the interrevision to the rules and modify the
8 agreement now based on that. And once the rules are
9 modified, I mean in general the agreement contemplates
10 that -- I mean it's not that the agreement is not based
11 exactly on the rules, and so it doesn't require that a
12 change in the rules necessarily requires a change in the
13 settlement agreement itself. But I can't imagine
14 circumstances where, for instance, the basis for
15 measurement was changed, and so a reporting and
16 recording system that the company had used to measure
17 its compliance with a rule it no longer needed it or it
18 needed to change it in order to measure its compliance
19 with a new rule.

20 There could be merit to changing the -- this
21 performance plan so that you could use the same
22 reporting and recording system to measure your
23 compliance with this performance plan too. But if you
24 do that, you should do it in a way that preserves the
25 balance, the stake that the customers and the company

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1 have in this settlement agreement. So that, for
2 instance, if you decided in your rule making that you
3 were going to put an additional exception in that you
4 didn't make before in your rule, I don't think it at all
5 follows that you should carry that over and create that
6 same exception in the settlement agreement, because the
7 settlement agreement was something that -- where the
8 customers -- there were gives and takes. There was a
9 negotiation that went on, and so then to shift it to the
10 disfavor of the customers would be inappropriate.

11 CHAIRWOMAN SHOWALTER: All right, thank you.

12

13 E X A M I N A T I O N

14 BY COMMISSIONER HEMSTAD:

15 Q. I'm trying to get a handle on the procedural
16 environment that is presented here. We have a petition
17 for mitigation, which is straightforward in the sense
18 that we can look at our order and the underlying
19 settlement agreement and its language and determine
20 factually whether the mitigation standard has been met.
21 In your testimony now here, you're offering on a going
22 forward basis a couple of alternatives, which I take as
23 a soft offer. But if we were to seriously consider
24 that, assume for this discussion that we think it's a
25 good idea, isn't your proposal in effect the equivalent

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1 of a petition then to reopen the merger order and
2 address the substantive standards of that order?

3 A. Yes, it is, I mean not that our proposal is.
4 I think that was the company's petition, that it had two
5 parts. One was to mitigate it, and that was something
6 that was addressed in the settlement agreement and the
7 order approving that. It was contemplated that the
8 company might seek mitigation, and that would have been
9 handled, I believe as I understand it, without the sort
10 of formal hearing process that we see here today. It
11 would have been something more like an open meeting.
12 But it's the fact that they want to change the
13 settlement order, the merger order itself that has
14 thrown it into this type of proceeding.

15 Q. Yes, and the Chair has pointed out to me that
16 the petition is for modification of the Ninth
17 Supplemental Order itself. Well, I guess then I'm
18 having some difficulty with that on both sides of the
19 question. We have an underlying bargain for agreement.
20 If we thought this was a good idea, wouldn't it be more
21 appropriate to either suggest or order that the parties
22 to that agreement have some further discussion as to
23 whether they would wish to offer some modifications to
24 the underlying agreement in some sort of a joint
25 petition?

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1 A. Commissioner Hemstad, I want to assure you
2 that the Commission doesn't need to suggest or order
3 that we do that. We have attempted to reach some sort
4 of mutually agreed to resolution of the mechanism itself
5 on a going forward basis, and that's not been
6 successful. So I don't know that there's anything more
7 to be done on that front. I guess I would -- I guess I
8 would hope, I don't know that there's any reason to hope
9 this, that if, you know, at this point, the company can
10 still be hoping for its position to prevail, and it's
11 position would be that if it did just like it did last
12 year each year in the future, its credit would go from
13 \$1 Million a year to zero. You know, our proposal
14 certainly doesn't put them anywhere near zero unless
15 they improve their performance incredibly, if I can use
16 that word since it's already been used. So it could be
17 that once their range of possibilities are narrowed a
18 bit and they see what the Commission itself is willing
19 to give them, then it could be that that will be an
20 opportunity for negotiations to resume again.

21 COMMISSIONER HEMSTAD: I think that's all I
22 have.

23 COMMISSIONER OSHIE: No questions.

24 JUDGE MOSS: Okay.

25 Did the questions from the Bench cause you to

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1 have anything further, Ms. Anderl?

2 MS. ANDERL: Just one.

3

4 C R O S S - E X A M I N A T I O N

5 BY MS. ANDERL:

6 Q. Dr. Blackmon, you said that the 24 hour
7 period in MR-3 is one that the company manages to. Why
8 did you say that?

9 A. Because it's my understanding based on my
10 experience in working with the company over the years.

11 Q. Is that information, that understanding, is
12 that -- could that be obtained from reading anything
13 with regard to the MR-3 definition in your testimony?

14 A. No.

15 Q. Then did you understand Mr. Jones yesterday
16 to explain that he operates on either a 48 hour or two
17 day restoration standard?

18 A. I understood him to talk about -- to say that
19 they manage based on the 48 hour standard. I think by
20 the time he was done, it was clear that he doesn't
21 manage based on the two working day standard.

22 MS. ANDERL: That's all.

23 JUDGE MOSS: Okay.

24 Mr. ffitch.

25 MR. FFITCH: Just one area, Your Honor.

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1 C R O S S - E X A M I N A T I O N

2 BY MR. FFITCH:

3 Q. You have referred to the MP-3 I think it's
4 called.

5 A. MR-3.

6 Q. MR-3, MP-3 has got something to do with
7 music, doesn't it?

8 MS. JOHNSTON: Yes.

9 JUDGE MOSS: Teenagers at home, Mr. ffitch?

10 MR. FFITCH: That's right, teenagers at home.

11 BY MR. FFITCH:

12 Q. I'm looking at page 50 of the MR-3, and I'm
13 also having in mind your testimony at page 7. This is
14 your opening testimony, page 7, line 8, where you talk
15 about the problem with the new exclusions as being ill
16 defined and open ended.

17 A. Yes.

18 Q. As I understand it, you have suggested that
19 in the event that some type of exception be approved
20 that this would -- the exclusions that are in the MR-3
21 would be kind of a ready-made template to be used. Is
22 that a fair summary of your testimony?

23 A. Yes, I mean they come to us ready made. They
24 reflect, I believe, a lot of work by the company and
25 various competitors, state commission staffs, things

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1 like that, who have worked on the Qwest 271 process in
2 various states.

3 Q. Okay. I'm now directing you still to page 50
4 of the MR-3 and looking under the exclusions. The first
5 bullet point talks about trouble reports being coded as
6 follows, and there's a reference to disposition codes
7 for customer action. Do you see that?

8 A. Yes.

9 Q. Do you know how that's defined or when those
10 codes would be used for customer action?

11 A. I don't know specifically how it's defined,
12 no.

13 Q. Do you have any basis for concluding that the
14 choice to use the disposition code for customer action
15 would be any more defined or less open ended than the
16 kind of exception that the company is currently
17 proposing in its own petition?

18 A. I think that there probably is not any
19 difference, at least in the first instance, in terms of
20 whether there is any kind of discretion at the
21 individual employee level about how to code that.
22 Though there is one difference, and that is that because
23 this MR-3 is part of the performance assurance plan that
24 is being developed through the 271 process, I think that
25 it is likely to have more scrutiny by more parties in

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1 more states than the highly state specific retail data
2 series that is used currently in the performance
3 mechanism in this state. But in terms of what you were
4 asking about specifically for the -- in a how do we know
5 whether it was really customer action, I think that
6 problem exists with both of them.

7 MR. FFITCH: Thank you, Mr. Blackmon.

8 I don't have any more questions, Your Honor.

9 JUDGE MOSS: Any redirect?

10 MS. JOHNSTON: I just have one question,
11 thank you.

12

13 R E D I R E C T E X A M I N A T I O N

14 BY MS. JOHNSTON:

15 Q. I apologize, Dr. Blackmon, I missed this,
16 which is the easier deadline to meet, the two working
17 day or the 48 hour?

18 A. Two working days is longer. On average it's
19 60 hours. 48 hours is 48 hours.

20 MS. JOHNSTON: Thank you.

21 JUDGE MOSS: All right, that would appear to
22 complete the examination of Dr. Blackmon. We appreciate
23 your testimony, and you are released from the stand.

24 Mr. ffitch, I believe you have Ms. Kimball.

25 MR. FFITCH: Yes, Your Honor, Public Counsel

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1 calls Mary Kimball.

2 Your Honor, we have been going since 1:30
3 without a break, and I would just offer the opportunity
4 before we get started with the next witness if that's
5 the Bench's preference.

6 JUDGE MOSS: All right, I think it's probably
7 a good idea to take a little stretch break here in the
8 middle of the afternoon. 10 minutes adequate? All
9 right, let's break for 10 minutes.

10 (Recess taken.)

11 JUDGE MOSS: Ms. Kimball, if you will rise
12 and raise your right hand, please.

13

14 Whereupon,

15 MARY M. KIMBALL,
16 having been first duly sworn, was called as a witness
17 herein and was examined and testified as follows:

18

19 JUDGE MOSS: Thank you, please be seated.

20 Mr. Ffitch.

21 MR. FFITCH: Thank you, Your Honor.

22

23 D I R E C T E X A M I N A T I O N

24 BY MR. FFITCH:

25 Q. Good afternoon, Ms. Kimball.

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1 A. Good afternoon.

2 Q. Could you please state your full name and
3 spell your last name for the record.

4 A. Mary Kimball, K-I-M-B-A-L-L.

5 Q. And could you give your business address,
6 please.

7 A. 900 Fourth Avenue, Suite 2000, Seattle,
8 Washington 98164.

9 Q. And by whom are you employed?

10 A. The Attorney General's Office, Public Counsel
11 Section.

12 Q. And what is your position with the Public
13 Counsel Section?

14 A. I am an analyst.

15 Q. Can you briefly describe your duties as an
16 analyst for Public Counsel?

17 A. Yes. In the context of the U S West Qwest
18 merger, I have been working on a number of duties
19 related to merger implementation since I began with
20 Public Counsel in July of 2000. The work includes
21 quantitative and qualitative analysis, policy analysis.

22 Q. And as part of your work, have you had
23 occasion to meet with Qwest employees and with
24 Commission Staff employees on merger implementation
25 issues?

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1 A. Yes, I have. There have been numerous
2 meetings since -- I believe since about the fall of
3 2000, I have been participating in monthly service
4 quality meetings with Qwest representatives and
5 Commission Staff. As part of those meetings, we have
6 worked to develop the reporting formats for the company
7 to report the data necessary for the service quality
8 performance program. I have also participated in -- in
9 conjunction with those meetings, we have worked to
10 develop the consumer bill of rights and the annual
11 report on service quality to customers, this brochure
12 here. I have also worked with Qwest representatives and
13 Commission Staff and other stakeholders as part of the
14 WTAP advisory group that has been working to fulfill and
15 implement the merger commitment related to WTAP
16 participation.

17 Q. And can you just briefly describe your
18 educational background.

19 A. Sure. I have a Bachelor of Arts Degree in
20 Political Science from Williams College and a Master's
21 Degree in Public Policy from the University of
22 California at Berkeley.

23 Q. Now, Ms. Kimball, do you have before you a
24 copy of what has been marked as Exhibit 510 in this
25 proceeding, comments of Public Counsel in response to

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1 Qwest's petition for modification?

2 A. Yes, I do.

3 Q. And was that set of comments prepared by you?

4 A. Yes, it was.

5 Q. Do you have any changes or corrections to the
6 comments?

7 A. No, I do not.

8 Q. And are they true and correct to the best of
9 your knowledge?

10 A. Yes.

11 MR. FFITCH: Your Honor, I would offer
12 Exhibit 510.

13 MS. ANDERL: No objection.

14 JUDGE MOSS: There's no objection, it will be
15 admitted as marked.

16 MR. FFITCH: And Ms. Kimball is available for
17 questions, Your Honor.

18 JUDGE MOSS: All right.

19 Ms. Anderl, do you have any questions for
20 this witness?

21 MS. ANDERL: A few.

22

23 C R O S S - E X A M I N A T I O N

24 BY MS. ANDERL:

25 Q. Ms. Kimball, when did you obtain your

1 Master's Degree?

2 A. I obtained it in 1997.

3 Q. What did you do between the time you obtained
4 your Master's Degree and the time you went to work for
5 the Attorney General's Office?

6 A. I worked for a research and evaluation firm
7 based in the bay area in San Francisco.

8 Q. What was that firm?

9 A. Social Policy Research Associates.

10 Q. What did you do there?

11 A. I worked on qualitative and quantitative
12 program evaluations for the U.S. Department of Labor.

13 Q. You did not participate in the negotiation of
14 the settlement agreement that's at issue today?

15 A. That's correct.

16 Q. Lets talk, Ms. Kimball, about the mitigation
17 paragraph. Do you have a copy of that settlement
18 agreement?

19 A. Yes.

20 Q. And the paragraph that we discussed with
21 Dr. Blackmon on page 7 entitled mitigation of credit
22 amounts, have you reviewed that?

23 A. Yes.

24 Q. Pursuing the line of questioning that the
25 Chairwoman pursued with Dr. Blackmon, is it Public

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1 Counsel's view that the only thing that the Commission
2 should consider in considering whether mitigation is in
3 the public interest is whether there were unusual or
4 exceptional circumstances, or are there other factors as
5 well?

6 A. Well, I guess our interpretation would be
7 that those two sentences there are taken in tandem, so
8 that in considering the public interest and whether or
9 not the company has demonstrated that burdon that the
10 mitigation request is in the public interest, that as
11 part of that consideration, we look at whether the
12 circumstances were unusual or exceptional. That may not
13 be -- well, I will just leave it at that.

14 Q. I will ask the question then. Is that all
15 that you look at?

16 A. It may not be the absolute totality. I think
17 it's fair to say that when you're crafting a standard of
18 sorts of this sorts, you can't contemplate every single
19 circumstance under which the company may petition for
20 mitigation.

21 Q. Do you think the commissioners should
22 consider anything else other than unusual or exceptional
23 circumstances when the Commission determines whether
24 mitigation is in the public interest?

25 A. It's difficult for me to answer such an open

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1 ended question. It would depend on what that other else
2 is.

3 Q. Well, that would have been my next question
4 for you depending on what your answer was. Do you think
5 that there are any other circumstances that the
6 Commission should consider?

7 A. I don't have any such circumstances to offer.
8 My feeling is that it's -- that the company has that
9 burdon to make that demonstration.

10 Q. In determining whether mitigation is in the
11 public interest, do you think it would be reasonable for
12 the Commission to consider how close to obtaining or
13 meeting the standard the company came?

14 A. I think that would -- well, I don't agree
15 with that. I agree with Dr. Blackmon's response to that
16 line of questioning on that issue, that there are other
17 standards by which the credit obligation amount is not
18 altered depending upon how far the company misses the
19 mark or how close the company gets to that mark, and
20 that is not how this particular standard at issue was
21 crafted.

22 Q. Do you think that the reasons why the company
23 missed a particular standard are relevant in determining
24 whether mitigation of the credit is in the public
25 interest?

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1 A. They may be relevant.

2 Q. Did you consider those reasons when you made
3 your recommendation that's contained in Exhibit 510?

4 A. Which recommendation in particular are you
5 looking to?

6 Q. The recommendation to not mitigate the credit
7 amounts.

8 A. Can you restate the full question then?

9 Q. Did you consider the reasons why the company
10 missed the standard when you recommended that there be
11 no mitigation?

12 MR. FFITCH: Your Honor, I'm going to object
13 and ask for a clarification of the question.

14 JUDGE MOSS: I thought it got pretty clear
15 there towards the end, so let's see if the witness
16 understands it.

17 Ms. Kimball, do you understand the question?

18 THE WITNESS: Could you say it again, please.

19 MR. FFITCH: Your Honor, apparently the
20 witness doesn't. I'm just going to briefly finish the
21 point, which is that she's been asked to testify about
22 unstated reasons that, this is the phrasing of counsel's
23 question, did you consider certain reasons, that that's
24 the point of clarification we have. We have no reasons
25 that are explained by counsel to clarify the question,

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1 so.

2 JUDGE MOSS: Well, let me try to interject
3 here. As I understand the question, it is whether
4 Ms. Kimball considered the reasons the company asserts
5 it failed to meet the standards when she made the
6 recommendation in these comments that there be no
7 mitigation. Is that not the question?

8 MS. ANDERL: That is the question.

9 JUDGE MOSS: That is the question. Is that
10 clear?

11 MR. FFITCH: That's not how I understood the
12 question previously.

13 JUDGE MOSS: Is it clear now?

14 MR. FFITCH: If that is Ms. Anderl's
15 question, that is a different question, and I guess it's
16 up to the witness to determine whether it's clear to
17 her, and she can answer it.

18 A. I guess I would ask counsel to point to the
19 specific reasons. There were a number of different
20 reasons that the company cited.

21 BY MS. ANDERL:

22 Q. Ms. Kimball, before you prepared these
23 comments, did you read the company's petition?

24 A. Yes, I did.

25 Q. Do you have a copy of that before you?

1774

1 A. Yes, I do.

2 Q. Could you take that out, please.

3 A. Mm-hm.

4 Q. Would you turn to page 6.

5 A. Yes.

6 Q. Do you see there the company's statement that
7 of the 233,236 trouble tickets for the year 2001, 1,435
8 of those were not closed within two business days?

9 A. Yes, I see that.

10 Q. And did you read past that page in the
11 petition to review the breakdown of the reasons why for
12 those 1,435 tickets they were not closed within two
13 days?

14 A. Yes, I did, I believe I pointed out a
15 mathematical error in the company's reporting of its
16 manual analysis.

17 Q. Okay. And do you see on page 8 that the
18 company provides a general breakdown for four main
19 reasons why the standards, the two day interval, was not
20 met?

21 A. Yes, I do.

22 Q. Okay. Now back to the question that I asked
23 and that the Judge clarified, did you consider those
24 reasons in making your assessment that mitigation should
25 not be granted?

1775

1 A. Yes, I did.

2 Q. Taken by itself, do you think that if the
3 only reason the standard were not met was due to
4 customer reasons, would that be a circumstance in your
5 mind that would warrant mitigation?

6 A. No, I don't. I think there are a lot of
7 questions as to how we define customer reasons and under
8 what circumstances a particular failure to restore an
9 out of service trouble ticket is coded as customer
10 reason or the customer not being available.

11 Q. Well, assume with me that you were satisfied
12 that the reason was truly a customer reason. Would you
13 agree with the principle that a customer caused reason
14 outside the control of the company would be a basis upon
15 which mitigation should be considered, if not granted?

16 A. I guess I am skeptical that you could so
17 clearly construct an exclusion for around customer
18 reasons. I would have to -- I would have to look at --
19 I will just leave it at that.

20 Q. Did you read Mr. Jones's testimony?

21 A. Yes.

22 Q. Did you read his discussion about certain
23 examples that might constitute a customer reason that
24 prevents the company from closing a ticket within two
25 days?

1776

1 A. Could you point to a specific page in his
2 testimony?

3 Q. Do you have it with you?

4 A. Yes.

5 Q. Do you remember Mr. Jones giving an example
6 of a reason or reasons that might constitute a customer
7 reason?

8 A. I believe there was some discussion around
9 vicious dogs and hot tubs in inappropriate places.

10 Q. So would you sitting here today tell me that
11 you can not think of a single circumstance that would be
12 legitimately described as a customer caused reason that
13 prevented Qwest from closing a ticket within two
14 business days?

15 A. I think there may be some legitimate reasons
16 as to why a customer -- I think there may be some
17 legitimate reasons behind concluding that a customer
18 caused the miss, yes, but I don't agree that one could
19 always affirm that conclusion in every single instance.

20 Q. And in the circumstances where one could
21 affirm that conclusion, would you agree that those
22 circumstances are ones that ought to be taken into
23 consideration in determining whether mitigation should
24 be granted?

25 A. I think it's appropriate to take them into

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1 consideration.

2 Q. Do you think that they would ever be a basis
3 for granting mitigation?

4 A. They might be, yes.

5 Q. And what about the circumstance, Ms. Kimball,
6 where a major cable cut or outage occurred and Qwest
7 dispatched technicians and worked 24 hours a day
8 straight through from the time of the outage until the
9 repair was made but was not able to restore all of the
10 service within two days, do you believe that that would
11 be a factor that might justify mitigation?

12 A. I think if the circumstances are warranted,
13 it might. I believe that Mr. Jones testified yesterday
14 that the circumstances are always unique in those
15 situations.

16 Q. So sitting here today, do you have a position
17 on whether you could establish a general rule about a
18 major cable outage, or would you want to consider that
19 on a case-by-case basis?

20 A. At this point, I would want to consider it on
21 a case-by-case basis.

22 Q. And what type of information would you want
23 to know about the cable outage in order to make a
24 decision about whether the mitigation was warranted in
25 any particular instance?

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1 A. I think that's something that we would want
2 to think through very carefully, so I don't know that I
3 could come up with an absolutely complete list here
4 today. I think we would want to know what were the
5 reasons causing the outage and what influence did the
6 company have over those reasons.

7 Q. Can you think of anything else that you would
8 want to know?

9 A. Certainly as we have discussed, we would want
10 to know the efforts that the company made to restore
11 service working 24 hours a day.

12 Q. Anything else?

13 A. That's all I will mention at this time.

14 Q. Do you discuss anywhere in your comments the
15 disposition of the \$667,000 if the petition for
16 mitigation is granted?

17 A. No, we don't discuss that, I don't.

18 Q. Does Public Counsel have a position on that?

19 A. Well, I guess my first reaction is those are
20 two separate questions, that first we considered whether
21 or not Qwest's petition has met the burden of
22 demonstrating that mitigation is in the public interest.
23 So first we determine whether or not mitigation is
24 warranted. What to do with that those funds, I'm not
25 sure that that's actually relevant.

1779

1 Q. Do you think that how the funds would be used
2 might be a factor that the Commission might consider in
3 assessing whether mitigation was in the public interest?

4 A. I'm inclined to think that it's not relevant,
5 that first we consider whether or not the petition meets
6 the mitigation standard.

7 Q. And the mitigation standard is a
8 consideration of the public interest; is that right?

9 A. And as I mentioned, we view that as being
10 read in tandem with the question of whether or not the
11 circumstances were unusual or exceptional.

12 Q. Just so that I understand then, Public
13 Counsel does not believe that the ultimate use the
14 mitigated funds would be put to has any bearing on
15 whether mitigation is in the public interest in the
16 first instance?

17 A. I don't think that was contemplated at the
18 time that this merger settlement agreement was
19 negotiated.

20 Q. You didn't participate in those negotiations,
21 did you?

22 A. No, I did not.

23 MS. ANDERL: I have no other questions, Your
24 Honor, thank you.

25 JUDGE MOSS: Ms. Johnston, anything for this

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1 witness?

2 MS. JOHNSTON: No, Your Honor.

3 JUDGE MOSS: Any questions from the Bench for
4 Ms. Kimball?

5 CHAIRWOMAN SHOWALTER: I have one.

6

7 E X A M I N A T I O N

8 BY CHAIRWOMAN SHOWALTER:

9 Q. Can you turn to Exhibit 509, the last page,
10 Staff alternative B. I'm sure you heard my discussion
11 with Dr. Blackmon, and I would like to skip over the
12 threshold question and just assume that for the moment
13 we're looking at alternatives to the existing settlement
14 agreement. As between this Staff alternative B and what
15 the company is proposing, do you have a preference? And
16 I would put that as the 99.5% cliff with the exceptions
17 provided by the company.

18 A. Well, my first reaction is that our
19 inclination is to think that it's not a good idea to
20 modify one performance measure out of the eight measures
21 in the service quality performance program, because
22 as --

23 Q. I will get to the question of whether you
24 would prefer this alternative to the status quo, but I
25 would like you to answer the question I asked, which is,

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1 as between the company's proposal and this proposal,
2 Staff alternative B, do you have a preference?

3 A. Well, I think there are -- there are aspects
4 of Staff alternative B that we prefer over Qwest's
5 proposal, in particular the idea of having a per
6 occurrence credit obligation. I think we have a lot of
7 questions around exactly what the standard is with
8 respect to Staff alternative B. We have the one
9 document that describes what the standard is and what
10 the exclusions are, but we have some questions around
11 exactly how those exclusions are interpreted and defined
12 and what the parameters are that allow the company to
13 code something in a particular way. So in order to give
14 you a final answer on your question, I guess I would
15 need some -- we would need some of our questions
16 answered before we can really compare those two
17 alternatives.

18 Q. Do I take it from your comments then that the
19 graduated aspect of the Staff proposal B is something
20 you think is preferable to the 99.5% cliff in the
21 company's proposal?

22 A. Well, I guess I think about sort of two
23 things. One is what is the standard. And second is,
24 what is the credit obligation and how is it calculated.
25 And I think those are two different moving parts. And

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1 for us, we need to think real carefully to think about
2 exactly what kinds of incentives we're trying to give
3 the company to meet a particular standard.

4 Q. Well, assuming that the exclusions offered
5 with Staff alternative B are more conservative than the
6 exclusions offered by the company in its proposal, or if
7 you want assume the exclusions are identical, is the per
8 occurrence method better than the 99.5% cliff?

9 A. I guess that would be one factor, but we
10 would really have to look at all the different pieces.

11 Q. Well, I'm asking you to assume that there are
12 no other factors and the only factor, the only
13 difference between the two proposals, assume for the
14 hypothetical, is a 99.5% cliff versus a per occurrence
15 charge, can you answer that question?

16 A. I would say in general we would probably lean
17 more toward a per occurrence type of performance
18 measure, provided that the amount was sufficient enough
19 such that the company did have an incentive throughout
20 the month or whatever the reporting period might be. As
21 Dr. Blackmon discussed, you want to craft a mechanism
22 that sends the right signals and provides the right
23 incentive, and you want to try to avoid a mechanism
24 whereby once they know they have either met the mark or
25 missed the mark they're not making an effort to restore

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1 service.

2 Q. If it's a per occurrence charge, then there's
3 no such thing as making the mark or missing the mark, is
4 there?

5 A. That's true, but if the amount at issue -- I
6 guess it would depend on what would -- what is the
7 amount at issue and how the standard is crafted. It
8 could be the case that there is a performance measure
9 with a per occurrence credit obligation, but perhaps the
10 amount of credit obligation is low enough that we don't
11 think it's sufficient to send the right incentive
12 signal.

13 Q. Well, what do you think about \$25? Did you
14 have the opportunity to look at this testimony before
15 you took the stand?

16 A. Yes, we did, we did. But as Dr. Blackmon
17 mentioned, this is the product of an effort that
18 involves Qwest and competitive carriers and various
19 state commissions. My understanding is that some of the
20 data reporting and exactly what data is behind it is not
21 exactly set in stone. I don't know that it's completely
22 finalized. And we did not have an opportunity to go
23 through all of the exclusions and have a full
24 understanding of exactly, as I said, what the parameters
25 are for coding something in a particular way.

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1 Q. Well, that's with respect to the MR-3. But
2 for purposes of the hypothetical, I'm really trying to
3 just focus on the per occurrence aspect. So assume that
4 the exclusions are the same as the company is proposing,
5 and so is \$25 per occurrence sufficient? If you want,
6 you can assume there are no other exclusions, no
7 additional exclusions to what is in the current
8 agreement.

9 A. Well, I will say that it is a concern to us
10 that the credit obligation for the company under this
11 standard is lower than it would have been this year in
12 2001 in terms if you look at Exhibit 509, so that gives
13 us some concern that maybe \$25 isn't sufficient. Maybe
14 it should be higher.

15 Q. Okay. Then I said I would ask you, if you
16 look at this Staff alternative B and compare it to what
17 is in the current agreement, the 100% standard, do you
18 think one is better than the other?

19 A. I don't have an opinion on that right now. I
20 would need to have more questions answered about Staff
21 alternative B.

22 Q. Well, let me ask you about the 100% standard.
23 Do you agree that it's almost impossible for the company
24 to meet the 100% standard, that generally speaking it's
25 going to be paying a credit every month?

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1 A. I agree that it's a -- it is a -- it appears
2 to be a difficult standard to meet. I guess based on
3 the fact that it's similar to the existing rule, in fact
4 it's more lenient than the existing rule in that it
5 provides for more exceptions, and the fact that the
6 company agreed to it, it's not clear to me that there's
7 a compelling reason to modify it.

8 Q. Well, isn't one difference between the
9 agreement and the rule is that it takes an affirmative
10 act on the part of the Commission to prosecute a
11 complaint under the rule, so there's a judgment involved
12 there essentially, prosecutorial discretion, and then in
13 addition there's due process under the rule, so that the
14 difference between a rule and this agreement is these
15 are automatic penalties or credits I would say?

16 A. Mm-hm.

17 Q. The question I'm trying to get at is whether
18 the agreement as structured provides really any
19 incentive on this measurement, because it will virtually
20 never be met. So the amount will be paid, and then it
21 doesn't matter if the company misses the standard by an
22 inch or a mile, it's the same amount. Whereas the
23 graduated approach would seem to give the company an
24 incentive to minimize the number of payments, which it
25 again will probably always be making, because it will

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1 never in any month, my guess is, achieve a perfect
2 record, but at least it will be paying less if it
3 behaves better and more if it has more failures. Isn't
4 that an advantage to the Staff proposal?

5 A. That may be an advantage to the Staff
6 proposal. I guess it's fair to say that our preference
7 would be if the Commission would like to modify the
8 standard, we believe that there are other aspects of the
9 merger agreement that could also -- that could be
10 strengthened and improved upon.

11 Q. And I shouldn't have called it the proposal.
12 I'm sure that, Dr. Blackmon is not even here, but I'm
13 sure he would be thinking it's an alternative, not a
14 proposal, here he is.

15 CHAIRWOMAN SHOWALTER: Thank you, I have no
16 more questions.

17 COMMISSIONER HEMSTAD: I have no questions.

18 COMMISSIONER OSHIE: No questions.

19 JUDGE MOSS: Anything further from
20 Ms. Johnston or Ms. Anderl?

21 MS. JOHNSTON: No, Your Honor.

22 MS. ANDERL: Perhaps.

23

24

25

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1 C R O S S - E X A M I N A T I O N

2 BY MS. ANDERL:

3 Q. Ms. Kimball, do you think that one of the
4 purposes of the performance standard is to drive certain
5 behavior on the part of the company?

6 A. Yes, I do.

7 Q. And do you think that changing the standard
8 from 100% to 99.5% would change or would drive different
9 behaviors on the part of the company?

10 A. It might. I would agree with the comments
11 that Dr. Blackmon made when he was on the witness stand
12 that there could be circumstances where there's an
13 incentive, there's an insufficient incentive to restore
14 out of service conditions either once the company knows
15 it will meet the standard or once it believes it will
16 not.

17 Q. And on a 100% standard, if the company misses
18 a two day interval on March 4th, what type of incentive
19 does the company have for the rest of that month?

20 A. There may be a limited incentive.

21 MS. ANDERL: That's all I have.

22 JUDGE MOSS: Redirect, Mr. ffitch?

23 MR. FFITCH: Yes, I have a few questions,

24 Your Honor.

25

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1 R E D I R E C T E X A M I N A T I O N

2 BY MR. FFITCH:

3 Q. Ms. Kimball, Ms. Anderl for the company asked
4 you a few questions about customer reasons and major
5 cable outages, and she asked you your opinion about the
6 significance of customer reasons and major cable outages
7 in connection with the mitigation petition. Is it your
8 testimony or recommendation in this case that any of the
9 customer reason information provided by the company in
10 any of its testimony or exhibits warrants mitigation of
11 the merger standard in this case?

12 A. I don't believe the company has provided
13 sufficient evidence of that, no.

14 Q. And with regard to major cable outages, the
15 same question, is it your testimony that any of the
16 information or testimony or exhibits or evidence offered
17 by the company in this proceeding meets the standard for
18 mitigation in the merger order and settlement agreement?

19 A. No, I do not believe it meets the standard.

20 Q. Do you believe that any of the evidence of
21 customer reasons provided by the company constitutes
22 unusual or exceptional circumstances?

23 MS. ANDERL: I guess, Your Honor, I would
24 object at this point. This seems to be duplicative of
25 the witness's direct comments and not specifically

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1 focused on the cross.

2 JUDGE MOSS: Overruled.

3 A. Could you restate the question?

4 BY MR. FFITCH:

5 Q. Do you believe that any of the customer
6 reasons, testimony or evidence, offered by the company
7 in this case constitute unusual or exceptional
8 circumstances?

9 A. No, I'm not sufficiently convinced.

10 Q. Same question with regard to major cable
11 outages?

12 A. No, I'm not sufficiently convinced.

13 Q. Chairwoman Showalter asked you some questions
14 asking you to compare some alternative proposals. Could
15 you turn to Exhibit page 507, please, excuse me, Exhibit
16 507, to the attached comparison of credit amounts, the
17 same exhibit that you were looking at with the
18 Chairwoman.

19 CHAIRWOMAN SHOWALTER: That's 509.

20 JUDGE MOSS: That's 509, Mr. ffitch.

21 BY MR. FFITCH:

22 Q. Pardon me, Exhibit 509, Mr. Blackmon's
23 testimony, Dr. Blackmon's testimony.

24 A. Yes.

25 Q. I'm sorry, I'm stumbling over the exhibit

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1 numbers. His testimony is 507, but the chart we're
2 looking at is Exhibit 509, I apologize.

3 The Commission asked you some very specific
4 -- the Chairwoman asked you some very specific
5 comparison questions. Do you have any other
6 observations that you want to make about Commission
7 Staff alternative A and Commission Staff alternative B?

8 A. I guess my only other observation would be
9 that if the Commission would like to modify, I believe
10 that we would need -- the parties would need more time
11 in order to endorse one particular alternative over
12 another to try to come to agreement on a particular
13 alternative.

14 Q. In answer to one of the Chairwoman's
15 questions, you began to answer whether it was
16 appropriate for the Commission to modify one particular
17 performance standard in this proceeding. What did you
18 mean by that?

19 A. Well, I was thinking of what Dr. Blackmon
20 testified to, which is that the service quality
21 performance program in the entire merger settlement
22 agreement are a balance of various interests, and we
23 have very strong concerns with modification of one
24 particular measure of one -- of the totality of the
25 settlement agreement, particularly from our perspective

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1 if that modification benefits the company but does not
2 provide a benefit to customers.

3 Q. In your opinion, if the merger is going to be
4 reopened to revisit the service quality performance
5 program or other conditions of the merger, should this
6 be the only condition that's looked at?

7 A. No, I believe other aspects should be
8 considered as well.

9 Q. What are those?

10 A. I believe in Dr. Blackmon's testimony he
11 pointed to a couple of areas such as the performance
12 standards for trouble reports and for no dial tone as
13 being weaker than the existing rule, and perhaps those
14 standards could be tightened. Other areas from our
15 perspective would include the WTAP provision, which is
16 the language in the settlement agreement is fairly
17 broad, and that is an area that could be tightened to
18 identify particular actions the company could take to
19 improve participation. We also believe it would be
20 beneficial to send the consumer bill of rights to new
21 customers. That's not something the company currently
22 does.

23 Q. You were asked by the Chairwoman if you had
24 an opinion as between the company's, well, really the
25 application of the current standard in the merger

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1 agreement with regard to trouble reports and, excuse me,
2 out of service reports and Staff alternative B, and you
3 testified that you did not have an opinion about that,
4 those two alternatives. Do you have an opinion based on
5 the record in this proceeding to date whether the
6 Commission should modify the existing standard by
7 replacing it with Staff alternative B?

8 A. Yes, my opinion is not to modify.

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

11 JUDGE MOSS: All right.

12 Ms. Kimball, we appreciate your testimony,
13 and you are released from the stand.

14 THE WITNESS: Thank you.

15 JUDGE MOSS: At this time, Ms. Anderl, the
16 Bench would recall Ms. Jensen briefly, and she may
17 retain her seat. And, Ms. Jensen, I will remind you
18 that you remain under oath.

19

20 Whereupon,

21 THERESA JENSEN,
22 having been previously duly sworn, was called as a
23 witness herein and was examined and testified as
24 follows:

25

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1 E X A M I N A T I O N

2 BY CHAIRWOMAN SHOWALTER:

3 Q. Ms. Jensen, I have one question. As between
4 Staff alternative B and the status quo, do you have a
5 preference?

6 A. Yes, I do.

7 Q. What is it?

8 You sounded awfully certain when you answered
9 yes.

10 A. Well, as someone who watches measures as part
11 of their responsibility, I understand how it drives
12 behavior, and I would say that if you're trying to
13 attain an objective in percentage standard, hopefully
14 not 100%, but a percentage standard will drive a
15 behavior to attain that standard that a per miss
16 regardless of amount will not drive. And the reason
17 being is that -- and a 100% standard makes that
18 difficult, because as the other parties have said, if I
19 miss once, depending on when in the month I miss that
20 once, I have already missed the standard. In a standard
21 of 99% or 99.5%, I don't know until I have the total
22 volume in for the measurement period as to what percent
23 I have attained.

24 Q. Right, but that's not my question. My
25 question is, as between Staff alternative B and the

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1 100%, what is your preference?

2 A. I can tell you the company's preference is
3 100%.

4 CHAIRWOMAN SHOWALTER: Okay, thank you.

5 JUDGE MOSS: Did that line of questioning
6 prompt anything else from the parties for Ms. Jensen?

7 Apparently not.

8 Anything further from the Bench?

9 We don't see any need for oral argument or
10 briefs in this proceeding, but I will certainly open the
11 question for the parties.

12 MR. FFITCH: Your Honor, Public Counsel would
13 like the opportunity to make a brief closing statement.
14 We hope that this is five minutes or less.

15 JUDGE MOSS: Five minutes or less, all right.

16 MR. FFITCH: Before we get to that, I did
17 want to make sure that we offered the Public exhibits if
18 they had not been.

19 JUDGE MOSS: Let's go ahead and do that, and
20 we will get our record cleared up. We have Exhibits 511
21 and 512, 511 being the comments from the Spokane
22 neighborhood action programs, acronym SNAP, and 512
23 being a set of public comments that I assume,
24 Mr. ffitich, were sent into the Commission and then
25 culled from its files by Public Counsel.

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

2 JUDGE MOSS: Is there any objection to the
3 admission of either of those?

4 MS. ANDERL: So long as they're both given
5 the same treatment as illustrative exhibits, there is no
6 objection.

7 JUDGE MOSS: Yeah, there's no sponsoring
8 witness on either of them, so.

9 MR. FFITCH: I will just note for the record,
10 Your Honor, that all of those exhibits oppose grant of
11 mitigation for the company.

12 JUDGE MOSS: Okay, thank you.

13 All right, those are admitted then, and I
14 believe that will complete the housekeeping.

15 Ms. Johnston, Ms. Anderl, did either of you
16 wish to have a brief closing statement?

17 MS. JOHNSTON: Yes, I would like to make a
18 brief closing statement.

19 JUDGE MOSS: All right, well, it is the
20 company's petition, so, Ms. Anderl, if you choose in the
21 wake of the other statements to make a brief closing, I
22 would let you go last, you have the last word.

23 MS. ANDERL: Thank you.

24 JUDGE MOSS: Mr. ffitch, why don't you go
25 ahead.

1 MR. FFITCH: Thank you, Your Honor. As
2 stated in our comments, Your Honor and Commissioners,
3 Public Counsel does oppose the mitigation request in
4 this case. We believe the merger agreement clearly
5 states the company has the burdon of demonstrating that
6 any mitigation is in the public interest, and we believe
7 that standard is properly intended as being read
8 together with the unusual or exceptional circumstances
9 standard. This was never intended to be a completely
10 open ended opportunity for the company to come in and
11 argue that wide open public interest argument. Any
12 number of bases could be offered for mitigation. The
13 reason why this standard was inserted in the agreement
14 was so that there would be some guidance for the parties
15 and for the Commission in evaluating mitigation
16 requests, and we would ask the Commission to interpret
17 the standard in that fashion.

18 We don't believe that the company, as we
19 argue in our petition, has met that standard. The kinds
20 of circumstances that have been pointed to here I think
21 that the testimony of the witnesses amply reflects are
22 well within the types of circumstances encountered by a
23 telephone company in conducting its business. There has
24 been absolutely no evidence of any type of cable outage
25 or customer availability problems that were not well

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1 known to the company that were not experienced prior to
2 the time of the merger agreement and that could not have
3 been anticipated by the company when it entered into the
4 merger agreement. This standard was agreed to by the
5 company with knowledge of how its business works, with
6 knowledge of major cable outages and customer reasons,
7 and the company should comply with that standard. The
8 company should not come in here 18 months or 2 years
9 later and say that now it has a better idea and maybe we
10 ought to do this a little differently. We just think
11 that is entirely inappropriate.

12 We also oppose modification of the standard
13 at this time. We have very strong concerns about
14 essentially unilateral modification of a settlement
15 agreement and Commission order at the request of one
16 party. In this case, the company has petitioned to
17 modify one of the eight performance standards in the
18 service quality performance program. These eight
19 standards represent a negotiated compromise that was
20 agreed to by all the parties. The performance program
21 itself is a key provision to the agreement, very
22 important to Public Counsel, and is part of the balance
23 of agreements that was entered into on a wide range of
24 topics in the agreement, including rates and other
25 matters.

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1 As Ms. Kimball testified, if we are going to
2 reopen the merger agreement and reopen the service
3 quality performance program, Public Counsel actually has
4 a number of serious concerns about the way that the
5 service quality program is going and about other aspects
6 of the merger agreement, and we believe that if we're
7 going to reopen this matter that all of those things
8 should be put on the table. We actually concur with
9 Commissioner Hemstad's suggestion that rather than
10 trying to litigate these matters piecemeal in this
11 fashion, if the Commission believes that the parties
12 should go away and discuss modification, we would be
13 willing to do that with the company and put all of these
14 issues on the table and see if there's some basis for a
15 joint proposal to modify on an agreed basis where we
16 take a look at all of the issues, not just one issue.

17 One other point I want to address is the
18 question of customer credits versus investing in
19 Washington. We view this as really another request by
20 the company to modify the agreement. This is a request
21 for modification that wasn't included in the company's
22 petition. It showed up in the testimony of Ms. Jensen
23 and has sort of developed a life of its own as the
24 proceeding has gone on. Whether it's viewed as
25 mitigation or modification, we strongly oppose changing

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1 direction on this issue as well.

2 I would like to particularly draw the
3 Commission's attention to the transcript in this
4 proceeding beginning at page 399. Commissioner Hemstad
5 asks Dr. Blackmon at that point essentially, what
6 happened to your request to require the company to
7 increase investment in Washington state by \$100 Million
8 per year. Dr. Blackmon then explains in the next page
9 or so that the Staff actually has a preference against
10 mandating investment and that the performance standard
11 approach and the service quality performance program was
12 essentially adopted as a preferred alternative to that
13 to provide an incentive to the company to invest in good
14 service quality in this state.

15 And most significantly, I direct your
16 attention to page 403 of the transcript where Ms. Jensen
17 testified that the service quality performance program
18 does operate or did operate as an incentive to the
19 company to invest in its infrastructure to provide
20 better service quality. This is directly contradictory
21 to Ms. Jensen's testimony on the witness stand in this
22 proceeding.

23 So in summary, we don't believe this is an
24 appropriate time or place to revisit the clearly
25 understood decision that was made at the time this

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1 merger agreement was entered into with full knowledge of
2 all the parties and the Commission that the appropriate
3 direction here was that if there is a failure to meet a
4 service quality standard, credits go to customers. The
5 company doesn't keep the money.

6 My final point is that I would just I guess
7 observe that this is an opportunity for the Commission
8 to send a strong message to Qwest and to other utility
9 companies that Commission agreements will be enforced
10 and that merger agreements and other kinds of settlement
11 agreements and stipulations to which companies agreed
12 must be complied with.

13 Those are my comments, thank you.

14 JUDGE MOSS: Thank you, Mr. ffitch.

15 Ms. Johnston.

16 MS. JOHNSTON: Thank you, I will try to be
17 brief here as well. The Commission has two issues
18 before it. One is whether to grant Qwest's plea for
19 mitigation of \$667,000 that it owes to customers in the
20 form of credits, and the second issue is whether to
21 modify the order that this Commission issued in 2000,
22 not that long ago, approving the Qwest/U S West merger.
23 While the facts and the arguments on the two are
24 related, the Commission can decide them separately.

25 I will start with the mitigation issue,

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1 because it's the most clear cut. Qwest has failed to
2 demonstrate that it is in the public interest to
3 withhold this money of \$667,000 from the customers. The
4 mitigation provision, which we have discussed at length,
5 says that:

6 The Commission will in determining
7 whether mitigation is in the public
8 interest consider Qwest's level of
9 preparedness and response in a
10 circumstance that was unusual or
11 exceptional.

12 It is quite clear here that Qwest would like
13 a different standard. Both in the written testimony and
14 the oral testimony, Mr. Jones talked about the company
15 making its best efforts or doing all it reasonably could
16 have. And Ms. Jensen talked about the company making
17 "incredible improvement". In fact, those are not the
18 standards that Qwest agreed to when it negotiated the
19 service quality performance program. Page 7, sub
20 paragraph 5, states that:

21 The company shall have the burdon of
22 demonstrating that mitigation of any
23 service quality credit amount is in the
24 public interest.

25 I will grant you that that is the

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1 Commission's overall mandate, to regulate in the public
2 interest. So broadly speaking, we have an obligation
3 under 80-04 to regulate in the public interest as
4 provided by the public service laws. This language in
5 this paragraph of the agreement goes on to state:

6 In considering whether mitigation is in
7 the public interest, the Commission
8 shall consider whether the assessment of
9 credit amounts is due to unusual or
10 exceptional circumstances for which the
11 company's level of preparedness and
12 response was reasonable.

13 Now this language came up in a different
14 context not long ago involving PSE. In the Schedule 48
15 Air Liquide litigation, everyone was crying
16 extraordinary exceptional circumstances, at least the
17 customers to PSE. And Mr. Stan Berman to his credit,
18 his motto became, a deal is a deal. And you rejected
19 that in that case because of the extraordinary
20 circumstances in the energy market and the volatile
21 wholesale prices. Well, here we don't have the
22 extraordinary, exceptional, or unusual circumstances.

23 And also not long ago, and this is a matter
24 of weeks, this very language came before the Commission
25 upon a petition of PSE to mitigate penalties involving

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1 its customer call centers. They claimed extraordinary
2 unusual circumstances. There again the Commission
3 mitigated the penalty. Why, because this language had
4 meaning. And the Commission said, yes, there were
5 extraordinary exceptional circumstances going on in the
6 electric industry during the time, so we will mitigate.

7 So I think that it's important the Commission
8 be consistent in its position interpreting this very
9 language, which likewise appears not only in this
10 situation, but also in the PSE/WNG merger.

11 CHAIRWOMAN SHOWALTER: Yes, but Ms. Johnston,
12 where does it say that we may not consider anything
13 else? The fact that we mitigated in a circumstance
14 where we did find unusual circumstances doesn't preclude
15 absent some language barring us us finding in the public
16 interest mitigating circumstances for other reasons.
17 You have to say that this paragraph here means we can't
18 consider anything else, and I don't -- I just don't
19 think it says that.

20 MS. JOHNSTON: Maybe perhaps in a technical
21 sense you are correct, a literal reading of sub
22 paragraph 5. I can tell you that this language to the
23 parties to the negotiation, at least from their
24 perspective, this language had meaning.

25 Now I would like to turn to the evidence.

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1 And as I said before, there were no unusual or
2 exceptional circumstances in 2001, so Qwest's level of
3 preparedness and its level of effort and its level of
4 improvement are relevant, and those are two separate
5 standards I believe in sub paragraph 5. First you have
6 to determine whether or not there are such
7 circumstances, and then you turn to, gee, was the
8 company's preparation reasonable, and was its
9 preparedness and response reasonable.

10 Here in this case, Qwest has argued that its
11 failures due to customer reasons were unusual and
12 exceptional. But if you look at the evidence, that
13 doesn't bear out. Mr. Jones agreed that customer misses
14 are common, and of all the trouble reports that Qwest
15 receives, he testified that 1 in 6 or 16% requires
16 customer access to fix. Now for those trouble reports
17 that Qwest failed to fix on time, 1 in 5 or 19.8%,
18 required customer access. So then, you know, I'm forced
19 to ask myself and I encourage you to do the same, if 1
20 in 6 is the norm, then how can 1 in 5 be "unusual or
21 exceptional"? It simply isn't. Qwest also has argued
22 that these undefined major cable cuts are unusual and
23 exceptional. And once again, Mr. Jones' testimony is
24 that Qwest experienced 11 of these last year, yet Qwest
25 is claiming that all 11 are unusual, that each one is

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1 unique according to Qwest. Now by that reasoning,
2 everything is unique, and the entire service quality
3 performance plan is meaningless.

4 However, the failure to show the
5 circumstances were unusual or exceptional is not the
6 biggest hole in Qwest's argument. The biggest hole is
7 that even if you were to let them treat the customer
8 misses and the cable cuts as unusual and exceptional,
9 Qwest still did not make that standard that it set for
10 itself. I asked Mr. Jones about this yesterday.
11 Mr. Jones agreed that under the most favorable
12 presentation of Qwest in 2001, Qwest did not meet the
13 standard of clearing all out of service conditions
14 within two working days. This is, to my way of
15 thinking, this is why Qwest would love to focus on some
16 other standard like its incredible improvements in
17 service quality or that they exercise best efforts. But
18 Qwest didn't even make that showing in this case.

19 It presented the Commission with two numbers,
20 one for 1999 and one for 2001. Granted, the 2001 number
21 is larger than the 1999 number, however, the two numbers
22 were not measured consistently. The 2000 number
23 measures a smaller set of trouble reports. The first
24 Mr. Jones testified to yesterday as getting the highest
25 priority in restoration. It also measures performance

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1 against an easier deadline, as Dr. Blackmon testified,
2 two working days instead of 48 hours. Those two periods
3 sound like they would be the same, and it took two or
4 three company experts to try to explain the differences.
5 The bottom line, however, is that the 2001 results are
6 measured against a deadline that is easier to meet.

7 So given all this, Staff's position is that
8 Qwest has not shown any reason why the Commission should
9 let it get out or be relieved from the merger commitment
10 that was so firmly made when it was before you asking
11 for approval of the merger. 18 months isn't that long
12 ago. Qwest is under this program according to the
13 stipulations that you approved until 2005. Surely it
14 can come in in 2003 and ask to get out from under it,
15 but 2005 is three years from where we are today. It was
16 reasonable for Qwest to make the merger commitments it
17 did at the time, it was reasonable for the Commission to
18 approve it, and there's simply nothing in 2001 that will
19 let Qwest qualify for mitigation.

20 Now I would like to turn my attention for
21 just a few brief minutes to the revisions to the merger
22 order itself. In considering requests from Qwest, it is
23 important to recognize that the service quality program
24 was the product of settlement. In general, we think the
25 Commission should think very carefully about disrupting

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1 the terms of that settlement agreement. If Qwest had
2 made the same proposal as Dr. Blackmon testified today
3 immediately after the settlement was agreed to, under
4 the terms of the settlement itself, we could have gotten
5 out from under it because we don't like it. But now
6 that Qwest has locked down the merger approval, which is
7 what it wanted so desperately back in 2000, and it's
8 here asking to revise the terms of the contract it
9 signed and agreed to wholeheartedly, and it's here
10 asking for relief from one of the parts that benefits
11 the customers in a significant way.

12 Staff believes that the proposed revisions
13 need to be viewed in light of what customers and the
14 company get under the plan that this Commission approved
15 in 2000. If we were starting all over again, we would
16 certainly consider how strict or loose to make the
17 performance standards and how to balance the interests
18 of both the customers and the company. But we're not
19 starting fresh. As Dr. Blackmon testified, Qwest's
20 proposed revision cuts only in its favor. It's entirely
21 one sided. There can be no doubt that this proposed
22 revision benefits only Qwest. And as it stands today,
23 Qwest owes customers \$1 Million for its failure to
24 restore service on time, and it's undisputed that had
25 its proposed revisions been in place in 2001, it would

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1 have paid nothing.

2 So Staff offered a response by way of counter
3 proposal, offered an alternative to the existing
4 mechanism, and I think the alternatives were offered for
5 two purposes. First, Staff believed that its
6 alternatives would make both the company and the
7 customers better off on a prospective basis, and just a
8 few moments ago we heard from Qwest that Qwest evidently
9 prefers the 100% standard that it agreed to. Second,
10 Staff felt that the alternatives would need to be there
11 if the Commission decided the existing mechanism is
12 unworkable on a going forward basis. I think we don't
13 quarrel with or dispute that the existing mechanism
14 could be improved upon, but as it's written and as we
15 agreed to and signed, it's not unworkable.

16 So given that, the Staff believes that the
17 best course for the Commission is to honor the original
18 agreement and require the company to honor the original
19 agreement that was the product of good faith
20 negotiations. It should not adopt Staff's proposal over
21 Qwest's objections, and we have just learned that the
22 company is not in favor of Staff's proposals. And it
23 should not adopt Qwest's proposal over the objections of
24 both Staff and Public Counsel either. So lastly I would
25 just urge the Commission to adopt Staff's position in

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1 this case.

2 Thank you.

3 JUDGE MOSS: Thank you, Ms. Johnston.

4 Ms. Anderl.

5 MS. ANDERL: Thank you, Your Honor. We did
6 bring this petition before the Commission for mitigation
7 and modification because we thought that the factors
8 that should be considered in both of those were
9 interrelated enough that they bore consideration
10 together. We do, however, agree that they are separate
11 and that mitigation is clearly allowed for under the
12 existing agreement, and so let's look at that first,
13 because there we don't have to consider the argument of
14 a deal is a deal and you should live with it.

15 This is the deal, that Qwest is permitted to
16 come forth and ask for mitigation, and that's exactly
17 what we have done. We think that the standard here is
18 different from the Puget standard that was quoted to you
19 by the other party. The Puget standard, which is set
20 forth in Public Counsel's comments on page 5, does not
21 have a public interest test in it. It allows Puget to
22 ask for mitigation only if there are unusual or
23 exceptional circumstances, but there isn't the
24 overarching consideration that the Commission is
25 directed to look at the public interest in determining

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1 whether mitigation is warranted. We believe that in the
2 Qwest case, the Commission is mandated to look at
3 whether there were unusual or exceptional circumstances
4 but isn't bound to deny the petition for mitigation if
5 those circumstances don't exist and is bound to look at
6 other factors as well, factors that go toward answering
7 the question, is the mitigation generally in the public
8 interest.

9 We think in making that decision, you should
10 look at things like what was the purpose of the
11 standard. And when you ask that question and answer it,
12 we believe that the purpose of the standard was to drive
13 improved service quality, and the answer is that to that
14 extent that it worked. Qwest's performance improved
15 measurably. We believe that whether you measure our
16 performance last year with the existing exclusions or
17 the additional exclusions that we would like to have
18 included, that 99.5%, which is what we hit on average or
19 better, is incredible. That's the word that Ms. Jensen
20 used in her testimony. It's a word that's been somewhat
21 denigrated by the other parties, but we do believe that
22 it's very good performance, and we think it's relevant
23 to look at how close we did come to obtaining that 100%
24 standard in determining whether mitigation is warranted.

25 We think that the company's willingness to

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1 make a commitment as to how the mitigated funds would be
2 directed is relevant to the consideration of whether the
3 mitigation is in the public interest. We don't think
4 that's a modification of the settlement agreement at
5 all. If the other parties would recommend that the
6 funds be simply turned back to the company for use at
7 the company's discretion, obviously that's acceptable as
8 well. But we think that all of the those factors,
9 including the reasons why the company missed the
10 standard, how close the company got, and what the
11 company would do with the mitigated funds, are factors
12 that you consider in addition to whether there were
13 unusual or exceptional circumstances.

14 There's been some discussion about whether
15 cable outages and customer access constitutes unusual or
16 exceptional circumstances. I think we could discuss
17 that, we could perhaps disagree on it, I don't know that
18 it matters. In some cases, I think they were unusual or
19 exceptional. Staff suggests that because we needed
20 customer access for, oh, gosh, I don't know 63,000
21 repair tickets last year that needing customer access is
22 not unusual or exceptional, but I would suggest to you
23 that being unable to obtain it in 240 cases is what's
24 unusual or exceptional. So I agree that needing
25 customer access isn't unusual, but that's not what we're

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1 looking at, that's not what we're claiming. What we're
2 claiming is it's quite out of the norm to not be able to
3 get it and to not know in advance that you're going to
4 need it, to have the hot tub or the locked gate.

5 It's been suggested in some of the closing
6 statement that even if you give us all of the misses
7 that we have talked about as being unusual or
8 exceptional and back those out, we still don't meet the
9 100%, so therefore mitigation wouldn't be warranted in
10 any event. Again, I don't think that's the standard,
11 and I don't think we need to show you that but for X, Y,
12 and Z we would have hit 100%. I think you have to look
13 at the totality of the circumstances and determine
14 whether mitigation is in the public interest considering
15 the factors that I mentioned a moment ago.

16 And I guess -- and so that's the mitigation,
17 and I do think that the one thing I would agree with
18 Mr. ffitich on is it is an opportunity for the Commission
19 to send a message, but not the message that Mr. ffitich
20 would have you send. I think it's important for the
21 Commission to send a message that the provisions that
22 allow the company to ask for mitigation are valid
23 provisions in the settlement agreement. I believe the
24 way Staff and Public Counsel would read them would be to
25 read the mitigation provision virtually out of

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1 existence, and I believe this is an opportunity for the
2 Commission to send a message acknowledging the improved
3 service performance.

4 I do want to point out that we're not asking
5 for mitigation of the entire \$1 Million credit. We
6 tried to draw a line and say, you know, we're asking for
7 a modification to 99.5%, and it's only for those months
8 where we didn't meet even what we would like to be the
9 revised standard, we're not going to ask for mitigation
10 for those months, and that's how we came to that. So
11 we're not here today telling you that we ought to not
12 pay the full \$1 Million.

13 Finally, I guess as to the modification, I
14 believe that is a more complex and potentially
15 concerning issue. I think Ms. Jensen accurately
16 represented the company's position that even though the
17 100% standard is not the best standard, we prefer it to
18 Staff's proposals, which are I don't think adequately
19 developed on this record and are probably not --
20 probably don't even send as good an incentive message as
21 the 100% standard does, as imperfect as that one is.

22 Staff suggested though that our request for
23 modification of the merger agreement benefits only the
24 company, and I really disagree with that. I think that
25 modifying the standard to establish a standard that is

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1 more in the public interest in that it sends a better
2 message, provides a stronger incentive to the company,
3 is really one that benefits both the company and the
4 public interest and the customers, the rate payers
5 indirectly, perhaps more strongly than the credit would
6 on their bill. And so we do take exception to the
7 suggestion that the proposal that we have offered on the
8 modification is one sided.

9 Thank you.

10 JUDGE MOSS: Ms. Anderl, I will put a couple
11 of questions to you, I think, in light of your argument.
12 One is the policy argument that has been raised with
13 respect to the Commission modifying an order that is
14 essentially approving an agreement among a host of
15 parties in the case of these merger agreements or
16 settlement agreements. Let's put the shoe on the other
17 foot and say that Public Counsel came in here and said
18 to the Commission, well, you know, on this other
19 performance standard over here, Qwest is only performing
20 at about 24% when it set 100% or 90% as its target, we
21 think you should modify the order by making it a \$10
22 Million penalty. Do you think that would be good public
23 policy?

24 MS. ANDERL: I don't think the result would.
25 I think though that they are permitted under the legal

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1 construct that we have in Washington under Title 80 and
2 34-05 to ask for that.

3 JUDGE MOSS: Well, I'm not talking about the
4 legality, the ability to do that, I'm asking about the
5 policy question as to whether that would promote in the
6 future the negotiation of arrangements like this among
7 the parties. I mean Qwest is involved in this kind of
8 thing frequently before this Commission and others.

9 MS. ANDERL: I understand what you're saying,
10 and I think that -- I think the parties ought to be
11 allowed to ask, and if they have sufficient basis and
12 have convinced the Commission that what they have asked
13 for is in the public interest, then I think that the
14 parties live with the outcome.

15 JUDGE MOSS: You're going to be echoing
16 Mr. Berman in the future, a deal is a deal is a deal.

17 MS. ANDERL: I think a deal is a deal is a
18 deal, and part of a deal is that you can come back and
19 renegotiate.

20 JUDGE MOSS: All right.

21 CHAIRWOMAN SHOWALTER: I just want to, before
22 you move to your next question, on this threshold issue,
23 do you agree that the standard is not simply is the
24 proposal better than what's in the agreement, but that
25 the proposal is enough better than what's in the

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1 agreement that we ought to -- that it compensates for
2 opening up an agreement that the parties settled with an
3 eye toward it lasting for the anticipated period of the
4 settlement, that that too is a value that we have to
5 weigh?

6 MS. ANDERL: Yes, absolutely, I think that
7 any time you implement a settlement or an agreement for
8 a year, year and a half, there may be lots of thought,
9 gee, we would have done this differently, we could have
10 done it better if only we knew then what we know now,
11 and so I think the reasons should be compelling.

12 CHAIRWOMAN SHOWALTER: So why is it so
13 compelling here? Let's take a given for the sake of
14 argument that either the 99.5% standard or the
15 alternative is actually better for both customers and
16 the company than the 100% standard, but why does it make
17 so much difference? Why not live with this? Why is
18 this particular provision so significant?

19 MS. ANDERL: Well, I guess part of it is
20 because it is the \$1 Million cliff with no perceivable,
21 at least on my part, customer benefit as long as Qwest
22 is providing a good and high level of performance. I
23 guess part of it is that we know more now, and I guess I
24 just got done saying maybe that's not enough. But I
25 think it does go to the incentive that the company has

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1 and the message that is being sent to the company.

2 You know, that said though, if you don't find
3 the reasons compelling, then as I think we have said,
4 the mitigation may get us to where we need to go. I
5 mean the mitigation may allow you to take into
6 consideration the factors that we are asking you to
7 consider to modify, and you may say, no, we think that
8 we want the company to continue to adhere to a 100%
9 standard, it makes us nervous to change the agreement,
10 but all the factors that you presented to us in support
11 of modifying the petition and mitigation are enough to
12 mitigate it. And I think that sends a good message to
13 the company as well.

14 COMMISSIONER HEMSTAD: Why wouldn't you sit
15 down with the other parties in view of the comments
16 made, they have concerns too about the efficacy of some
17 of the other standards and whether with the benefit of
18 hindsight some of them might have been done differently
19 or better from somebody's perspective, why wouldn't you
20 sit down and have that conversation about renegotiating
21 the entire package of performance standards rather than
22 coming to us and asking us to change one?

23 MS. ANDERL: We could do that. Partly the
24 petition was driven by the time line that's set forth in
25 the agreement where we had to ask for mitigation by the

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1 30th of January, and we felt that it was fair to roll
2 both pieces together. So partly it's been a time line
3 that is in some ways artificial but in some ways real.
4 We could. We did have some discussions.

5 JUDGE MOSS: I just have one other brief line
6 or, well, I hesitate to say question because it always
7 turns out --

8 MS. ANDERL: I'm sorry?

9 JUDGE MOSS: It always turns out to be more
10 than one question so I won't say one.

11 MS. ANDERL: More than one, right.

12 JUDGE MOSS: And some in this room at least
13 have heard me before paraphrase, or perhaps it's even a
14 quote, from I believe it was Justice Cardoza who
15 observed that the public interest standard is an empty
16 vessel into which substance must be poured. And I'm
17 curious in listening to your argument what you mean when
18 you think of in the public interest. And I'm thinking
19 in terms of, do you mean it would promote the public
20 interest in some fashion to relieve Qwest from two
21 thirds of its credit obligation or that it would simply
22 be consistent with the public interest to do that or
23 perhaps an even lower standard that it would at least
24 not be inconsistent with the public interest to do that?
25 Where are you falling within that range?

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1 MS. ANDERL: Definitely consistent with, and
2 if I think it through for a moment, I think it would
3 promote the public interest for the reasons that I
4 described. That in part because of how Qwest has
5 proposed that the funds would be directed, in part
6 because of how the standard and the settlement agreement
7 drove I think a behavior that the Commission desired.
8 And in looking at that, I think that perhaps the
9 overarching goal of the public interest would be to
10 promote good service. To the extent that that goal was
11 achieved or at least driven by to some extent the
12 overall standards, to the extent that the company
13 provided good service and yet still would pay in essence
14 be the most severe penalty on a measure, those are
15 inconsistent, and so mitigation of some part of that
16 would promote the public interest.

17 JUDGE MOSS: Why wouldn't it promote the
18 public interest even more to decline to mitigate and
19 make Qwest work even harder towards not having to pay
20 any penalties next year?

21 MS. ANDERL: I think that what I have heard
22 is a general consensus that the standard is one that the
23 company will likely fall off the cliff on almost every
24 month, and I don't know how declining to mitigate it in
25 any way would force the company to work harder. I think

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1 the company right now drives toward 100%, and it has
2 fallen short by, you know, 2 or 3 or 4/10 of a percent
3 from month to month, but I don't know how failing to
4 mitigate that would drive us any harder.

5 JUDGE MOSS: And there's just one thing in
6 that connection that concerned me a little bit in your
7 petition, and that is it seems to me, and help me if I'm
8 reading this wrong, but it seems to me that there's a
9 suggestion in there that if there is not mitigation of
10 this penalty that the company will take that as a
11 disincentive to performance, and I was a little
12 concerned about that suggestion.

13 MS. ANDERL: No, because there are a lot of
14 other incentives that we have for good performance as
15 well, not just this penalty. And I know we put in the
16 petition, you know, it doesn't matter if we perform
17 at --

18 JUDGE MOSS: 60%.

19 MS. ANDERL: -- 60% --

20 JUDGE MOSS: And 59% in other places.

21 MS. ANDERL: -- or 59% or 95%, and that's
22 true, and we did that to make a point, you know, so that
23 it did jump out at you. But we have --

24 JUDGE MOSS: Well, the company went so far as
25 to say it might be forced to direct its resources

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1 elsewhere if it does not receive mitigation, and that's
2 the part that I'm concerned about.

3 MS. ANDERL: Well, and I think we need to
4 read that in the overall understanding of what our
5 incentives are for providing good service, and that is
6 that we would like to keep our customers happy. That is
7 that if we miss these two day repair intervals, we are
8 obligated to do other things as well, individual
9 customer credits. It costs us more in resources to, you
10 know, to perhaps dispatch again or handle additional
11 repair calls, repeat calls if we haven't fixed something
12 by day two, the customers call again, we have the repair
13 center or the business office that gets additional
14 calls.

15 So I think it's not accurate to suggest that
16 the \$1 Million penalty is the only incentive that we
17 have driving us either positively or negatively. We
18 have a lot of other incentives to run our business well.
19 And I think Mr. Jones explained to you how important it
20 is for us to restore the out of service tickets for
21 reasons I think that are entirely separate from whether
22 we're going to pay \$1 Million or not, but this is a
23 factor.

24 JUDGE MOSS: Okay, that's all I have.

25 Okay, well, we thank you all very much for

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1 your very able presentations over the course of the last
2 couple of afternoons, and the Commission will take the
3 matter under advisement, and we will not expect any
4 written briefs, and we will act in due course.

5 Our record is closed, thank you.

6 (Hearing adjourned at 4:25 p.m.)

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