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JUDGE HAENLE: The hearing will come to order. The purpose of the hearing today is to take argument on respondent's motion to dismiss this complaint. This oral argument is taking place on February 10, 1993 before the Commission. I will note that the date of this oral argument was set on the record at the end of the hearing on February 2, 1993. In the way of appearances, if you just want to give your name and your client's name. Mr. Harlow.

MR. HARLOW: Thank you, Brooks Harlow, representing the complainants Northwest Payphone Association and others.

JUDGE HAENLE: Mr. Shaw.

MR. SHAW: Edward Shaw representing US West Communications.

JUDGE HAENLE: Ms. Brown.

MS. BROWN: Sally Brown, assistant attorney general for Commission staff.

JUDGE HAENLE: Thank you. In connection with the schedule we set at the end of the hearing last week, you all submitted written materials, a written motion, written responses. I believe the

25 Commission has read those written materials and it

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1 will not be necessary for you to repeat what's in
2 those written materials, and then we indicated we
3 would take Mr. Shaw's -- any brief response Mr. Shaw
4 might have. In connection with that, Mr. Shaw has
5 distributed some materials which you will find on your
6 tables.

7 MR. HARLOW: Judge, I think there's a
8 preliminary we need to address first.

9 JUDGE HAENLE: Go ahead.

10 MR. HARLOW: Since it's not a primary basis
11 of our answer, but attached to the answer is the
12 response to bench request No. 1 which was requested by
13 the bench before the motion was made and the
14 complainants rested and so I think it would be
15 appropriate to mark that and have it admitted into the
16 record officially before we take the argument.

17 JUDGE HAENLE: The next number in order is
18 23, I believe. I need one copy.

19 (Marked Exhibit No. 23.)

20 MR. HARLOW: The parties have a copy
21 attached to the answer.

22 JUDGE HAENLE: We do have all the parties
23 here for this motion. I hadn't written down on my
24 list of things to do that today but I don't see any

25 reason not to. I believe everyone has received it.

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1 Have you any objection to the entry of this response
2 to bench request?

3 MR. SHAW: No.

4 JUDGE HAENLE: Any objection, Ms. Brown?

5 MS. BROWN: No.

6 JUDGE HAENLE: I will enter then the
7 response to bench request No. 1 as Exhibit 23.

8 (Admitted Exhibit No. 23.)

9 JUDGE HAENLE: Anything else of a
10 preliminary nature?

11 MS. BROWN: Not from the complainants.

12 JUDGE HAENLE: Commissioners, do you have
13 any questions of Mr. Shaw regarding his motion?

14 CHAIRMAN NELSON: No.

15 COMMISSIONER CASAD: No.

16 COMMISSIONER PARDINI: No.

17 JUDGE HAENLE: Any questions of Mr. Harlow
18 regarding his response to the motion?

19 CHAIRMAN NELSON: No.

20 COMMISSIONER PARDINI: No.

21 JUDGE HAENLE: Questions of Ms. Brown
22 regarding her response?

23 CHAIRMAN NELSON: Likewise.

24 COMMISSIONER CASAD: No.

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COMMISSIONER PARDINI: No.

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1 JUDGE HAENLE: I guess that brings us then
2 to any brief response you might have, Mr. Shaw.

3 MR. SHAW: Thank you, your Honor. I have,
4 as you indicated, distributed three items. The first
5 item is simply a compilation of the Commission rules
6 and statutes that have been cited by the parties and
7 just for the convenience of the bench when reference
8 is made to those in argument today, the other two
9 items are two cases, Herrett Trucking versus the
10 Commission's predecessor Commission and the Port of
11 Seattle versus the Commission all going to the
12 applicability of RCW 80.36.135, which has been raised
13 both by staff counsel and Mr. Harlow.

14 So with that I would just address my
15 remarks to rebutting issues raised primarily in the
16 memorandum in opposition of Harlow and the first issue
17 is timeliness, and as I indicated before this motion
18 is to the jurisdiction of the Commission. It's not
19 addressed to the discretion of the Commission. It's
20 very narrowly drawn that the Commission simply does
21 not have the jurisdiction to entertain this complaint.
22 On that basis timeliness does not apply. The
23 Commission either has jurisdiction or it doesn't, and
24 the reason for bringing it at this stage is the belief

25 of the company that the complainants might cure the

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1 lack of jurisdiction in the Commission by offering the
2 correct evidence or proving jurisdiction. They failed
3 to do that.

4 The cite to WAC 480-09-425 to the effect
5 that any motion directed towards a pleading must be
6 submitted in writing and et cetera, number one in the
7 packet is not addressed. We submit to a motion to
8 dismiss for lack of jurisdiction. We are not
9 directing this motion to any pleading. It is directed
10 towards the legal fact of the failure to establish
11 jurisdiction in this Commission by the complainants.

12 The next and more substantive argument is
13 that this complainant relies by these complainants
14 under all three sections of RCW 80.04.110 and/or
15 80.36.135 and that's where I wish to address the
16 remainder of my remarks. 110, which is page 5 in the
17 packet, is of course the complaint statute of the
18 Commission that it is familiar with and we agree with
19 the complainants that it has three relevant sections.

20 The first argument is that this complaint
21 is proper under paragraph one, that this complaint is
22 a complaint by persons or corporations alleging that
23 US West as a public service corporation is in
24 violation of law or orders or rules of this

25 Commission. Clearly, there has been no allegation

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1 that the company has violated any order or rule of the
2 Commission. To the contrary, the evidence is that the
3 company is in conformance with the applicable
4 Commission rules. So the last issue is whether this
5 complaint can stand because it's brought alleging a
6 violation of law.

7 Now, as the complainants discuss at pages
8 7, 8 and 9 of their memorandum they state that the
9 problem identified in the complaint is US West's
10 alleged price squeeze and the cure in part is to
11 change US West rates. And then they go on to quote
12 extensively from their witness' testimony to the
13 effect of that is the core issue in this complaint and
14 that issue is of course that the company's revenues
15 properly attributable do not cover the costs of the
16 company's services that should be properly
17 attributable and the request for relief is on page 11
18 of their memorandum, the quote from Dr. Cornell that
19 we be ordered to increase our rates by placing a
20 charge on our pay telephone service when a customer
21 uses the pay telephone but does not put coins in the
22 box to institute a so-called box charge or a charge
23 for the use of the pay phone when the customer is
24 charging the call to a credit card or another number.

25 That clearly is a complaint that this Commission

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1 should order this company to raise its rates.

2 In the alternative, they want a commission
3 paid to them, and that raises a very interesting
4 issue. A commission under RCW 130 -- excuse me
5 80.36.130, page 8 of the packet to these complainants
6 to the extent they are not public service companies
7 but are just customers of the company would be on the
8 face an unlawful rebate. The suggestion seems to be
9 that this Commission should order this company, US
10 West, to pay these complainants commissions when their
11 pay phones are used to generate traffic that's routed
12 to US West, particularly the operator services
13 traffic. That is just simply beyond the Commission's
14 jurisdiction unless they are public service companies
15 and then they control their own destiny. If they in
16 fact are public service companies in the nature of
17 miniature local exchange companies providing local and
18 toll service, then like any other local exchange
19 company they could charge access charges to US West if
20 they delivered traffic to US West, but the idea that
21 US West pays commissions to private parties, whether
22 or not they're a competitor of US West, is beyond the
23 jurisdiction of this commission clearly. Could this
24 Commission order US West to pay commissions to Boeing

25 just because Boeing generates and sends a lot of

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1 traffic to US West? Clearly not. Could this
2 Commission order US West to pay a commission to each
3 residential subscriber on the basis that US West in
4 effect uses the subscriber's CPE facilities in order
5 to deliver traffic to the phone company. Clearly not.
6 Key to that issue is the complainants being public
7 service companies like GTE in order to claim that we
8 have to pay them funds for the use of their
9 facilities.

10 The second part of the quote at page 11 is
11 nonsensical in the sense that it talks about such a
12 commission being made available to all payphone
13 providers who choose to use US West payphones.
14 Presumably what that testimony meant to say is
15 provided to all payphone providers who choose to use
16 US West operator services, and that makes clear that
17 there's no compulsion for these private parties to use
18 US West operator services.

19 The complaint on the text of the
20 complainant's own memorandum in opposition has the
21 core issue the level of US West's rates and it does
22 not deal at all with alleging that US West is in
23 violation of law. It talks about discrimination,
24 provision of operator services, operator services are

25 available to all. That's the commission issue.

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1 Discrimination in the compensation of payphone
2 facilities. That's the issue of forcing us to raise
3 our rates or pay them commissions. Billing and
4 collection charges are detariffed, are classified as
5 effectively competitive and therefore they are subject
6 pursuant to statute and specifically RCW 80.36.360,
7 they are subject only to the Consumer Protection Act,
8 RCW 19.86.170. They are not deemed to be regulated by
9 this Commission. That is page 15 of the packet.

10 The allegations that US West subsidizes its
11 payments to local site providers is simply the issue
12 of the level of our rates and then the last general
13 allegation of discriminatory and unfair marketing
14 installation practices all goes to anti-competitive
15 behavior, part 3 of 110. None of the statutes cited
16 by the memorandum deal with the complaint. The
17 complaint is against the rates and can only be
18 reasonably construed to be against the rates of the
19 company. Therefore, I submit it cannot be brought
20 subject to section 1 of 110 and neither can it be
21 brought pursuant to section 2. It's alleged that the
22 association, the payphone association, may be made up
23 of more than 25 entities, including US West and the
24 city of Tacoma, and GTE, and United. It would be

25 absurd on its face to suggest that US West is a

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1 nonvoting member of the Northwest payphone
2 association, thus bringing a complaint against itself.
3 This Commission cannot simply meet the 25 ratepayer
4 rule by counting up members of the named complainant,
5 the Northwest Payphone Association. That would be
6 equivalent to five ratepayers trying to bring a
7 complaint and alleging that they've got five members
8 in each of their family and therefore -- that's
9 clearly not the intent of the statute. We have four
10 named complainants. There is no proof on this record
11 that any of the members of the Northwest Payphone
12 Association are ratepayers of US West. At the most we
13 have four named members. It cannot fall under the
14 second proviso.

15 US West has always felt that this
16 complaint, if it applies at all, falls under the third
17 proviso which clearly allows one public service
18 company to complain before this Commission against
19 another public service company of anti-competitive
20 acts or behaviors or rates or practices by the
21 respondent. That is the way that we thought this
22 complaint was always brought and the complainants
23 failed to prove, and in fact proved the opposite, that
24 their members are in fact public service companies

25 or the named complainants. The one issue is Paytel

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1 who is a registered telecommunications company.

2 Look at the Commission's order authorizing
3 registration attached to the memorandum, makes it
4 clear that the company is registered to provide
5 operator services through their store in forward
6 technology. At the most what that suggest is that
7 this complaint has to be dismissed and if they wish
8 they can bring a complaint in the name of Paytel, I
9 think more correctly. Paytel is not a public service
10 company for the issues raised in this complaint. US
11 West provides CPE on a regulated business. AT&T is a
12 registered telecommunications company before this
13 Commission. Would this Commission entertain under RCW
14 80.04.110, the second proviso, a complaint by AT&T
15 against US West dealing with CPE when clearly AT&T is
16 not a public service company for the purposes of CPE.

17 I think that kind of illustration points
18 out the fact that Paytel is a registered
19 telecommunications company for operator services.
20 Does not make it a registered company for the subject
21 of this complaint which is simply payphone services.
22 There is no allegation about the company's operator
23 services other than we should pay commissions to these
24 unregulated providers.

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The company, myself personally, has always

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1 felt that there is no way to realistically conclude
2 that these payphone companies are not public service
3 companies, but the fact of the matter is that they are
4 not registered even though RCW 80.36.350 requires all
5 public service companies to register. That's the best
6 evidence apparently that they are not. The Commission
7 has apparently not taken steps to consider them public
8 service companies on the basis that apparently they do
9 not believe they provide a telecommunications service.
10 That is the state of the case and these complainants
11 cannot be public service companies, obviously three of
12 them are not at least and have to be dismissed as
13 complainants in this case.

14 Lastly, it's argued that 135 suggests that
15 any person can bring any kind of a complaint at all
16 against a regulated company if that regulated company
17 is currently regulated under an alternative form of
18 regulation. I think a reasonable reading of RCW
19 80.36.135, page 9 of the packet taken in context shows
20 that the quoted language of the respondent's does not
21 repeal the entirety of RCW 80.04.110 as to US West or
22 a company like US West. Read in context, clearly, the
23 thrust of 135 is that the Commission can rescind an
24 alternative form of regulation if it finds that it's

25 no longer serving the purposes of the statute and an

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1 individual ratepayer or other person can file a
2 complaint alleging that the AFOR is no longer
3 providing a fair, just and reasonable rates. The two
4 cases that I've handed up, Herrett Trucking and Port
5 of Seattle are cited for the proposition as set forth
6 in those cases that repeals of statutes by implication
7 are simply not favored and that the two statutes are
8 to be read in a consistent fashion. When 135 was
9 adopted that was the clear concern that an AFOR that
10 might last for five or six years would, over time,
11 perhaps in changed circumstances produce rates that
12 resulted in unfair and unjust and unreasonable prices
13 and that either the Commission or a ratepayer could
14 bring a complaint against that AFOR and argue that it
15 should be terminated or changed.

16 110 deals very specifically with the issue
17 here, which is addressed by the Kohl case that when
18 one company comes before this Commission to allege
19 that the practices and rates of another company result
20 in unfair competition that company has to be a public
21 service company. This Commission simply is not a
22 court of equity or an anti-trust court that could deal
23 with the complaints of these complainants.

24 I would like to make one last reference to

25 a statute and that's 80.36.186 which reinforces my

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1 reading of these statutes in harmony and that statute
2 was again part of the legislative act that adopted 135
3 and it made it clear, if you would read the whole
4 thing at page 13 of the packet, that legislature
5 specifically prohibits discrimination and unfair
6 practices going to harm competition by a
7 telecommunications against another telecommunications
8 company and augment and reinforces the provisions of
9 04.110 that this Commission has indeed primary
10 jurisdiction over allegations of regulated companies
11 against each other about unfair competition. It has
12 no jurisdiction whatsoever pursuant to Kohl about
13 allegations of unregulated companies against regulated
14 companies.

15 Lastly it's in the memorandum, but I think
16 it's very important that what this complaint is really
17 about is about changing the Commission's existing
18 rules and regulations relating to payphones. And page
19 3 of the packet, I've set out the rule WAC 480.120.138
20 dealing with payphones and it's clear that payphones
21 in subsection 12 can only be connected to public
22 access lines in accordance with an approved tariff and
23 that US West is not subject to that requirement and
24 that in section 13 that no trunking is allowed which

25 is one of the allegations in this complaint and, more

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1 importantly, I think, in the underlying language over
2 in the second column, sub 18, that it is incumbent
3 under the rules of this Commission for US West to
4 enforce its approved tariff against these complainants
5 and to take action to enforce all the requirements of
6 this all rule.

7 Now, it's an improper situation for the
8 Commission to adopt rules that require the company to
9 do something under its pervasive regulation and then
10 entertain a complaint by unregulated competitors,
11 essentially complaining that US West is following
12 the Commission's rules.

13 As I pointed out in my memorandum in
14 support of motion that does not mean that the
15 Commission cannot address all of these issues, and
16 there are other ways to go about it, but this
17 complaint as formulated by the complainants, requires
18 a determination that the Commission has no
19 jurisdiction over it. Thank you very much.

20 JUDGE HAENLE: Commissioners, have you
21 questions of Mr. Shaw?

22 CHAIRMAN NELSON: No.

23 COMMISSIONER CASAD: I have none.

24 COMMISSIONER PARDINI: No.

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JUDGE HAENLE: Anything to be covered that

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1 you folks haven't already covered in your memorandum?

2 MR. HARLOW: A lot of new stuff has been
3 thrown in. I will try to make it brief.

4 JUDGE HAENLE: Very brief.

5 MR. HARLOW: He made at least one correct
6 statement, he said this should be a narrow issue. It
7 is a narrow jurisdictional question and Mr. Shaw's
8 arguments on the merits of which there were several I
9 will ignore for that reason.

10 First of all, let me try and address as
11 best I can the cases that were submitted by
12 Mr. Shaw, and I was aware of them just a few minutes
13 before you were. The best one to look at perhaps is
14 the Port versus Washington Utilities and
15 Transportation Commission which is a case that
16 Mr. MacIver of my office argued a few years before I
17 started practicing law so I do have some familiarity
18 with it, and basically what was going on there was the
19 Port of Seattle decided it wanted to try and get a
20 better consession agreement from its airporter bus
21 service which at that time was operated by Western
22 Tours. And so they attempted to assert that their
23 jurisdiction repealed or superseded the jurisdiction
24 of the Utilities and Transportation Commission.

1 Commission didn't think so. What was involved there
2 was title 81 of RCW as well as title 14, completely
3 unrelated statutes, and it was clearly a repeal
4 argument. In this situation, our citation to the
5 alternative form of regulation or AFOR statute is not
6 a repeal. I don't see how it can be read that way and
7 is certainly not an argument. What it instead does is
8 add additional bases for jurisdiction.

9 The intent of the legislature is quite
10 clear on its face with regard to that statute, and
11 that is that since the Commission was in essence tying
12 its hand to bring its own complaint the legislature
13 wanted to make sure that the public was protected and
14 therefore added additional basis for jurisdiction as
15 to companies under AFOR. It's not an attempt at
16 repeal.

17 I don't want to talk at length about the 25
18 person test. This is not the main basis for our claim
19 of jurisdiction here. We do have a telecommunications
20 company that was a complainant, it was an intentional
21 strategic decision by the complainant to make sure
22 that we had several grounds for jurisdiction. To try
23 to distinguish Paytel's operations as AOS vis-a-vis
24 payphone company is impossible, the functions being

25 provided out of the same box. It's on that same

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1 circuit board that you saw on the first day of the
2 hearing. It's one and the same service and the
3 company as a whole both AOS side and payphone provider
4 side is being affected.

5 I think that what's happened here. First
6 of all, US West I know has been back pedaling. I
7 think US West in making its motion at the close of the
8 hearing has overlooked some of the important facts. I
9 point those out in the brief, I won't repeat them,
10 overlooked provisions of the law, most particularly
11 the AFOR statute. I had hoped that in light of these
12 oversights being pointed out in our brief that US West
13 would rethink its motion and withdraw it. They
14 haven't. I credit Mr. Shaw for his artful attempt to
15 distinguish the AFOR statute, but I think it's
16 basically at this point a desperate motion to try to
17 avoid the Commission getting to the issues of this
18 case that are very important to address for the public
19 interest in general as well as for the benefit of
20 competition and my clients. Thank you.

21 JUDGE HAENLE: Questions, Commissioners?

22 Ms. Brown, anything else?

23 Anything more? We will recess, I would
24 guess, five minutes. We will recess briefly to

25 discuss this and we will be back as soon as we can.

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1 (Recess.)

2 JUDGE HAENLE: Let's be back on the record.

3 During the time we were off the record the Commission
4 considered the written documents and the oral comments
5 made this afternoon. The Commission has determined
6 that the motion to dismiss should be denied. The
7 Commission feels that this complaint is authorized
8 under RCW 80.04.110 considering that US West has
9 agreed that Paytel Northwest is a registered
10 telecommunications company which makes it a public
11 service company. The Commission rejects the
12 distinction that US West is attempting to make that as
13 a registered AOS company it would only be able to
14 complain on AOS matters.

15 Secondly, the Commission feels that this
16 complaint -- that the Commission has jurisdiction to
17 consider this complaint under the general terms of
18 80.04.110, that it is not just against rates but it is
19 against other terms and conditions as well which would
20 authorize any person to bring such a complaint.

21 Third, the Commission feels it also has
22 jurisdiction under RCW 0.36.135 that a person can
23 file a a complaint against a company under an
24 alternative form of regulation. The Commission has

25 not reached the issue of whether other Northwest

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1 Payphone Association members are telecommunications
2 companies which must be registered. It doesn't feel
3 it is necessary to reach that issue to rule on this
4 motion. Have I covered everything, Commissioners?

5 CHAIRMAN NELSON: Yes.

6 JUDGE HAENLE: So the motion has been
7 denied and we will continue with this case under the
8 schedule that has already been announced.

9 Anything else need to be discussed?

10 Then the hearing will be adjourned and we
11 will be on with the next step.

12 (Hearing adjourned at 2:15 p.m.)

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