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

2 JUDGE TOREM: This is Docket UT-081393, the
3 Verizon Access versus Embarq complaint. This is the
4 second prehearing conference being held on Wednesday,
5 November 19th, 2008. It's a little after 1:30 p.m.
6 I'm going to take appearances in the short form from
7 those that are here in the room, and I've already laid
8 out what the agenda will be before we went on the
9 record. I'll lay that out in an even more abbreviated
10 form after appearances. We start with Verizon Access.

11 MR. ROMANO: Yes, Your Honor. Gregory M.
12 Romano on behalf of Verizon Access.

13 JUDGE TOREM: You have co-counsel available
14 on the line?

15 MR. ROMANO: Yes, Your Honor. We have
16 Christopher Oatway on the line representing Verizon
17 Access as well.

18 JUDGE TOREM: For Embarq?

19 MR. HENDRICKS: Trey Hendricks and Sue
20 Benedek on the line as co-counsel for Embarq.

21 JUDGE TOREM: AT&T, one of the intervenors is
22 on the line as well?

23 MS. MANHEIM: Cindy Manheim for AT&T, and
24 Letty Friesen is on the line as well.

25 JUDGE TOREM: Commission staff?

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1 MR. THOMPSON: Jonathan Thompson for
2 Commission staff.

3 JUDGE TOREM: Again, I'm Adam Torem
4 co-presiding with Ann Rendahl today. First order of
5 business is going to be to look to Mr. Rick Finnigan
6 who is here for the Washington Independent Telephone
7 Association, or WITA, and was not able to be with us
8 last time, and I hope no credit is done. He had a
9 motion that I initially denied following an amicus
10 brief because it wouldn't be of assistance to the
11 Commission at the point where we were on September
12 24th. We are going to talk up WITA'S petition to file
13 an amicus brief first and then return to the deferred
14 ruling that needs to be given on the motion to dismiss.
15 As I told the parties off the record, we are going to
16 entertain any additional oral argument that they might
17 desire today. Then we will take a brief break and
18 Judge Rendahl and I can confer and hopefully give you a
19 ruling on the motion from the Bench and as needed, give
20 you a written decision down the road.

21 If we come back and need to, we will set a
22 procedural schedule to deal with the complaints and all
23 the other details that go with setting up a procedural
24 schedule, such as discovery, protective orders, and
25 determining filing dates and the rest. So

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1 Mr. Finnigan, I'm not sure we need to take an
2 appearance from you, but it would help.

3 MR. FINNIGAN: Thank you, Your Honor.

4 Richard Finnigan appearing on behalf of the Washington
5 Independent Telecommunications Association. My address
6 is 2112 Black Lake Boulevard Southwest, Olympia,
7 Washington, 98512. The e-mail address is
8 rickfinn@localaccess.com. Telephone number is (360)
9 956-7001. Fax number is (360) 753-6862.

10 JUDGE TOREM: Mr. Finnigan, my understanding
11 is that WITA filed an amicus brief back on October 27th
12 and asking for permission to file that, and you told me
13 this afternoon that your client has no wish to
14 intervene formally in the case; is that correct?

15 MR. FINNIGAN: That is correct, Your Honor.
16 We are not seeking intervention. We are in the same
17 posture we were before where we want to offer our
18 viewpoint as an amicus to the Commission, and should
19 the Commission find that helpful, that's fine. If not,
20 that's at the Commission's discretion, and if you would
21 like me to go into it in some detail as to why we think
22 it's appropriate for the Commission to consider WITA's
23 position, I would be happy to do that.

24 JUDGE TOREM: I think it would be appropriate
25 for you to give me a brief argument on that, and

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1 Mr. Romano, I'll give you equal time to argue in
2 opposition after seeing what you've submitted in
3 writing previously.

4 MR. FINNIGAN: Thank you. At the time we
5 submitted our original motion, we were wondering and
6 pondering whether the FCC would, in fact, take some
7 action. November 5th has come and gone, and the FCC
8 has taken what I would describe as an interim step
9 forward.

10 The FCC has put out for comment three
11 proposals, one of which deals only with universal
12 service reform, but the other two are attempts to
13 address on a comprehensive basis intercarrier
14 compensation reform. They are on a very fast track.
15 Opening comments are due next Wednesday, the 26th. I
16 spent the morning preparing what may be comments
17 depending on what the clients think of them. Reply
18 comments are due a week later with the thought being
19 that this will go before the Commission to be
20 considered at their December open meeting, the Federal
21 Communications Commission.

22 The point that we were raising in our amicus
23 brief is that intercarrier compensation reform, access
24 reform, really needs to be addressed on a comprehensive
25 basis, and a very important element of that for rural

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1 carriers such as Embarq is the way in which access
2 reductions would be handled through possible offsets in
3 other revenues, increasing other forms of revenues,
4 whether that is an increase in a SLIC charge or an
5 increase in a universal support mechanism, both of
6 which are elements that the FCC has proposed.

7 Just so it's clear on the record, right now
8 the FCC is not proposing increased universal service
9 funding availability for price cap rural carriers but
10 only for rate of return rural carriers. Our position
11 is that it's a severe oversight, and there will be very
12 strong comments, I'm sure, filed with the FCC pointing
13 out that the need of rural carriers to, whether they be
14 price cap or rate of return, because of their lack of
15 economies of scope and scale, because of the
16 communities that they serve that you can't just simply
17 take away one of the three existing primary streams of
18 revenue and expect them to be able to provide service
19 at the same levels that they are providing today.

20 That's our essential point is that it would
21 be inappropriate at this stage to take a look at
22 addressing, if you will, access reform on a
23 carrier-by-carrier basis by focusing solely on Embarq
24 and what its rates are, and that's why we undertook to
25 filing an amicus and present that viewpoint to the

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1 Commission.

2 JUDGE TOREM: Mr. Romano?

3 MR. ROMANO: Thank you, Your Honor. Our
4 response is set forth in our written filing, but just
5 briefly here, the bottom line to Verizon is that the
6 WITA-proposed amicus brief does not address the real
7 issue here, which is whether Verizon has stated claims
8 upon which the Commission may grant relief, so if the
9 Commission chooses to accept entry of the amicus brief,
10 Verizon believes it should not be afforded any weight
11 because it also doesn't add any new perspective to what
12 Embarq has already taken in the case. Thank you.

13 JUDGE TOREM: Judge Rendahl and I have
14 already discussed the propriety of entertaining the
15 amicus brief at this stage of the proceeding. She's
16 not flagging me down to make sure that we talk about it
17 again. So I am going to grant the motion to file the
18 amicus brief and will consider its policy arguments in
19 making a ruling later today on the motion to dismiss.
20 So, Mr. Finnigan, for that purpose, the brief is in,
21 and I've read it so I understand what you've referred
22 to and in the context of what's happened or not
23 happened earlier this month with the FCC, what that
24 means now on the wider scale of things.

25 I wanted to ask you to clarify for me though

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1 based on having already jumped ahead into the substance
2 of what's contained in your brief whether there is any
3 indication that this commission aside from the FCC
4 would take up more than a single carrier, if there is
5 any other mechanism you suggest we do in the state of
6 Washington to address this if the FCC somehow stalls
7 and doesn't make further progress with the change of
8 administration that's pending.

9 MR. FINNIGAN: There is two parts to that
10 question. If the FCC acts, the proposals that the FCC
11 has put out for comment include some involvement at
12 least of the state commissions, and that may be either
13 establishing a carrier-by-carrier intercarrier
14 compensation rate or a statewide intercarrier
15 compensation rate, and there may be some other aspects
16 to that as well.

17 On the flip side, which is part of the
18 question you asked, what is possible, if the
19 Commission, that being the Federal Communications
20 Commission, stalls and does not act, would seem to me
21 that there are a couple of options open to the
22 Commission, and I'm not advocating these on behalf of
23 WITA. I'm just responding to your question at this
24 time. But one of them is a rule-making. The
25 Commission has done that before with the terminating

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1 access rule, and that type of action has been upheld by
2 the court as an appropriate means addressing questions
3 of this nature.

4 The other option clearly is a generic docket.
5 That's how we got started in access charges in U-8523.
6 There is a third option. This would not normally be
7 initiated by the Commission, but the Commission has
8 created a mechanism through the Washington Exchange
9 Carrier Association where any party can ask that a
10 docket be opened to consider industry-wide issues, and
11 pursuant to rules of procedure approved by the
12 Commission, a docket session is called together and a
13 decision is made whether it's appropriate to try and
14 move forward on an industry basis.

15 So there are those three mechanisms that
16 exist within the Commission statutes and rules that I
17 can identify off the top of my head.

18 JUDGE TOREM: But you've already clarified
19 for me that WITA is not advocating, at least today, for
20 any of those options.

21 MR. FINNIGAN: At this stage, we haven't
22 discussed it, so I can't tell what our position would
23 be. If this is something that the Commission would
24 like us to consider, I can certainly take that back and
25 we can discuss it and formulate a position, but right

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1 now, I can't make up positions on behalf of my client.

2 JUDGE TOREM: I haven't had that discussion
3 with my commissioners either. My views may or may not
4 represent the views of others. You used what I thought
5 was an acronym, a SLIC?

6 MR. FINNIGAN: I'm sorry, yes, a subscriber
7 line charge. That's an end-user charge that the
8 Federal Communications Commission has created in which
9 charges that were formally contained in access charges
10 have been changed to become end-user charges that are
11 applied on an account basis by line.

12 JUDGE TOREM: Thank you, Mr. Finnigan. I
13 think having granted the petition to file the amicus
14 brief and we received it and read it, I'm going to turn
15 back to the motion to dismiss, and Mr. Hendricks, I
16 want to give you an opportunity to briefly sum up your
17 argument and bring it up-to-date given the action or
18 inaction as you see it from the FCC earlier this month,
19 and then I want to turn to the parties that have
20 actually filed a response.

21 I think, Mr. Romano, you are the only
22 opposition filing, but I'm not sure if Ms. Manheim, in
23 the scope of your intervention, we didn't really
24 discuss it as to the motion to dismiss if AT&T was
25 going to take a position and wanted a few moments, even

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1 though there is nothing in writing to warn anybody else
2 in the room what the position might be, I'm probably
3 the only one that's not sure what it is. Ms. Manheim,
4 did you want to have some time to make any arguments or
5 comments on the motion to dismiss and how we might
6 dispose of it?

7 MS. FRIESEN: Your Honor, this is Letty
8 Friesen. I just got a note from Ms. Manheim. She's
9 having some volume problems with her phone, and so I'm
10 going to take over the lead for this particular hearing
11 if that's okay with you.

12 JUDGE TOREM: That's fine with me. How would
13 you like to respond to that question.

14 MS. FRIESEN: We would like to give a brief
15 response, certainly after Verizon has an opportunity.
16 I can give you what you probably think will be our
17 quick and dirty response, and that is that we concur in
18 Verizon's filing to date. So once they refresh the
19 record and update, then I would like an opportunity to
20 let you know if we've diverged positions.

21 JUDGE TOREM: And what I'll ask all the folks
22 giving argument today, and also give Mr. Finnigan a
23 chance given that his amicus brief is filed, give WITA
24 a chance to chime in as well, that we focus just on the
25 motion and what we should be doing as much as possible

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1 here in Washington for the policy concerns that have
2 been referenced by WITA and also echoed in the original
3 motion to dismiss filed by Embarq that we keep those
4 from getting too far afield again, and Commission
5 staff, do you want an opportunity to chime in on this
6 as well?

7 MR. THOMPSON: We could make a brief comment
8 after you've heard from the other parties.

9 JUDGE TOREM: I'm happy to give you the last
10 word, Mr. Thompson. So we will hear from Embarq and
11 Verizon, and then Ms. Friesen, you will be speaking on
12 behalf of AT&T, Mr. Finnigan and then Mr. Thompson, so
13 just briefly sum up. After we hear everything, then I
14 think we will go off the record long enough for me to
15 digest all that and take a look at things with Judge
16 Rendahl and then come back and issue a ruling and go
17 forward. Mr. Hendricks?

18 MR. HENDRICKS: Thank you. Trey Hendricks on
19 behalf of Embarq. Embarq's position with respect to
20 this complaint is that essentially, Verizon has
21 requested relief from the Commission that should not be
22 granted and is inappropriate. The reason that is is
23 because the request, the relief that they requested is
24 based on grounds that are not applicable to Embarq.

25 Essentially, Verizon has relied on several

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1 facts to make its complaint and seek relief, which is a
2 reduction of Embarq's access rates to Verizon or Qwest
3 levels, and it's done so on the basis that Embarq's
4 access rates are what we would call mathematically
5 higher than Verizon's, that Verizon's rates were at one
6 time reduced by the Commission a number of years ago,
7 and maybe the biggest flaw in the reasoning is that it
8 seems to think that Embarq in Washington is similar to
9 Verizon, and that couldn't be any further from the
10 truth.

11 Embarq, unlike Verizon in Washington, is a
12 rule telecommunications company and relies much more
13 heavily on these revenues to provide service in its
14 service areas than Verizon does. So the relief that it
15 requests simply to reduce these rates down to the level
16 of a company that's entirely dissimilar to Embarq just
17 isn't rational. So that's the first basis for our
18 motion to dismiss.

19 In addition, and this is coming more and more
20 to light, there is clearly momentum in critical mass of
21 the FCC to address these issues on a comprehensive
22 basis, and Embarq believes that this is the most
23 appropriate, efficient, and fair way to go about
24 dealing with the issues that surround intercarrier
25 compensation, and that Verizon's complaint addressing

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1 only one carrier, which it would appear it only made
2 because it believed that Embarq was a convenience
3 target for this particular complaint, is inappropriate,
4 and it won't solve the problem that customers and
5 companies in these rural areas face in providing
6 service. If anything, it could even potentially
7 exacerbate the problem.

8 So for the Commission to move forward on
9 these very important issues because Verizon found it
10 convenient to make a complaint against Embarq may be
11 good for Verizon were it to get the relief it
12 requested, but it would not necessarily be in the best
13 interest of the rural customers in the state.

14 So on those bases, Embarq firmly believes
15 that this is not the appropriate way to deal with
16 issues of intercarrier compensation in Washington and
17 universal service and that the Commission has other
18 means to address these issues that would be rational,
19 that would make sense for rural customers and the
20 companies that provide them. Mr. Finnigan, WITA,
21 represented several of those, as he mentioned, are
22 lawful means for the Commission to deal with these
23 issues, and the complaint in this case is simply not
24 the appropriate or best way to go about dealing with
25 them. Thank you.

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1 JUDGE TOREM: Thank you, Mr. Hendricks,
2 Mr. Romano?

3 MR. ROMANO: Thank you, Your Honor. To
4 respond to Mr. Hendricks' arguments set forth just a
5 minute ago, first of all, I would like to stand by our
6 response that we filed, but taking Mr. Hendricks'
7 argument one step at a time, the first argument he made
8 was that Embarq is dissimilar from Verizon. That's
9 obviously a factual question that should be resolved in
10 a hearing and should not be the basis for a motion to
11 dismiss. The complaint does state a claim for which
12 relief may be granted, which is the standard motion to
13 dismiss. So if there is some question about whether
14 Embarq is actually similar to Verizon, that's the sort
15 of factual inquiry that would be considered in a
16 hearing.

17 Secondly, there was a reference to the FCC.
18 As we know, we waited to see what the FCC was going to
19 do on November 5th. They issued an order which solely
20 addressed the compensation for ISP-bound traffic, did
21 not establish any comprehensive intercarrier
22 compensation reform, and I would add that Embarq
23 specifically asked the FCC not to issue its order on
24 November 5th, and so it's a bit of a shell game here to
25 have Mr. Hendricks say we should wait for the FCC to

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1 take action and then go to the FCC and ask them not to
2 take action.

3 Thirdly, as to whether this is the
4 appropriate way to handle requests to have access
5 charges reduced, the Commission has already found that
6 carrier-specific complaints are the way that access
7 charges may be reduced, even if there are comprehensive
8 rules established. For instance, Mr. Finnigan
9 mentioned the terminating access rule that was in
10 effect prior to the complaint filed against Verizon.
11 It was cited by Verizon as a reason why there shouldn't
12 be a carrier-specific complaint, and it was
13 specifically rejected by the Commission.

14 In fact, virtually all the arguments made by
15 Embarg were made by Verizon Northwest, and we know that
16 pretty well, and they were all expressly rejected, and
17 if you read those orders, the Commission was very clear
18 that carrier-specific complaints are indeed the way
19 access charges should be examined and potentially
20 reduced. That's it, Your Honor, unless you have any
21 questions for me.

22 JUDGE TOREM: I'm trying to refrain from
23 questions because then I'll knock my own train well off
24 the tracks. If I need to have them to make the
25 decision, I'll ask them, but I want to hear from each

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1 party first. Ms. Friesen, I think you are up.

2 MS. FRIESEN: Thank you, Your Honor. AT&T
3 does concur with the written response of Verizon to
4 handle our motion to dismiss. We also concur in the
5 oral arguments that Verizon has put forth here today.
6 I would reiterate that there is a standard that must be
7 met in order to grant a motion to dismiss, and I don't
8 believe that standard has been met by either
9 Mr. Hendricks' comments today nor by their previous
10 filing.

11 There are clearly genuine issues of material
12 fact in this proceeding. This proceeding is
13 specifically about the rates of Embarq and whether or
14 not they are fair, just, and reasonable. So to the
15 extent that there are pleadings in this proceeding to
16 date, they must be viewed in the light most favorable
17 to the nonmoving parties.

18 Given that, there is very little legal
19 support, if any, provided by Embarq for postponing or
20 dismissing this particular action, so AT&T just will
21 reiterate that Embarq has failed to meet the standard
22 for granting the motion to dismiss, and therefore, it
23 should be denied.

24 JUDGE TOREM: Thank you, Ms. Friesen.

25 Mr. Finnigan, anything to add at this point?

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1 MR. FINNIGAN: Just very briefly, Your Honor.

2 I was struck by a comment by Mr. Romano that Embarq
3 asked the FCC not to issue its decision on November
4 5th. I am familiar with Embarq's comments to the FCC,
5 and what Embarq was addressing was the fact that there
6 was in circulation a proposal that had not been
7 publicly vetted, and they were asking for the
8 opportunity to have that proposal put out for comment
9 because it appeared to be substantially different than
10 anything that it previously had commented on. It was
11 not an effort to tell the FCC not to ever act but an
12 effort to be able to provide comment concerning what
13 appeared to be a new proposal.

14 Ms. Friesen mentioned two standards, one of
15 which I think is accurate. The other she indicated was
16 that there are issues of material fact. That is not an
17 appropriate standard for a motion to dismiss. That's a
18 summary judgment standard and is not something that
19 should be part of the consideration as to whether there
20 are or are not issues of material fact. The question
21 is whether the matter should be dismissed.

22 And finally, what the Commission is obviously
23 aware is that if this is a complaint proceeding, the
24 Commission has a lot of discretion in this matter, and
25 even if the Commission determines that it may not

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1 dismiss the complaint, it could determine that it would
2 hold it under abeyance while the FCC is stating that it
3 may act, and those are my comments.

4 JUDGE TOREM: Thank you. Commission staff?

5 MR. THOMPSON: I think I would just state
6 really briefly since we didn't file any written
7 materials on this question, but I think Staff generally
8 agrees with the view that Verizon has stated a claim
9 upon which the Commission can grant relief,
10 particularly in light of the Commission's orders in the
11 case in which AT&T complained again Verizon's access
12 charges, the issue being whether there is a price
13 squeeze created by the level of Embarq's access
14 charges, and I'm not certain that we would agree that
15 the particular relief requested by Verizon; that is,
16 with regard to the level that those rates should be,
17 whether we would ultimately agree with that or whether
18 the Commission might ultimately decide that no relief
19 should be granted based on facts that would be
20 developed in the case, but at this point, it appears
21 that dismissal would not be appropriate given that
22 there is a justiciable claim set forth here.

23 I guess I would add that I think there is two
24 differences that Embarq raises with regard to the
25 earlier Verizon decision. One of those is, well, FCC

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1 action may be imminent, and I think I would agree with
2 Mr. Finnigan. That may be a reason to defer the case;
3 although, there is the ten-month clock under the
4 statute, but I don't believe it's a reason to dismiss
5 the case. It might be if the Commission were bringing
6 this on its own motion, but this a complaint by a
7 private party, so I don't think those kind of
8 discretionary questions come into play here.

9 The other difference that Embarq raises with
10 regard to the earlier Verizon complaint against Verizon
11 is that Embarq is differently situated than Verizon was
12 in that prior case, and the facts may bear that out and
13 may show that similar relief shouldn't be granted in
14 this case, but those are the kinds of facts that need
15 to be developed on the record after discovery and may
16 be possibly brought up later in a motion for summary
17 determination.

18 JUDGE TOREM: Mr. Thompson, is your client in
19 the telecom section here at the Commission at all, as
20 far as you know, thinking about a wider
21 Commission-brought complaint against all of the other
22 intrastate carriers to have a wider approach to this?
23 You mentioned maybe we wait for the FCC. Is there any
24 reason to wait for a Commission-wide response
25 complaint?

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1 MR. THOMPSON: We haven't discussed that
2 possibility. I don't think that's something we
3 considered. Shaking of heads from Staff.

4 JUDGE TOREM: I know the workload is
5 unbearable, so I wasn't expecting the answer would be
6 affirmative, but I wanted to acknowledge the earlier
7 mention by Mr. Finnigan as to what the other UTC
8 options might be and that being apparently within the
9 range of those. Judge Rendahl, do you have any
10 questions you want to interpose at this time?

11 JUDGE RENDAHL: No, not at this time. You
12 might want to ask Mr. Hendricks for any brief response
13 before we take a break.

14 JUDGE TOREM: I might and I think I will.

15 MR. HENDRICKS: A couple of things just
16 briefly. First, this issue of whether or not Embarq is
17 a rural company I think is indisputable and doesn't
18 require a hearing to determine. I think it's clear and
19 written somewhere that Embarq is a rural carrier, and I
20 believe even the Commission may have taken notice of
21 the fact in prior proceedings. Certainly nothing has
22 changed.

23 The other is that the Commission has broad
24 discretion in these matters, and even if the Commission
25 were not to dismiss the case for failure to state a

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1 claim, the other bases that Embarq has cited, I think,
2 justify dismissal in this case, and possibly some of
3 the parties have suggested a more comprehensive
4 approach to addressing the issues. If the Commission
5 doesn't dismiss for failure to state a claim, Embarq
6 encourages it to explore those other options rather
7 than taking this inefficient and frankly unfair
8 approach to addressing access rates in the state.

9 JUDGE TOREM: I'm intrigued by your
10 suggestion that our rules under 480-07-380 give us a
11 whole lot more wiggle room than what's stated in CR
12 12(b)(6), a failure to state a claim, and the only
13 other reference as to a basis for a motion to dismiss
14 to be granted is under CR 12(c), which is essentially a
15 motion for judgement on the pleadings, and I haven't
16 heard anybody make reference as to that standard or
17 whether that would be appropriate, probably because it
18 closed more to the motion for summary judgment, and we
19 haven't had affidavits for the appropriate types of
20 filings there --

21 MS. FRIESEN: This is Letty Friesen. May I
22 respond to the idea that the summary judgment standard
23 is not appropriate? There is precedent for that.

24 JUDGE TOREM: Briefly go ahead.

25 MS. FRIESEN: There is precedent for that.

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1 If you take a look at the August 24th order out of 2005
2 in the case of, In the Matter of Integra Telecom of
3 Washington versus Verizon, Docket No UT-053038, in the
4 opinion of ALJ Mace, she cites to that standard and
5 with a footnote in there to where that standard comes
6 from, and it appears that the Commission has used, in
7 fact, no judgement issue with material fact that's the
8 moving parties entitled to a judgment of a matter of
9 law as one of the standards considered in the context
10 of a motion to dismiss. So I would just encourage you
11 to take a look at that order, and its Page 4 is really
12 where the discussion begins.

13 JUDGE TOREM: Thank you for that
14 clarification of prior Commission precedent and
15 interpretation of what the current rule is, and I
16 imagine back in 2005, these rules were just coming
17 online to replace some other existing rules that I
18 believe were similar.

19 MR. HENDRICKS: One more point, Your Honor,
20 and that is the Commission has within its authority to
21 hold this proceeding in abeyance while either the FCC
22 addresses these issues or in order to take up a more
23 comprehensive review of its own.

24 MR. ROMANO: Your Honor, if I might respond.

25 JUDGE TOREM: Go ahead, and then we will see

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1 if anybody else has any last comments before we do take
2 a break.

3 MR. ROMANO: The bottom line is that there is
4 a statutory deadline to rule on a complaint, and I
5 think that need to be remembered, first of all, and
6 second of all, the idea that the proceeding would be
7 held in abeyance because of some sort of imminent FCC
8 action I think is a mistake.

9 Just yesterday, the chairman of the FCC
10 indicated that action was unlikely at any time soon, so
11 the idea of characterizing the FCC action as being
12 imminent I think is incorrect, and I also think that
13 you need to look back at the statutory deadline and
14 what needs to be done to get us there. Thank you.

15 JUDGE TOREM: So we can tell you now, it
16 shouldn't come to anyone's surprise while we were
17 willing to wait one time, I think we gave an indication
18 that if the FCC hadn't acted that we would be willing
19 to go forward, and certainly, if the motion is not
20 granted on the grounds, we will be willing to go
21 forward and set a procedural schedule today.

22 So unless there is further comments that
23 parties want to give to me or Judge Rendahl to take
24 under consideration for the next 15 minutes to about
25 2:30, I want to make sure when we come back and

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1 announce the ruling that the parties have looked at
2 both possible outcomes and decided if it's the one not
3 in favor of your client that you are ready to give us a
4 suggested procedural schedule that helps give us some
5 wiggle room to meet that statutory deadline that would
6 be required, I believe, somewhere around May 25th of
7 2009?

8 MR. ROMANO: I had written down May 14th, but
9 I can double-check that.

10 JUDGE TOREM: I was just going off the date
11 of your cover letter and counting ten months. So we
12 are talking about mid May next year?

13 MR. ROMANO: Yes, Your Honor.

14 JUDGE TOREM: Anything else before we take a
15 break? I'm hoping we will be ready to go back on the
16 record at 2:30. We are off the record.

17 (Recess.)

18 JUDGE TOREM: It's a little after 2:30. I'm
19 sure as you all expect, yes, we are going to issue a
20 ruling on the motion to dismiss today and not delay
21 further.

22 During the break, we did take a look at the
23 standard of review set by our rules, and as guided by
24 the language of 480-07-380, sub 1, looked at both Civil
25 Rule 12(b)(6) and Civil Rule 12(c), but under either

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1 standard, the motion to dismiss has to be denied,
2 because there are facts stated in Verizon's complaint,
3 and those certainly do need to be developed further.
4 It appears they do state a claim on which relief, if
5 it's appropriate, might be granted. What that relief
6 is, if any, is going to depend heavily on the quality
7 of the evidence presented when we get to a hearing on
8 the matter.

9 I want to comment also that the motion to
10 dismiss asks in the alternative that we continue to
11 hold the claim and the complaint in abeyance, and I
12 think I said it before the break that we gave the FCC
13 one chance to do this. We do have a statutory deadline
14 under RCW 80.04.110, sub 3, of ten months to take care
15 of things.

16 There may be cause for extending that
17 ten-month deadline, and we might talk about that in
18 setting the schedule, but giving the FCC more and more
19 time, I'm not willing to do that, and I feel that to be
20 fair to both parties, we may get to the point where we
21 are ready to issue a final order in the case and the
22 FCC acts and does something that makes the whole thing
23 moot, but that's a risk that I think we have to assume.

24 So although the momentum, as Mr. Hendricks
25 has argued, for comprehensive reform appears to have

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1 been struck up, I'm not confident it is going to
2 continue to go forward at a rate that we need to wait
3 for, so we are not going to hold this in abeyance
4 either. There are a number of specific points that
5 Embarq raises and were responded to by Verizon in its
6 complaint and response and also addressed in support by
7 WITA in its amicus brief. I'm not going to discuss
8 those specifically today from the Bench. I think we
9 have the ruling that we need to set up the schedule
10 today, but I'll go into more detail in a written ruling
11 that I hope to have out by the end of December, and
12 then we'll address the questions about the presumption
13 of just, reasonable, or undue preferential rates.

14 We'll address the question about mathematical
15 differences and articulate the basis for not granting
16 the motion to dismiss as to why those facts actually do
17 still stay the claim, and also touch briefly on the
18 universal service fund policy issues that were raised
19 as reasons why we shouldn't take up this complaint at
20 this time, but I'll address those in writing rather
21 than continue to speak coherently from the Bench.

22 That's the ruling on the motion to dismiss.
23 What I think we still need to do today is address a
24 procedural schedule and find out probably off the
25 record what date we want to work backward from. It

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1 appears that, Mr. Romano, you were suggesting somewhere
2 in mid May of 2009, and if Verizon is willing at this
3 point to say based on the delay it took us from your
4 filing date to schedule the September 24th prehearing
5 conference and the additional delay the Commission
6 chose to take up waiting for the FCC until today of an
7 additional five or six weeks, if you want to stipulate
8 that there is any just cause to extend that deadline
9 now, that might tell us a different date from which to
10 start.

11 I don't know if you want to talk to
12 co-counsel before, but we might go off the record to
13 allow you to do that. That way, we are all on the same
14 page where we start counting backwards to fit
15 everything in. The statutory deadline of ten months
16 talks about a Commission final order, so I think we
17 have to give time not only for a hearing, posthearing
18 briefing, and initial order, and then possibly appeals
19 up, it's a tight deadline to meet, so we will take that
20 all into consideration as we build a schedule.

21 MR. ROMANO: Thank you, Your Honor. If I
22 could confer with co-counsel off the record, I would
23 appreciate it.

24 JUDGE TOREM: That would be appropriate. Is
25 there anything else we need to do, questions about the

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1 ruling on the motion to dismiss that we want to take up
2 right now in this session before we come back? Maybe
3 we can talk about a protective order or the discovery
4 issues and whether those are appropriate in this case?

5 MR. ROMANO: If we could have the standard
6 protective order issued in this case, we could commence
7 discovery. I think that would be appropriate.

8 JUDGE TOREM: The standard discovery rules as
9 set up by Commission rules?

10 MR. ROMANO: Yes, Your Honor.

11 JUDGE TOREM: Any of the other parties wish
12 to disagree or concur with what Mr. Romano is
13 suggesting as to the protective order and to the
14 discovery timing that's set out in the rules?

15 MS. FRIESEN: AT&T concurs.

16 JUDGE TOREM: Thank you, Ms. Friesen.
17 Hearing no others -- I'm seeing nods of heads -- that
18 we will issue a protective order, just the standard
19 language in this case, as well as invoke the
20 Commission's discovery rules.

21 Doesn't look like there is anybody else in
22 the room. Anybody else on the bridge line have any
23 other items before another brief recess to talk off the
24 record and let counsel confer about when we set dates?
25 Seeing none and hearing none, then we are off the

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1 record again.

2 (Discussion off the record.)

3 JUDGE TOREM: We are now back on the record.

4 It's now a little after four o'clock in the afternoon.

5 The parties have been working on a schedule, and Judge

6 Rendahl and I have been back in the room working with

7 them to see that the dates fit into the Commission's

8 calendar and that the discovery rules can be adjusted

9 where necessary to make these dates a reality.

10 Let me state right off the bat that none of

11 these dates are going to get us anywhere close to the

12 Commission's ten-month deadline by statute, so I take

13 it that there is a general recognition that there is

14 cause to go beyond mid May for a final order, and that

15 will become readily apparent as I list the dates. All

16 of these dates are going to be on the assumption that

17 Embarq wants to do a comprehensive cost study and

18 submit that with their testimony next spring.

19 If Embarq finds out that that's not the case

20 and this procedural schedule can be shortened

21 dramatically, they will file a letter by December 12th

22 and confirm for the Commission that yes, they are going

23 to need to do a full and comprehensive cost study. In

24 the letter if they state otherwise, they will indicate

25 when they will be able to get with the other parties

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1 and propose a new procedural schedule for the
2 Commission to adopt, and I've invited them if that's
3 the case to be in touch with me as a group so we can
4 have some procedural exparte communications and that
5 whatever you are proposing, particularly for the
6 hearing dates, will fit the Commission's calendar.

7 So after December 12th, we will know whether
8 these following dates are relative. The first is
9 Wednesday, February the 18th, 2009. That will be the
10 deadline for Verizon and intervenor AT&T to file their
11 direct testimony. Embarq's testimony and response as
12 well as its comprehensive cost study will come in on
13 Friday, April 17th, 2009. The rebuttal testimony from
14 Verizon and AT&T will be due on Friday, June the 5th,
15 and on that same date will be the first opportunity for
16 Commission staff to weigh in with its comments, whether
17 they be characterized as response or just their view on
18 the case.

19 Embarq will be given a chance for a
20 surrebuttal, and that will come on June 26th, and
21 Verizon's sursurrebuttal, or whatever the last word is
22 officially called, will come in on July the 15th. Now,
23 that same July the 15th date may include filings from
24 AT&T and from Commission staff if they feel that's
25 necessary, but that will only occur if they file a

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1 motion as well akin to our procedure for replies to
2 briefs asking permission and stating the reasons why
3 they think it's necessary.

4 So those will be due again on that same date
5 of July 15th but will be introduced via motion asking
6 permission for the Commission to entertain those, and
7 that's because we recognize this is Verizon's case and
8 the plaintiff does get the last word, and if AT&T and
9 Staff want to chime in, they should tell us why and
10 tell us that Verizon concurs that their views can only
11 be expressed by them or whatever language for us to
12 accept their filing.

13 This period of time from June 5th forward is
14 going to have some reduced and accelerated discovery
15 times. The note in the prehearing conference order
16 from today will be annotated to indicate that on June
17 5th, we will shorten response times from the normal
18 rule of ten business days down to five business days,
19 and that's why those surrebuttal and final word periods
20 are shortened and more condensed than the rest of the
21 schedule.

22 The hearing will be held on Wednesday,
23 Thursday, and Friday, August 5th, 6th, and 7th, here in
24 Olympia, and Judge Rendahl and I will confer once we
25 look at other schedules and determine an appropriate

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1 date for the cross-exam exhibits to come in. That will
2 probably be the Monday before the hearing, August 3rd,
3 or perhaps as early as the prior Friday, July 31st.

4 After giving time for the transcript to be
5 created, we have set September 4th as a deadline for
6 briefs. The preference of the parties, as I understand
7 it, is that there will be just one round of briefs
8 filed simultaneously and that if the parties upon
9 seeing the briefs believe that something is not clear
10 or if there is a need for response briefs to come in,
11 motions will be filed no later than September the 11th.

12 Our hope is that a referral from the Bench is
13 that such a motion will be an agreed motion by both
14 sides, that there are things that having now read the
15 other side's brief could have been better stated and
16 it's worth another round of briefs, which will cause a
17 delay in what we try to get out of our initial order in
18 this case in 60 days.

19 So we are looking right now at early November
20 2009 for an initial order to come out in the case, and
21 I'm being specific. That is an initial order in the
22 current posture. If the parties wish to file a motion
23 somewhere in the appropriate time frame, and I don't
24 know if that would be getting closer to the rebuttal or
25 surrebuttal testimonies, but your experience in that is

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1 probably greater than mine as to when to seek
2 permission -- that we sit on this case for a final
3 Commission order to come out sooner rather than later.
4 That is something you will have to factor in the timing
5 of, but right now, we would be looking at an initial
6 order sometime in October or early November at the
7 latest and then having the opportunity for petitions
8 for review by the commissioners that would extend this
9 out for another period of time, whatever that is.
10 Parties, did I get all that correct from what you can
11 see?

12 MR. ROMANO: Yes, Your Honor.

13 MS. FRIESEN: Yes, Your Honor.

14 MR. HENDRICKS: Yes, Your Honor.

15 JUDGE TOREM: Any other business we need to
16 take up today? Hearing none, seeing none, it's about
17 ten minutes after four.

18 MS. BENEDEK: I think you had mentioned
19 earlier something about a standard protective order?

20 JUDGE TOREM: Yes. We earlier indicated
21 before we took our break that there will be a standard
22 protective order issued, and that I will probably issue
23 that simultaneously with this prehearing conference
24 order, and that was also the part where we discussed
25 the idea of invoking the Commission's discovery rules,

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1 and I think it's going to be in agreement that even if
2 this prehearing conference order doesn't come out until
3 tomorrow or early next week, the discovery rules are
4 invoked now and can begin right away.

5 MR. HENDRICKS: I've forgotten. Does the
6 standard protective order include provisions for highly
7 confidential and confidential?

8 JUDGE RENDAHL: No, it does not. Do you need
9 the highly confidential provisions?

10 MR. HENDRICKS: Sue?

11 JUDGE RENDAHL: You can confer with
12 Commission staff and they can provide you a copy of our
13 standard and our standard highly confidential, which I
14 think we have one of each, and then let us know as
15 quickly as you can which form of the protective order
16 you need. Verizon, would be opposed to a highly
17 confidential protective order?

18 MR. ROMANO: No.

19 JUDGE RENDAHL: Why don't the parties decide
20 which version they need and let us know and that is the
21 version we will enter.

22 MR. HENDRICKS: We can get back to you before
23 the end of the week if not tomorrow.

24 JUDGE RENDAHL: For the record, do you have
25 our e-mails, the ALJ e-mails?

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1 JUDGE TOREM: I think they were published
2 with the last prehearing conference order.

3 MS. BENEDEK: Is service by e-mail
4 acceptable?

5 JUDGE RENDAHL: No. Official service is done
6 by mail or in-person delivery to the Commission, and we
7 officially serve our orders by mail, but we get e-mail
8 addresses so we can send you all a courtesy copy as
9 soon as it's done. The official service is done by
10 mail.

11 MS. BENEDEK: Can we stipulate among the
12 parties to service by e-mail?

13 JUDGE RENDAHL: Yes, you may, as long as you
14 let us know in a letter that's what you are doing, and
15 I can't remember which section of the rule that's in,
16 but it's in one section of our procedural rules.

17 JUDGE TOREM: I do believe in the last
18 prehearing conference order the closing paragraphs
19 referenced a number of copies that needed to be filed.
20 I believe it was an original plus ten in this case, and
21 that we had adopted the electronic filing and then put
22 in electronic filing on the due date, and then you
23 could serve or get the hard copies in the next business
24 day. Mr. Romano, you appear to have it in front of
25 you.

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1 JUDGE RENDAHL: I believe our new rule is
2 automatic, so you may submit it electronically on the
3 due date that we establish, and then on the following
4 business day submit the appropriate number of copies in
5 the official filed version.

6 MR. ROMANO: Your Honor, that is consistent
7 with what's in the prehearing conference order.

8 JUDGE RENDAHL: If we find out we need fewer
9 than ten copies, we will let you know.

10 JUDGE TOREM: Our apologies to the trees
11 involved, but I think we did try to cut it down from
12 the original plus 12 last time, and we still have some
13 hold-ons that can't get below a certain number. Any
14 other business to take up today?

15 MR. ROMANO: No, Your Honor.

16 MR. HENDRICKS: No.

17 JUDGE TOREM: Then we really are adjourned.

18 (Prehearing adjourned at 4:13 p.m.)

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