

00001

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of)
United Telephone Company)
4 of the Northwest's, d/b/a) DOCKET NO. UT-001713
Sprint, Petition for) Volume I
5 Declaratory Order.) Pages 1-32

6

7 A prehearing conference in the above matter
8 was held on December 18, 2000, at 9:46 a.m., at 1300
9 South Evergreen Park Drive Southwest, Olympia,
10 Washington, before Administrative Law Judge TRE
11 HENDRICKS.

12 The parties were present as follows:

13 SPRINT, by DAVID F. WHITE (via bridge),
Attorney at Law, Tonkon Torp, 888 Southwest Fifth
14 Avenue, Suite 1600, Portland, Oregon 97204.

15 NETWORK MANAGEMENT GROUP, INC., and
MR. BATES, by DANIEL C. LORENZ (via bridge), Attorney
16 at Law, 521 Southwest Clay, Portland, Oregon 97201.

17 PUBLIC COUNSEL, by ROBERT W. CROMWELL, JR.,
Assistant Attorney General, 900 Fourth Avenue, Suite
18 2000, Seattle, Washington 98164.

19 Also Present: Mary Taylor - Consumer Program
Specialist at the WUTC.

20

21

22

23

Kathryn T. Wilson, CCR

24

Court Reporter

25

00002

1

P R O C E E D I N G S

2

JUDGE HENDRICKS: This is a prehearing conference in Docket No. UT-001713, a petition by United Telephone Company of the Northwest, d/b/a Sprint, for a petition for declaratory order. Today is December 18th, 2000, and we are convened in a hearing room at the Commission's offices in Olympia, Washington, pursuant to notice to all parties. My name is Tre Hendricks, and I'm the presiding administrative law judge in this proceeding. I'd like to start this morning by taking appearances from all the parties, and we can begin with Sprint.

13

14

MR. WHITE: This is David White representing Sprint.

15

16

MR. LORENZ: This is Dan Lorenz representing Mr. Bates and Network Management Group, Inc.

17

18

MR. CROMWELL: Robert Cromwell on behalf of Public Counsel.

19

20

JUDGE HENDRICKS: Could you please give your addresses?

21

22

23

24

MR. WHITE: My address is at the law firm of Tonkon Torp, and our address is 1600 Pioneer Tower. That's 888 Southwest Fifth Avenue, Portland, Oregon, 97204.

25

MR. LORENZ: Dan Lorenz on behalf of

00003

1 Mr. Bates and Network Management Group. The address is
2 521 Southwest Clay, Portland, Oregon, 97201.

3 MR. CROMWELL: Robert Cromwell, assistant
4 attorney general for the State of Washington. My
5 mailing address is 900 Fourth Avenue, Suite 2000,
6 Mailstop TB-14, Seattle, Washington, 98164-1012. My
7 direct line is area code (206) 464-6595. My fax number
8 is area code (206) 389-2058. My e-mail address is
9 robertc1@atg.wa.gov.

10 JUDGE HENDRICKS: Mr. Lorenz and Mr. White,
11 could you just state your phone number for the record?

12 MR. LORENZ: Area code (503) 222-1161.

13 MR. WHITE: My phone number is area code
14 (503) 802-2168.

15 JUDGE HENDRICKS: Thank you. As set out in
16 the December 4th, 2000, Notice of Receipt of Petition
17 for Declaratory Order and Notice of Prehearing
18 Conference, the purpose of this conference is to
19 formulate issues, discuss the need for further hearings
20 and to hear petitions for intervention. Are there
21 petitions for intervention today?

22 MR. LORENZ: Other than the participation of
23 Mr. Bates and the Network Management Group, I'm unaware
24 of any other parties who have asked for intervention in
25 this action.

00004

1 MR. WHITE: We are also unaware of any other
2 motions for intervention.

3 MR. CROMWELL: Public Counsel will be
4 participating in this case primarily for purposes of
5 monitoring and, as necessary, addressing those legal
6 issues that might arise.

7 JUDGE HENDRICKS: Thank you. What are the
8 facts giving rise to this dispute? Mr. White, if I
9 could begin with you.

10 MR. WHITE: Sure. Sprint offers data lines
11 and voice lines to Mr. Bates and various of the
12 businesses or business names that he does business
13 under. He offers Internet access services, and some of
14 the data lines we provide are call-in numbers that his
15 end-users can call in for access to the Internet
16 eventually.

17 Over the last two years, there have been a
18 number of controversies concerning the bills, including
19 claims by Mr. Bates that the PICC charges and the LNP
20 charges should not be applied to some of his data
21 accounts. In addition, there have been claims that
22 we've given preference to some of his competitors, in
23 particular, Gorge.net. Over the last two years, some
24 charges have accrued on his accounts, and we have
25 sought to have those late charges removed and have been

00005

1 unsuccessful in receiving payment for those accounts.
2 We filed an appropriate notice to terminate the account
3 in the fall of this year, and Mr. Bates then filed for
4 a temporary restraining order with the Circuit Court in
5 Klickitat County.

6 We have sought a declaratory order from the
7 WUTC clarifying that we, Sprint, have not provided any
8 undue preferences under RCW 80.36.170; that there have
9 not been any unlawful overcharges under RCW 80.04.230,
10 and that we have complied with the discontinuation of
11 services provisions under WAC 480-120-040.

12 JUDGE HENDRICKS: Thank you. Mr. Lorenz, do
13 you have anything to add to that?

14 MR. LORENZ: Yes, Your Honor. We agree that
15 there are issues relating to the PICC charges, the LNP
16 charges, and the preference with the competitor. There
17 are also issues raised relating to network access
18 charges. The services provided here are being provided
19 to an ISP, and there are some specific FCC regulations
20 and instructions as to what kinds of things can and
21 cannot be charged as part of the FCC's promotion and
22 encouragement of the development of the Internet, and
23 Sprint has not recognized any of those specific
24 regulations from the FCC as it relates to the supplying
25 of these services to an ISP.

00006

1 JUDGE HENDRICKS: Are there any other
2 comments?

3 MR. WHITE: That's all we have, Your Honor.

4 MR. LORENZ: That's all we have, Your Honor.

5 MR. CROMWELL: No comment on the procedural
6 background.

7 JUDGE HENDRICKS: Now I'd like to discuss
8 which issues are before the Commission, including the
9 authority of the Commission to enter a declaratory
10 order in spite of the preliminary injunction in the
11 Klickitat County Superior Court, as well as the
12 requirements of the Declaratory Order Statute, RCW
13 34.05.240, and I'd just like to open it up to, first we
14 can begin with Sprint and try to delineate some of
15 these issues that are raised here.

16 MR. WHITE: We believe all of the issues that
17 we have outlined are within the jurisdiction of the
18 WUTC and should be a part of this declaratory order
19 proceeding. In particular, the undue preference claim
20 under RCW 80.36.170 has a statutory primary
21 jurisdiction with the WUTC, so we believe the expertise
22 of the WUTC should be used in resolving that issue and
23 declaring that there is no undue preference under that
24 statute.

25 In addition, again due to the technical

00007

1 nature of these claims and this industry, we believe
2 that the overcharge claim, whether or not Sprint has
3 properly complied with the discontinuation of service
4 claims, have common law primary jurisdiction with the
5 WUTC, and we believe that there are actual
6 controversies here as we've outlined and that we
7 believe that we should be allowed to discontinue
8 service, and our inability to discontinue service is
9 affecting our business. So we believe that all of the
10 provisions of the declaratory order statute have been
11 complied with and would make an order here appropriate.

12 JUDGE HENDRICKS: If I could just ask you a
13 question. It's my understanding that a preliminary
14 injunction was entered by the Superior Court for
15 Klickitat County?

16 MR. WHITE: That's correct.

17 JUDGE HENDRICKS: Maybe you could just
18 discuss that for a minute and how that might affect
19 Commission jurisdiction and authority in this matter.

20 MR. LORENZ: Your Honor, I believe the
21 Superior Court judge who issued the preliminary
22 injunction recognized at least potentially concurrent
23 overlapping jurisdiction as to some of the issues.
24 It's our position that there are some issues that both
25 the WUTC and the Superior Court may have concurrent

00008

1 jurisdiction over. The Court, however, recognized that
2 there were some of the claims, particularly breach of
3 contract claims, that would not be within the
4 jurisdiction of the WUTC and that the Court would have
5 to have primary jurisdiction over in order to determine
6 the appropriate damages, assuming that plaintiff
7 prevails with respect to the claims in that case,
8 plaintiff being in that case being the respondent in
9 this action.

10 It's our position, Your Honor, that the WUTC,
11 like I indicated, may have concurrent jurisdiction to
12 address some of these issues. We are not satisfied
13 that the preference issue raised by counsel, 80.36.170,
14 is a matter that necessarily belongs within the
15 jurisdiction of the WUTC. As we've reviewed that
16 statute, it appears that that is really designed as a
17 class-base distinction from community to community,
18 services being provided differently on a generalized
19 basis so as to treat different portions of the state or
20 different portions of the community different.

21 We believe that the issues that are raised by
22 my clients relative to the preference question had to
23 do with providing a particular service to a competitor
24 on an essential basis rather than there being some sort
25 of distinction between offering one set of services in

00009

1 White Salmon and another set of services 20 miles up
2 the gorge. I think that ladder situation is the one
3 that was really intended to be covered by 80.36.170 and
4 not the situation we are addressing here where Sprint
5 is providing, so that you are aware of what the issue
6 is, that Sprint is providing PRI services to a
7 competitor at a time where they were then only allowing
8 DSF service for my client.

9 JUDGE HENDRICKS: Mr. White, I'll give you an
10 opportunity to respond to that, if you would.

11 MR. WHITE: We believe that it would be
12 helpful, nonetheless, to the Circuit Court in Klickitat
13 County to have that resolved; that, in fact, RCW
14 80.36.170 is not an issue, so we believe that predicate
15 would be useful to resolve. If Mr. Bates is willing to
16 stipulate to that, then we believe that would be
17 helpful to the resolution at the court case in
18 Klickitat County.

19 In addition, we don't believe that the
20 temporary restraining order in Klickitat County moots
21 any of these claims, in particular, the discontinuation
22 of service issues, in that the Court in Klickitat
23 County required Mr. Bates to post a bond in order for
24 the temporary restraining order to be entered. As far
25 as we know, there has been no bond posted, so it may

00010

1 well be the case that the restraining order that the
2 Court contemplated will not, in fact, be entered, or
3 if, in fact, after we proceed in that case the
4 restraining order is removed, then it would be relevant
5 whether or not we've complied and are able to
6 discontinue service. So we don't believe that the
7 proceedings in Klickitat County have made these
8 proceedings moot, and we believe that there is
9 jurisdiction.

10 JUDGE HENDRICKS: Mr. Lorenz?

11 MR. LORENZ: First with respect to the bond,
12 we discovered last week that although the bond had been
13 applied for shortly after the hearing in Klickitat
14 County, it apparently was not issued. There was some
15 additional paperwork issues. My office spoke with the
16 bonding company this morning to determine what was
17 necessary, and we expect that issue will be resolved
18 here in the next day or two.

19 JUDGE HENDRICKS: I would like to stick with
20 the issue of preference, and I heard discussion from
21 both Mr. White and Mr. Lorenz, and there does appear to
22 be some disagreement as to whether that's something
23 that the Commission has authority to decide in a
24 declaratory order, and so I'd like to put that on the
25 list of issues that are going to need additional

00011

1 discussion beyond what we do today. Do you both agree
2 to that?

3 MR. WHITE: Yes, we do, Your Honor.

4 MR. LORENZ: Yes, Your Honor, I agree.

5 JUDGE HENDRICKS: The other issue, Mr. White,
6 that you first mentioned when you opened was the
7 overcharge issue, and if you could just briefly discuss
8 that in regards to the preliminary injunction.

9 MR. WHITE: Yes, Your Honor. We believe that
10 a number of the claims that have been made by Mr. Bates
11 relating to the overcharge we've discussed, in
12 particular, the PICC charge, the LNP charge, and the
13 access charges, are charges that could be resolved and
14 would be appropriate to be resolved by the WUTC.
15 Again, in particular because of the technical nature of
16 the telecommunications industry, we believe it's
17 something that the WUTC has expertise in over and above
18 the expertise the Court may have. So we believe that
19 those claims would be appropriate for the WUTC to
20 address and to issue an order under the declaratory
21 order statute.

22 JUDGE HENDRICKS: Thank you. Mr. Lorenz?

23 MR. LORENZ: Yes, Your Honor, it is our
24 position that the WUTC does have concurrent
25 jurisdiction to address some of the overcharge issues.

00012

1 However, one of the primary bases, I believe, of the
2 Superior Court's issuance of a preliminary injunction
3 was the fact that the Court found that the WUTC could
4 not exercise jurisdiction over all of the claims raised
5 by my client relative to the overcharging by Sprint and
6 the damages which would be available to my client
7 should he prevail and that, as such, it's possible that
8 those issues that are justiciable before the WUTC in
9 theory could come out slightly in Sprint's favor, and
10 the remaining issues, which would not be considered by
11 the WUTC but are available under the Superior Court
12 jurisdiction would be more than adequate to offset any
13 claims that Sprint would have, and therefore, Sprint
14 would not be in a position to shut off Mr. Bates' phone
15 lines or data lines at this point in time. I think it
16 was that basis that the Court determined that if
17 needed, it was required to move forward and that the
18 relief that could be provided by the WUTC could only be
19 partial.

20 So the question then becomes, is it
21 appropriate given that, assuming that the Superior
22 Court is correct about its analysis in that regard,
23 whether the WUTC should exercise its jurisdiction to
24 the extent it hasn't recognized in that the Superior
25 Court also has concurrent jurisdiction and could move

00013

1 forward with respect to the same issues and more issues
2 than the WUTC has the authority to deal with.

3 JUDGE HENDRICKS: But as to the overcharges
4 themselves and their nature of their existence, it's
5 your position that the Commission does have the
6 authority to make a determination in that regard?

7 MR. LORENZ: I believe that the WUTC is given
8 jurisdiction. As I say, I believe it is concurrent
9 jurisdiction with the Superior Court. Given the fact
10 that the Superior Court is addressing all of the
11 issues, part of the question is, and there is a
12 different mechanism for doing that in the Superior
13 Court as opposed to the WUTC, should the WUTC be moving
14 forward or not, but I do agree that WUTC does have
15 jurisdiction to evaluate overcharges.

16 JUDGE HENDRICKS: Thank you. As I understand
17 it, the parties disagree as to whether or not the
18 Commission may rule as to the discontinuation of
19 service by Sprint; is that right? And if so, if you
20 could state your positions beginning with Mr. White.

21 MR. WHITE: I believe our position is that
22 the discontinuation of service and compliance with the
23 discontinuation of service provisions is an issue
24 within the jurisdiction of the WUTC and that nothing in
25 the Klickitat County case has made that moot or removed

00014

1 that jurisdiction. Once the proceeding in Klickitat
2 County is resolved or if, in fact, a bond is not posted
3 so that there is a restraining order actually entered,
4 then, in fact, compliance with the discontinuation of
5 service will become an issue, so we believe that it
6 would be most efficient, while we have in front of the
7 WUTC this issue of undue preference and the issues
8 relating to overcharges, in particular, the LNP and
9 PICC and access charges that it would resolve as well
10 as to whether or not Sprint has complied with the
11 discontinuation of service provisions.

12 JUDGE HENDRICKS: So Sprint would like to
13 have a ruling that could go into effect based on the
14 eventual outcome in the Klickitat County Superior
15 Court; is that right?

16 MR. WHITE: That's right, Your Honor.

17 JUDGE HENDRICKS: Mr. Lorenz?

18 MR. LORENZ: The declaratory relief statute
19 requires the fact that there not be any other available
20 remedy or that this is going to be a meaningful order.
21 It would be our position that since there is a
22 preliminary injunction which has been issued by
23 Klickitat County -- although we do have this bond issue
24 floating out there -- that anything that the WUTC at
25 this point would do would be out current effect, and

00015

1 there, the WUTC is premature in acting at this time.
2 The issue is not ripe.

3 If the WUTC were to issue an order, it would
4 not have immediate impact until the conclusion of the
5 Klickitat case or the dissolution of that current
6 order. Based on that, it's our position that if the
7 WUTC wanted to stay these proceedings or hold them in
8 abeyance pending outcome of the Klickitat case, that
9 may make sense if it is not the usual procedure for
10 Sprint before disconnecting service to file a
11 declaratory action asking the WUTC for permission to do
12 that.

13 It's our position that the Sprint folks have
14 filed the WUTC action specifically to try to avoid the
15 Superior Court from exercising its jurisdiction. They
16 filed the action right before the hearing on the
17 preliminary injunction. The Court was made aware of
18 that. The argument was made that the WUTC instead of
19 the Superior Court had primary jurisdiction and that
20 that was a basis for the Superior Court not to be
21 issuing a preliminary injunction. The Court disagreed
22 with that analysis and ultimately ruled in favor of
23 respondents of this action as part of the Superior
24 Court action.

25 MR. WHITE: Your Honor, if I might respond.

00016

1 JUDGE HENDRICKS: Go ahead.

2 MR. WHITE: It is our position that it is
3 simply a matter of the more efficient use of this
4 proceeding, given that we do have outstanding issues
5 under the undue preference statute, and given that we
6 do have concurrent jurisdiction on at least some of the
7 overcharge issues that are before the Klickitat County
8 Court, and we believe that, in particular, those
9 overcharge issues are issues that the WUTC has
10 expertise over in terms of the PICC, LNP, and access
11 charges; that it simply makes sense to, while
12 addressing those issues that we address the
13 discontinuation of service versus a situation in which
14 we have a proceeding that addresses those two issues.
15 Then depending on the result of the Klickitat County
16 case, we may well have to come back again and then
17 resolve the discontinuation of service. We think it's
18 more efficient, more economical to address all three
19 areas at once.

20 JUDGE HENDRICKS: I think I understand that,
21 thank you. The other question I'd like you to address
22 is satisfaction of the requirements of the declaratory
23 order statute, and I'd like to try and be certain that
24 this is or is not an issue between the parties.
25 Mr. White, if you could speak to that.

00017

1 MR. WHITE: Certainly, Your Honor. We
2 believe certainly as we've outlined it there is
3 uncertainty involved that requires resolution, in
4 particular, the uncertainty relating to whether there
5 were overcharges and whether Sprint is owed certain
6 past-due amounts. We think there is controversy
7 regarding whether the undue preference statute is at
8 issue or has been violated, and we think there is
9 certainly outstanding controversy as we've outlined it
10 as to whether or not the discontinuation of service
11 provisions have been complied with.

12 So we think that this would not be merely an
13 advisory opinion at this point but would resolve those
14 outstanding controversies. We believe the
15 controversies adversely affect our client. In
16 particular, the outstanding late-due fees that are
17 currently pending certainly affect our client and our
18 ability or lack of ability at this point to recover
19 those, and we certainly think the uncertainty regarding
20 whether or not we can discontinue service adversely
21 affects Sprint's business in that not being able to
22 discontinue service affects our ability to collect
23 payment from our customers, and we believe that the
24 need to resolve those issues outweighs any adverse
25 effects, which we don't see any, frankly, as to

00018

1 resolution of any of those issues, and so we believe
2 that the various parts of 34.05.240 1(a) through (e)
3 have been complied with.

4 MR. LORENZ: It's our position, again, as you
5 can tell from the prior discussion that we disagree
6 with that analysis. Subsection B in particular talks
7 about a declaratory order not being appropriate where
8 it would be, I think the language is, merely an
9 advisory opinion. It is our position that if you issue
10 an order and nothing changes, what you've done is issue
11 an advisory opinion, and that's precisely what's
12 happening here.

13 Counsel's argument about there being some
14 amount in dispute and preventing Sprint from being able
15 to collect that is partially obviated by the Superior
16 Court having set a bond for the preliminary injunction
17 equal to the amount of the amount in controversy, which
18 is approximately 12 thousand dollars that is the
19 dispute between the parties is the amount that the
20 Court has set as the bond in that matter.

21 There is an issue, as I've referenced
22 earlier, about whether or not, in terms of prejudice,
23 the action of the WUTC, if it were to issue an opinion
24 or declaratory order, whether that would trump or
25 preempt the Superior Court from submitting that issue

00019

1 either on consideration of the issues as a trial to the
2 Court or because there are breach of contract issues
3 that are interrelated as a trial to a jury whether or
4 not the WUTC ruling in these matters or issuing an
5 advisory opinion or issuing a declaratory order would
6 preclude reconsideration or simply consideration of
7 those issues either by the Court or by a jury, and so
8 we do have issues, I think, in terms of whether or not
9 there are potential adverse impact that needs to be
10 considered beyond the inner workings of the WUTC
11 itself.

12 So our position is that under the provisions
13 of that statute, until and unless the preliminary
14 injunction is resolved by the Superior Court, there is
15 simply an advisory opinion being requested here, and
16 the WUTC should not be exercising jurisdiction at this
17 time.

18 JUDGE HENDRICKS: Thank you, Mr. Lorenz.
19 What I'd like to do is go off the record for a minute
20 and discuss some procedural questions, so we will do
21 that right now, and if you could just hold on for a
22 moment, please.

23 (Discussion off the record.)

24 JUDGE HENDRICKS: I do have one more question
25 of the parties. First of all, if the parties are

00020

1 familiar with the requirement for consent for a
2 declaratory order, and if so, do the parties consent in
3 this case?

4 MR. WHITE: Certainly we've requested for a
5 declaratory order, so certainly we consent.

6 JUDGE HENDRICKS: Yes. Mr. Lorenz?

7 MR. LORENZ: As you can tell from our
8 previous comments, it's our position that this matter
9 belongs in front of the Superior Court, and with that
10 in mind, to the extent we have the ability to consent
11 or not consent, it is not our position to consent at
12 this time.

13 JUDGE HENDRICKS: So you do not consent at
14 this time?

15 MR. LORENZ: No.

16 MR. CROMWELL: No objection.

17 JUDGE HENDRICKS: Is that, Mr. Lorenz, in
18 regards to all the issues before the Commission in this
19 request and petition?

20 MR. LORENZ: At this point, yes, that is our
21 position. It is our position that all of these issues
22 have been raised before the Superior Court, are
23 justiciable there, and rather than having two
24 proceedings going, partially dealing with the issues
25 here and completely dealing with the issues there, it's

00021

1 our position that the more complete forum is the way
2 that we would prefer to go.

3 JUDGE HENDRICKS: Mr. White, I'll give you an
4 opportunity to respond.

5 MR. WHITE: Our position, Your Honor, as we
6 stated before, is that there are certain issues in
7 front of the Court in Klickitat County that include
8 some of the issues that we've talked about, the undue
9 preference, overcharges relating to LNP, PICC, and
10 access charges. We believe that resolution of those
11 issues, which at least in the undue preference case is
12 a statutory primary jurisdiction, but we believe the
13 technical issues relating to some of the overcharge
14 issues are also very technical issues in the
15 telecommunications area that should be subject to the
16 primary jurisdiction of the WUTC.

17 So we believe that resolution of those issues
18 is not made moot by the Klickitat County case. That
19 case can continue on, and there are certain issues that
20 have been brought before the Court there in terms of
21 the breach of contract that would continue on even
22 after the WUTC rules on the issues that we've talked
23 about. So we believe that a declaratory order would be
24 appropriate here, helpful to the parties, and would
25 satisfy the declaratory order statute as well.

00022

1 If I may, Your Honor, could I inquire as to
2 the provision that requires mutual consent if there is
3 such a requirement?

4 JUDGE HENDRICKS: The citation is RCW
5 34.05.240, subsection 7.

6 MR. WHITE: I believe, Your Honor, that what
7 that section is contemplating is not necessarily a
8 party to the proceeding, a requirement that each party
9 consent to a declaratory order but rather an
10 indispensable third party who may be necessary but who
11 has not been brought into the proceeding not
12 consenting, but we've not looked in detail at this
13 issue, but that would be my reading of that section at
14 first blush. It would not necessarily require mutual
15 consent before a declaratory order was entered.

16 JUDGE HENDRICKS: Mr. Lorenz, do you have a
17 reply to that?

18 MR. LORENZ: As I have suggested earlier,
19 some of the significant issues that are going to be
20 addressed here are the question of whether or not
21 certain kinds of charges are appropriate to be included
22 in Sprint's tariff and can be lawfully charged to ISP's
23 under the FCC regulations, which preempt other types of
24 charges.

25 Certainly, if our position is correct that

00023

1 network access charges are not appropriate under any
2 circumstances under the FCC regulation, then every ISP
3 who is serviced by Sprint in the State of Washington is
4 going to be affected by this ruling. Similarly, the
5 PICC charges -- so that you understand, we have unit
6 directional PRI's. They are incoming PRI's. They are
7 not outgoing PRI's. They cannot physically issue a
8 call or issue a connection which is going to then go
9 outside of Sprint's local phone system to access the
10 interstate system, so that the whole FCC's enunciated
11 purpose for the PICC charges, to avoid dial-around
12 long-distance and that sort of thing, isn't even
13 possible with the equipment and services that are being
14 provided here.

15 The LNP issue is the same thing. So that you
16 understand what we are talking about, if my client has,
17 for instance, one access phone number with 48 trunks
18 going to it, he's given one phone number, which, in
19 theory, even if that one phone number is portable,
20 which in this case we believe it was not as to some of
21 these areas -- nonetheless, they are being charged LNP
22 charges as to all 48 trunks, even though there isn't
23 even a number that is portable. Those same kind of
24 issues relate to every ISP throughout the State of
25 Washington, and a determination by the WUTC as to those

00024

1 kinds of issues may certainly implicate disputes that
2 may exist between Sprint or other service providers
3 throughout the State of Washington --

4 JUDGE HENDRICKS: I'm wondering, Mr. Lorenz,
5 as to Mr. White's comments regarding the consent
6 provision in RCW 34.05.240 sub 7, if you could comment
7 on Mr. White's discussion of that particular section,
8 or are you prepared at this time to comment on that?

9 MR. LORENZ: I was attempting to comment. I
10 think there are two comments. Number one is whether or
11 not United Telephone by filing an action before the
12 WUTC when the customer has already initiated a Superior
13 Court complaint that addresses the same issue, whether
14 or not they can force my client to submit to the
15 jurisdiction of the WUTC when it has an action pending
16 in Superior Court. I don't think they have the power
17 to do that, and I think we are required to consent to
18 the WUTC acting. That's Step No. 1.

19 Step No. 2 is, I believe the statute also
20 contemplates that other parties who are affected by
21 this order are necessary to consent before the WUTC is
22 free to act. The discussion I was just going through
23 in terms of the impact of this order on other ISP's is
24 the second part of that analysis. Under the first part
25 we simply say, No, we've already chosen to go to the

00025

1 Superior Court. We do not consent to go to the WUTC.

2 The second part of the analysis is that if
3 our consent is not required under that first analysis,
4 we believe that there are, in fact, other parties who
5 are necessary parties who are not part of this action
6 at present and who would be adversely affected and
7 whose consent, therefore, is necessary before the WUTC
8 can and should proceed.

9 JUDGE HENDRICKS: Thank you.

10 MR. WHITE: Your Honor, if I might comment.

11 JUDGE HENDRICKS: Go ahead.

12 MR. WHITE: I think we've already addressed
13 the first point about subsection 7 really only applying
14 to quote, unquote, "indispensable third parties" and
15 not necessarily requiring that a party to the
16 declaratory judgment proceeding consent. On the second
17 point, we believe that it is absolutely clear under the
18 FCC orders that PICC and LNP and access charges that
19 have been applied in this case are appropriate.

20 So we believe that to the extent there is
21 prejudice as a result of this proceeding, it's in those
22 underlying FCC orders that establish that regime for
23 PICC charges, LNP, and access charges. There is
24 nothing about this proceeding that's going to expand
25 those beyond what's in the FCC docket there. We are

00026

1 just simply asking for the WUTC to enter an order
2 stating that those charges are appropriate for this
3 particular customer.

4 So we do not believe that this proceeding has
5 any wide-range effect other than any other case. It's
6 just simply applied to any other uncontroversial
7 regulatory rule. Certainly it's going to have an
8 effect on others, but it's not prejudicing others or
9 does not require other ISP's to participate in the
10 proceeding.

11 JUDGE HENDRICKS: Is there consensus between
12 Sprint and Mr. Bates that the Commission can rule as to
13 those FCC tariffs and orders that you are speaking
14 about?

15 MR. LORENZ: I'll tell you frankly that I've
16 been looking at those issues over the last week or two
17 trying to determine the answer to that specific
18 question, and I don't think that I'm prepared to give
19 you an absolute answer at this point. The more I look
20 at the FCC's materials specifically as it relates to
21 the Internet and the telecommunications industry's
22 impact on ISP's, it appears that the FCC has attempted
23 to carve that as being exclusively within their
24 jurisdiction and not within the jurisdiction of the
25 WUTC. Frankly, I'm concerned in doing my research that

00027

1 the Superior Court may not have jurisdiction over some
2 of the issues that I've raised as well, and obviously,
3 I'm the one that plead it in Klickitat County, but as
4 I'm researching further into this, I'm beginning to be
5 concerned that the FCC may have preempted state
6 regulation of the ISP's at all as it relates to these
7 issues.

8 JUDGE HENDRICKS: Thank you, Mr. Lorenz.
9 Mr. White, could you comment on that briefly?

10 MR. WHITE: Certainly, Your Honor. We
11 believe that there have been a number of overcharge
12 claims here, including the LNP, PICC, and access
13 charges. We believe that the filed rate doctrine in
14 many cases disposes of these, so we believe that we are
15 not asking the WUTC to in any way engage in analysis
16 that's prohibited by the FCC but simply rule on the
17 overcharge issues that have been raised here, and we
18 believe those are within the jurisdiction of the WUTC.

19 JUDGE HENDRICKS: Thank you. I'd like to go
20 off the record now just to discuss some of these
21 procedural matters, if we could.

22 (Discussion off the record.)

23 JUDGE HENDRICKS: We are back on the record
24 after discussing some procedural issues, and before we
25 do continue, I just wanted to ask Mr. Cromwell if you

00028

1 could briefly describe the opinion of the Public
2 Counsel's office regarding the consent provision in RCW
3 34.05.240.

4 MR. CROMWELL: Your Honor, I don't have that
5 provision in front of me. I have to confess not having
6 that available to me. If you would like, I can go and
7 get it and give it a look. Would you like that?

8 JUDGE HENDRICKS: Will it take you very long?

9 MR. CROMWELL: No.

10 JUDGE HENDRICKS: That would be fine. What
11 are the parties' preferences on schedule, generally, in
12 regards for the briefings? Mr. White?

13 MR. WHITE: We believe that some limited
14 paper discovery would be appropriate, and following
15 that, briefs could be filed with the Commission, and
16 that's what we envision.

17 JUDGE HENDRICKS: How much time would you
18 contemplate for that discovery?

19 MR. WHITE: It's hard to predict. We don't
20 think that it needs to be very wide-ranging, so we
21 believe it could be completed in a month or two.

22 JUDGE HENDRICKS: Mr. Lorenz?

23 MR. LORENZ: I think unless there are
24 discovery problems that develop as we exchange
25 requests, I would think that sixty days would be

00029

1 adequate time for discovery.

2 JUDGE HENDRICKS: Okay. Thank you. Is a
3 protective order requested?

4 MR. WHITE: We would think a protective order
5 would be appropriate.

6 MR. LORENZ: With respect to a protective
7 order, my client is a small ISP. We don't have
8 resources to be hiring lots of outside experts. I
9 don't have problems with a protective order but would
10 want to specifically include Mr. Bates as my technical
11 expert that I could confer with on any discovery
12 issues.

13 JUDGE HENDRICKS: Thank you, Mr. Lorenz.
14 Mr. White, do you have any comments regarding that?

15 MR. WHITE: No, Your Honor, we don't.

16 JUDGE HENDRICKS: Mr. Cromwell, have you
17 returned?

18 MR. CROMWELL: Yes, I have, Your Honor.

19 JUDGE HENDRICKS: If you could just comment
20 briefly on this section of the RCW.

21 MR. CROMWELL: Again, you are referring to
22 34.05.240 sub 7, entry of an agency declaratory order?

23 JUDGE HENDRICKS: Yes, that's correct, and I
24 suppose I'm asking what you believe the nature of that
25 and the applicability of that is to this case, if any.

00030

1 MR. CROMWELL: With the off-the-cuff caveat
2 that I'm reviewing it now for the first time, my
3 initial impression would be that it appears to be
4 directed towards those persons who would be considered
5 a necessary party and not the agency or those
6 petitioning the agency. I think perhaps a problem with
7 the applicability of that section to this type of
8 proceeding before the WUTC would be that the way
9 subsection 7 is worded, it appears directed to the more
10 present circumstance under the Washington APA whereby
11 you have an individual party or entity who is either
12 aggrieved by an agency action or is petitioning the
13 agency for some action. In other words, a situation
14 where it's an individual versus an agency, so to speak,
15 as opposed to the present circumstance where we have, I
16 suppose you would say two adverse parties who are
17 petitioning the WUTC for an adjudicatory resolution.

18 JUDGE HENDRICKS: Okay. Thank you,
19 Mr. Cromwell. Is there anything else to be discussed
20 at this time?

21 MR. WHITE: Your Honor, on the protective
22 order, I would like to talk to our clients about -- I
23 think that that's something we could work with
24 Mr. Bates in terms of fashioning an appropriate
25 protective order, but I don't want to be interpreted as

00031

1 necessarily agreeing that Mr. Bates would be the
2 internal expert for Skamania until we've had a chance
3 to talk to our client, but I think that we can address
4 those issues with Mr. Lorenz as we proceed.

5 MR. CROMWELL: Your Honor, I would express
6 some concern, perhaps mild concern, regarding the
7 participation of a named party for a small business
8 acting as the expert who is permitted access to
9 privileged documents produced during discovery. In
10 terms of the policy considerations that underlie the
11 protective order, the structure that the UTC has in
12 place, I would simply raise that to your attention and
13 perhaps suggest that it be balanced against the right
14 access to justice that Mr. Bates would have in front of
15 the Commission and if there is a means by which the
16 parties could agree and perhaps propose to the
17 Commission a way for that to occur without essentially
18 his competitors feeling that they are placed in an
19 unfair position. I don't know what information
20 Mr. Bates has sought from Sprint regarding his
21 competitors, but we would certainly be very sensitive
22 to that issue.

23 JUDGE HENDRICKS: Mr. Cromwell, thank you.
24 Mr. White, you will have five days to decide and make
25 the request to the Commission from today, so that would

00032

1 be Tuesday the 26th.

2 MR. WHITE: A response to...

3 JUDGE HENDRICKS: A request for protective
4 order.

5 MR. WHITE: Yes, Your Honor.

6 JUDGE HENDRICKS: Is there anything else to
7 come before the Commission at this time?

8 MR. LORENZ: I don't have anything else at
9 this time.

10 MR. WHITE: No, Your Honor, nothing else.

11 MR. CROMWELL: Nothing further, Your Honor.

12 JUDGE HENDRICKS: Thank you very much. This
13 conference is adjourned.

14 (Prehearing concluded at 10:48 a.m.)

15

16

17

18

19

20

21

22

23

24

25

