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BEFORE THE WASHINGTON UTILITIES AND

2

TRANSPORTATION COMMISSION

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4 In the Matter of the Petition) Docket No. UT-990385
for Arbitration of an)
5 Interconnection Agreement) Volume II
Between) Pages 188 - 223
6)
AMERICAN TELEPHONE TECHNOLOGY,)
7 INC., and US WEST)
COMMUNICATIONS, INC.)
8)
Pursuant to 47 U.S.C. Section)
9 252.)

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A hearing in the above matter was

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held on February 9, 2000, at 10:38 a.m., at 1300

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Evergreen Park Drive Southwest, Olympia, Washington,

14

before Administrative Law Judge LAWRENCE BERG,

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Chairwoman MARILYN SHOWALTER, Commissioner RICHARD

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HEMSTAD and Commissioner WILLIAM R. GILLIS.

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The parties were present as

19

follows:

20

ATTI, by J. Jeffery Oxley, 730
Second Avenue South, Suite 1200, Minneapolis,
21 Minnesota 55402.

22

US WEST COMMUNICATIONS, INC., by
Lisa Anderl, Attorney at Law, 1600 Seventh Avenue,
23 Room 3206, Seattle, Washington 98191.

24

Barbara L. Spurbeck, CSR
25 Court Reporter

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COMMISSION STAFF, by Shannon E.

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Smith, Assistant Attorney General, 1400 S. Evergreen
Park Drive, S.W., P.O. Box 40158, Olympia, Washington
98504-0128.

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1 CHAIRWOMAN SHOWALTER: This is a hearing
2 on an Arbitration Agreement, 990385. It seems to me
3 it makes sense for Ms. Anderl to go first.

4 MS. ANDERL: That would be fine, Your
5 Honor.

6 CHAIRWOMAN SHOWALTER: All right. Let's do
7 that, then.

8 MS. ANDERL: I think Ms. Roth was ready to
9 go first, but that's fine.

10 CHAIRWOMAN SHOWALTER: Mr. Berg, Arbitrator
11 Berg.

12 JUDGE BERG: This is Larry Berg, from the
13 Administrative Law Department for the Commission.
14 Chairwoman, just because of the nature of the
15 proceeding, it might be appropriate to have both
16 Counsel enter their appearances for the record before
17 parties begin to present arguments.

18 CHAIRWOMAN SHOWALTER: Okay, let's do that.

19 MS. ANDERL: Thank you, Your Honor. For US
20 West Communications, Lisa Anderl, 1600 7th Avenue,
21 Room 3206, Seattle, Washington, 98191.

22 MR. OXLEY: For ATTI, Jeff Oxley, 730
23 Second Avenue South, Suite 1200, Minneapolis,
24 Minnesota, 55402.

25 CHAIRWOMAN SHOWALTER: And is it

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1 appropriate for Staff and Staff Counsel, also, to
2 introduce themselves?

3 MS. SMITH: Shannon Smith, on behalf of
4 Commission Staff.

5 MS. ROTH: Jing Roth, on behalf of the
6 Commission Staff Telecom Section.

7 CHAIRWOMAN SHOWALTER: Thank you. Okay.

8 MS. ANDERL: Good morning, Commissioners.
9 We're here today for oral argument on the issue of
10 what should the final interconnection agreement
11 between ATTI and US West look like, and the parties
12 have largely accepted the Arbitrator's decision on
13 the contested issues. In fact, I think ATTI will
14 tell you they have wholly accepted it.

15 US West has asked for the Commission to
16 review and modify three aspects of the Arbitrator's
17 decision, and our written pleadings set forth our
18 arguments. I actually don't have anything new to
19 add. I wish that the Ninth Circuit had granted our
20 petition on re-hearing on the issue of UNE
21 combinations, but they did not, and so we will have
22 to await resolution by the Supreme Court of that
23 apparent inconsistency. I'll get into that in just a
24 minute.

25 The three issues that we've brought before

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1 you are, of course, the issue of whether or not ATTI
2 can appropriately opt into the reciprocal
3 compensation provisions from the MFS agreement. If
4 that sounds like the issue that was before you last
5 week in connection with ATG, that's because it is the
6 same issue.

7 CHAIRWOMAN SHOWALTER: And are there any
8 distinctions that you see?

9 MS. ANDERL: No, not that I'm aware of, or
10 none that are relevant. The timing on these is
11 generally the same and the positions of the parties,
12 I think, are the same on the issues. And Staff's
13 recommendation is, in fact, consistent with what its
14 recommendation was in ATG, and our position is
15 consistent with the position that we took in ATG.

16 The issue is, of course, the duration of
17 the reciprocal compensation term or provision. If
18 ATTI gets reciprocal comp as set forth in the MFS
19 agreement, when does that term expire. The
20 Administrative Law Judge or the Arbitrator said the
21 sooner of ATTI's own expiration date or 90 days after
22 the expiration date of the MFS agreement. And it was
23 our position that that potentially gives ATTI 90 days
24 longer than MFS, or another carrier would have the
25 benefit of that provision, and that's inappropriate.

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1 So the term should be synced up to make it
2 more -- what's the word I'm looking for -- more
3 contemporaneous in time with the expiration of the
4 MFS term. And we've got a suggestion, Staff has a
5 suggestion, and I think they're all an attempt to hit
6 a reasonable compromise of syncing up the timing a
7 little bit better.

8 The issue of UNE combinations is the next
9 one we've brought before you, and that is a tough
10 one. I do think the Supreme Court will end up
11 deciding it. I fear that the Arbitrator's decision
12 in this case is contrary to FCC rules that have been
13 vacated, and therefore inconsistent with the Eighth
14 Circuit ruling.

15 That, of course, begs the question of,
16 well, is it inconsistent with the Ninth Circuit. No.
17 All right. Are the Ninth Circuit and the Eighth
18 Circuit consistent with one another? Yes. And so
19 what are you to do with that. We would ask you not
20 to order an incumbent carrier to perform activities
21 that are contrary to or not supported by any of the
22 rules as set forth by the FCC, since the only rules
23 that authorized or required combinations of elements
24 that were not currently combined are the rules that
25 were vacated by the Eighth Circuit and not reinstated

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1 by the Supreme Court.

2 CHAIRWOMAN SHOWALTER: Can I ask you a
3 question on this one? Obviously, we live in the
4 Ninth Circuit.

5 MS. ANDERL: I know.

6 CHAIRWOMAN SHOWALTER: So it seems that
7 what is in the Arbitrator's decision has, in effect,
8 been upheld by the Ninth Circuit, or is within the
9 Ninth Circuit's allowance.

10 My question is, are you asking us to
11 contravene the Ninth Circuit or just to withhold a
12 decision so that we haven't contravened the Ninth
13 Circuit; we're just waiting to see what the Eighth
14 Circuit or the U.S. Supreme Court says?

15 MS. ANDERL: The latter, certainly. Yeah,
16 and it is kind of a minefield, and I don't want you
17 to contravene the Ninth Circuit, but I don't think
18 that that's what we're asking for you to do here.
19 We're just asking you not to order us to do something
20 that's potentially inconsistent with the Supreme
21 Court ruling, because we believe that the Supreme
22 Court's refusal to reinstate 315(C) through (F), or
23 whatever that is, if I have that right, is a clear
24 message that the recombinations should not be
25 permitted.

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1 CHAIRWOMAN SHOWALTER: Mr. Hemstad.

2 COMMISSIONER HEMSTAD: Well, so you would
3 urge us to simply hold that matter in abeyance, then,
4 apparently, awaiting the Supreme Court decision, but
5 that that effectively decides the issue, doesn't it,
6 I mean, until the decision is forthcoming?

7 MS. ANDERL: In a way, I guess it does,
8 yes. I mean, I don't think that there's a way you
9 can say that they can have recombinations, but they
10 can't have recombinations.

11 CHAIRWOMAN SHOWALTER: I think you're
12 asking us to exercise our discretion in a different
13 way than we have in the past and that the Ninth
14 Circuit has approved?

15 MS. ANDERL: Yes.

16 COMMISSIONER HEMSTAD: Without putting
17 words in your mouth, I suppose the distinction could
18 be made that the Ninth Circuit approved and what we
19 had decided as a matter of -- in other words, within
20 our ability to interpret and apply the Eighth Circuit
21 position prohibits -- I suppose that's the
22 distinction -- giving us some leeway, but --

23 MS. ANDERL: I think that it does.

24 COMMISSIONER HEMSTAD: But the reality is
25 that we've made an earlier decision that's been

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1 upheld by the Ninth Circuit, and despite your request
2 for a review, I'm hard-pressed to see why we should
3 now change our position.

4 MS. ANDERL: I understand your comments,
5 Your Honor, and I agree that what I'm asking you to
6 do here is a difficult decision for you to make, but
7 I do believe that this is not the MFS case. And that
8 decision that you made some three years ago,
9 determining at that time that it was appropriate to
10 do so, and order the recombinations under the
11 circumstances that were set forth in that
12 arbitration. And perhaps the more uncertain or
13 unsettled state of the law as it was three years ago,
14 while the Ninth Circuit may have upheld that
15 decision, I guess I would just suggest that, under
16 the circumstances as they present today, it may not
17 be appropriate to exercise your discretion or make
18 the decision in the same way.

19 CHAIRWOMAN SHOWALTER: So then on the
20 merits, not on the Ninth Circuit, Eighth Circuit,
21 what's the strongest argument why we should not order
22 recombinations?

23 MS. ANDERL: Because there's no language in
24 the act that appears to require it, and I don't
25 believe that recombinations of elements that are not

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1 currently combined or elements that are some of US
2 West's elements and some of ATTI's elements, those
3 types of combinations, I don't think you can find any
4 language in the act that either requires or
5 authorizes that.

6 The act simply requires incumbents to make
7 available unbundled network elements in ways that do
8 not prohibit other carriers from recombining them.
9 And I think the Supreme Court even said, and I have
10 the excerpt in one of the pleadings that we filed
11 with you, you know, this does not mean that the act
12 requires the incumbent to do all the work of
13 recombination, nor does it authorize the CLEC to
14 demand the incumbent do all that work. All that is
15 permissible under the act is that the incumbent
16 cannot separate already-combined elements just for
17 the sake of making the CLEC do wasteful work of
18 recombining things that already were combined.

19 COMMISSIONER GILLIS: But provided that you
20 are reimbursed for the work in making those
21 combinations, how are you harmed?

22 MS. ANDERL: Well, there's -- I think
23 you're always -- I mean, you're harmed, kind of as a
24 matter of law, if you are required to perform
25 activities that the law does not authorize you to be

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1 ordered to perform. The fact that there are limited
2 and finite resources, compensation is one piece of
3 it, but the fact that you're compensated doesn't
4 necessarily mean you have more people or more of the
5 other resources necessary to do that work, and if, in
6 fact, you are using your manpower to perform work
7 that the CLECs should be doing and that you have no
8 legal obligation to do, the fact that you're
9 compelled to do it, even if there's compensation,
10 doesn't cure that compulsion.

11 So it's kind of like if we were ordered to
12 manufacture bicycles. You know, would we be made
13 whole if we were compensated for that? And I guess
14 the answer is no, because there's no authority in the
15 law to require us to do it, and making us whole from
16 a monetary standpoint doesn't change the fact that
17 that's not the business that we're in and we oughtn't
18 be required to do it.

19 CHAIRWOMAN SHOWALTER: So do you want to
20 move to collocation, or do you have more? Why don't
21 you move to collocation.

22 MS. ANDERL: I'm ready to move to
23 collocation. The collocation issue, we don't dispute
24 that ATTI is entitled to adjacent collocation. We
25 just believe that the Arbitrator's interpretation of

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1 what it meant by adjacent collocation goes beyond the
2 scope of what the FCC asked or required incumbents to
3 provide in two ways.

4 One is the Arbitrator did not impose the
5 condition that adjacent collocation be made available
6 only when space is not available in an incumbent's
7 central office, and we believe that condition ought
8 to be present, and I believe that's consistent with
9 Staff's recommendation.

10 And further, the definition of what is
11 meant by adjacent we believe is more rationally read
12 as meaning -- a meaning consistent with its synonym,
13 which is contiguous. And consistent with the
14 language of the FCC, and that the Arbitrator's
15 decision saying nearby, even if it's down the street,
16 but not contiguous, kind of guts the meaning of
17 collocation.

18 COMMISSIONER HEMSTAD: Well, if adjacent
19 means contiguous, you had to move the goal post, but
20 then what does contiguous mean? What about across
21 the street? Is that contiguous?

22 MS. ANDERL: Let me find the FCC's rule,
23 which I think is the one that gives the right
24 guidance in terms of what we ought to be looking at.
25 The FCC rules that when space is exhausted on a LEC

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1 premises, ILECs are required to, quote, permit
2 collocation in adjacent controlled environmental
3 vaults or similar structures to the extent
4 technically feasible.

5 And so I think that means on the same
6 property or, you know, kind of touching on one side,
7 and --

8 COMMISSIONER HEMSTAD: Across the street
9 wouldn't do it, if that was the only space available?

10 MS. ANDERL: I think that's true, although
11 there may be exceptions there, as well. I'm thinking
12 of the situation that we have in the Seattle Main,
13 Seattle Mutual Building, where the buildings are
14 connected with an underground tunnel that is a --

15 COMMISSIONER HEMSTAD: Well, what are the
16 technical, practical technical problems of having a
17 location that isn't, in your term, contiguous?

18 MS. ANDERL: Well, I mean, to me, then,
19 it's not collocation. Collocation is, kind of by its
20 nature, on the ILEC premises or within an ILEC space.
21 And I'm not sure exactly what is meant here by down
22 the street collocation.

23 COMMISSIONER HEMSTAD: I'm trying to get to
24 the point of what are the practical problems in
25 making the interconnection work. And at one point, I

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1 realize perhaps that some of this environment that US
2 West took the position that collocation was taking,
3 and it couldn't have collocation. Now you're saying
4 that you must have collocation or -- adjacent, but it
5 can't be someplace nearby.

6 MS. ANDERL: Well, I mean, the argument
7 that collocation wasn't taking it and wasn't
8 permitted, I think was, under the old statutory
9 scheme, upheld, and it wasn't until the Congress gave
10 FCC specific authority to promulgate rules about
11 collocation that it became something that, once
12 properly compensated, was permissible.

13 It just seems to me that what happened here
14 in the Arbitrator's decision is that the order was
15 that there be collocation in an off-premises
16 location. And to me, and maybe we didn't say it this
17 clearly in the pleadings, and maybe we should have,
18 those are kind of internally inconsistent concepts.
19 You're only collocated with us when you're with us.

20 COMMISSIONER HEMSTAD: Okay. But my point
21 still is that we have a narrow legal argument as to
22 what the law requires, permits, or are there
23 technical problems with something that is not
24 contiguous?

25 MS. ANDERL: I don't think that I'm

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1 technically able to answer that. I'm not aware -- I
2 mean, other carriers interconnect with us without
3 having collocation. They just bring their facilities
4 in and there's no collocation; there's just
5 interconnection. I'm not sure you have to have
6 collocation to have interconnection.

7 And then, so what I think the FCC was
8 trying to do in the advanced services order was give
9 a CLEC an expanded opportunity on the ILEC premises
10 to locate its transmission equipment when that
11 transmission equipment or other equipment was
12 necessary for interconnection or access to unbundled
13 elements and space was not available in the ILEC's
14 central office.

15 So what the FCC did was say you have to go
16 out to an adjacent -- I would read contiguous --
17 location, including a controlled environmental vault.
18 It seems to me that that is the appropriate scope of
19 what ought to be granted in this case, absent a
20 showing that there was a need for anything different.

21 COMMISSIONER HEMSTAD: Okay. But I'm
22 trying to -- what is the practical dispute at issue
23 here? The company wants, if space is available,
24 continuous, and ATTI wants it someplace else. Why,
25 because it's cheaper?

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1 MS. ANDERL: I don't know why ATTI might
2 want to do that.

3 COMMISSIONER HEMSTAD: But you're offering
4 space that is contiguous; is that the case?

5 CHAIRWOMAN SHOWALTER: That's -- there's
6 been no finding in this case that the regular
7 collocation spot is filled up.

8 MS. ANDERL: Yeah, this is, at this point,
9 it's a fairly theoretical dispute. I'm not aware of
10 any times that ATTI -- well, of course, they don't
11 have an interconnection agreement yet. But I'm not
12 aware whether there are any central offices where
13 something like this would be required at this point
14 in the state of Washington or whether there are any
15 offices where space is exhausted.

16 COMMISSIONER HEMSTAD: All right. So we're
17 having a conceptual discussion.

18 MS. ANDERL: We are.

19 CHAIRWOMAN SHOWALTER: Because these are
20 the ground rules for what will happen in the future.

21 MS. ANDERL: And so I guess what we're
22 saying is, absent a showing that there's a need for a
23 more broader reading of what it is that collocation
24 means, it ought, at the outset, to be limited to what
25 the FCC seemed to define as what adjacent collocation

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1 should be. And that includes the limitation that
2 it's only available if there's no space in the CO,
3 and that adjacent ought to be interpreted in this
4 instance to mean limited to adjacent controlled
5 environmental vaults or similar structures.

6 CHAIRWOMAN SHOWALTER: What would you think
7 about language that said US West is required to offer
8 collocation in its facilities, that if the
9 collocation facility is filled up, it is required to
10 provide on its own premises, if available, facilities
11 or collocation, and that would be in cases of
12 adjacent -- skip over whether that means next to or
13 nearby. But that if there were no facilities at the
14 central office or adjacent, whatever that means, then
15 you could be required to cooperate with a, quote,
16 collocation, even though it was not on your
17 property.

18 I'm trying to get past the definitions --
19 which I realize the terms are in the law, I realize
20 that. But is your objection that even in that last
21 instance, where you're all filled up, there's --
22 there are no -- you're also filled up anywhere nearby
23 on your own property, that still, in that case,
24 that's the end of your obligation?

25 MS. ANDERL: But I think that -- and let me

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1 get to your thing second here. Let me first say that
2 the law does require us, when space is exhausted for
3 physical collocation, to offer virtual collocation.
4 And we would have to do that.

5 CHAIRWOMAN SHOWALTER: Whether or not it's
6 on your own property?

7 MS. ANDERL: I think that we would have to
8 do what -- no, I think virtual collocation's on our
9 property, and we would have to do what it took to
10 provide virtual. One of the things about virtual
11 collocation is, even though cageless physical
12 collocation is available on a bay at a time basis,
13 virtual collocation is available on a shelf at a time
14 basis, which there are six shelves in a bay, so that
15 even gets you down more granularly to -- you can kind
16 of always find a shelf. I think that's what the
17 Congress must have been thinking. So we would always
18 offer virtual. We believe we have an obligation to
19 do that.

20 What I heard you saying is would we
21 entertain some sort of a bona fide request process or
22 order to negotiate or cooperate to accomplish this
23 nearby collocation if indeed everything else were
24 full.

25 CHAIRWOMAN SHOWALTER: Right.

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1 MS. ANDERL: And certainly, it seems to me
2 that that, if we're looking for a way to address this
3 issue, is a wiser way to handle it in the sense of
4 let's not set up what the terms and conditions and
5 parameters are now on kind of a hypothetical
6 situation, but let's see what happens, if it happens,
7 and deal with the actual situation when and if it
8 ever comes up.

9 CHAIRWOMAN SHOWALTER: Then one more
10 question on the issue of what adjacent means. I have
11 to admit, when I first looked at this, I said I know
12 what adjacent means, it means next to, butted up
13 against. And then I went to my favorite dictionary,
14 and it says, Nearby, close to. So that's what the
15 dictionary says, which just goes to show you the way
16 some people may always use a word may, in fact, be
17 only one of a couple of definitions in the
18 dictionary. So since the dictionaries do allow for
19 two interpretations, don't we, then, have to allow
20 for both those possibilities under the law? Which is
21 not addressing your on-the-property off-the-property
22 question.

23 MS. ANDERL: I think that regulatory bodies
24 and courts are often called upon to decide what the
25 meaning of a word is, often, to your point, a word

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1 that we all thought we knew what it meant. And you
2 do resort to the dictionary, and sometimes there are
3 definitions that you cannot give effect to all of the
4 six or eight definitions of a word. Then I think you
5 have to think about what makes sense under the
6 circumstances.

7 CHAIRWOMAN SHOWALTER: So you're saying
8 that the combination of two terms, collocation and
9 adjacent, mean -- it's sort of a Venn diagram, but
10 there's only one way that you can have something
11 that's both adjacent and collocated, and that is if
12 it's on the same property. So you get to an
13 interpretation that means it's somewhere on your
14 property; it's just next to --

15 MS. ANDERL: Right.

16 CHAIRWOMAN SHOWALTER: -- or nearby, but
17 it's on the same property.

18 MS. ANDERL: I think that's right.
19 Clearly, the dictionary definitions do contemplate
20 both meanings of the word. I mean, when we went and
21 looked it up, of course, it allows next to or nearby.
22 It also says adjoining and provides, as one of the
23 synonyms, contiguous, which I think means touching on
24 one side, so --

25 CHAIRWOMAN SHOWALTER: Any more questions?

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1 Maybe we could begin with this third one, since we're
2 on it, that is the collocation issue, and work back
3 up. Is that acceptable to you?

4 MR. OXLEY: Yes, it is.

5 CHAIRWOMAN SHOWALTER: Okay. Why don't you
6 start on that one, then.

7 MR. OXLEY: I'd be happy to. Just to
8 introduce myself for the record, I'm Jeff Oxley. I'm
9 the director of regulatory affairs for ATTI. Thank
10 you for hearing this case this morning.

11 To start off on the adjacent collocation
12 issue, the basic obligation under the
13 Telecommunications Act and under Washington law is to
14 interconnect, and that's what's got to happen for
15 local competition to start. So the perspective to
16 analyze the question of collocation from is what
17 piece does it play in interconnecting telephone
18 networks.

19 And I look at it this way. If you can't
20 interconnect with the incumbent LEC, then you've got
21 no competitor there, or at least one less competitor.
22 You've got ever been able to do it to that point, and
23 then no more.

24 So what the FCC was doing, in its advanced
25 services order, was pushing that margin that excludes

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1 new competitors, pushing it out, and they were doing
2 it specifically by saying, US West and other RBOCs,
3 we're going to order you to provide adjacent
4 collocation.

5 And it's appropriate for the FCC to order
6 that because that's how they get that accomplished.
7 It's the LEC's property. How can ATTI ever get
8 rights in that property. It can't, unless US West
9 grants it or, by order of law, it has a right. So
10 the FCC gave us a right, on US West's property, to
11 move forward this process of interconnecting
12 telephone networks.

13 Does the FCC have to give us a right to
14 locate off US West property? No. All they have to
15 do is give us the right to interconnect. Now, US
16 West is saying, Look, ATTI, you can collocate -- or
17 you can locate, I'll leave off the co term, because
18 it's taking us into a semantic area, and I don't
19 think very helpful. If you want to locate off our
20 property, fine, do that, and then submit a BFR to us.

21 They're not saying they're going to accept
22 our proposal, they're not saying that they will
23 permit that; they're saying we can ask them about it.
24 And is that good enough or not. Our business
25 decision was no, it's not good enough. We're going

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1 to be investing \$20 million in building out our
2 network in Washington. There are offices that are
3 filling or full at the time being.

4 An opportunity may be to get US West to
5 agree to extend facilities to us off their land
6 wasn't what we thought was enough. So we came in and
7 we said, Look, in the context of US West telling us
8 we're full in our office, we're full around our
9 office, well, we want to say, Okay, what if we go to
10 the next place nearby, but off your property, will
11 you extend facilities to us. And I think the ALJ
12 said, Yeah, it's pretty reasonable.

13 It's consistent with what the FCC said in
14 the advanced services order, that states can extend
15 these rules. It's consistent with what Congress and
16 the Washington legislature has said in terms of
17 interconnection of networks being a fundamental
18 priority of the act. So we don't have the same
19 problems with that. Is that responsive to --

20 CHAIRWOMAN SHOWALTER: Yeah, but here's a
21 question I have. If the two parties had agreed to do
22 this, and I think one point you're making is that,
23 well, this, in effect, isn't collocation; it's
24 location, location nearby or location adjacent to,
25 meaning nearby, and if both parties had agreed, Well,

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1 that's fine, we'll submit that agreement, but that US
2 West isn't agreeing to that position, so then doesn't
3 it mean -- what is our authority to order US West to
4 agree to that position when they argue that it isn't
5 within the act?

6 I mean, it seems like their argument is,
7 This isn't collocation, because it's not on the same
8 property, really, and that even though it's adjacent
9 under one version of the dictionary, it already got
10 out from under the act because it's not collocation,
11 because collocation means, you know, together on the
12 same property. So what's your argument on that one?

13 MR. OXLEY: Well, that's why I didn't want
14 to get into the sticking the word co on there,
15 because we immediately get into, well, what did
16 Congress intend by saying collocation. I think what
17 they really intended is that two companies's
18 equipment interconnect. And typically, they need to
19 be close together to do that in a practically
20 effective way.

21 CHAIRWOMAN SHOWALTER: So I think we kind
22 of have to get into the word a little bit, but what
23 you're saying is collocation doesn't mean on the same
24 location, the ILEC's location; it means you join up
25 together somewhere. Somehow you've got to make an

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1 agreement to do that, and what's reasonable, given
2 that order, to collocate maybe in Switzerland, a
3 neutral territory. I don't mean Switzerland, but I
4 mean, it might be neither person's property.

5 MR. OXLEY: That's right. That's said
6 better than I did. But I guess I was resisting
7 giving it the same literal meaning and forgetting
8 about what the very purpose of the term is and what
9 its origins are in the act. I think it's the
10 interconnection that's the key thing.

11 CHAIRWOMAN SHOWALTER: Go ahead.

12 MR. OXLEY: Should I --

13 CHAIRWOMAN SHOWALTER: Any more questions
14 on collocation?

15 COMMISSIONER HEMSTAD: I do have a comment
16 on the -- well, in view of your general description
17 of the issue, I assume you would then agree with the
18 Arbitrator's -- call it dictum style addition to the
19 order that you have the right to be off-premise even
20 if there's space on the premise.

21 MR. OXLEY: Well, to share a thought with
22 you, Commissioner, and working my way through the
23 order, when I first read the ALJ's order, I mean, the
24 first three issues we win on, the second three we
25 lose on, so I'm thinking this is the greatest piece

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1 of work I've ever seen in my life. And then we get
2 to adjacent collocation, and I'm still on an upswing,
3 hit the others, I'm a bit on a down. But they're all
4 fair decisions, and he sure lays out the reasons why
5 he got there.

6 So I don't really have -- you know, I will
7 say we did not specifically ask for this, and the
8 reason why is that our economic sense would be that
9 it would be a lot cheaper for us to be in the office
10 and we would only look outside as a last alternative.

11 Do I think that it's a reasonable thing in
12 that context for the arbitrator to order that? Yeah,
13 because, you know, the economics will drive the order
14 of requests, and it's a reasonable solution.

15 If there aren't any other questions on the
16 collocation issue for me, then maybe I could just hit
17 the other two that were raised?

18 CHAIRWOMAN SHOWALTER: Sure.

19 MR. OXLEY: The first issue was about the
20 opt into the MFS language, and in their petition for
21 review of the Arbitrator's decision, US West brought
22 up two issues. US West Counsel only spoke about one
23 today, but the other one was in their petition, which
24 was that the Arbitrator erred in finding that the MFS
25 contract had expired. And I'd be willing to address

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1 that, if you had any questions.

2 Otherwise, I'll just move on to the other
3 point that US West actually talked with you about
4 this morning, which is what kind of notice should
5 ATTI get. And here we agree with Staff's
6 recommendation. Ms. Roth was saying, well, to get
7 notice, the contract really needs to have expired.
8 And it ain't over until it's really over, and there's
9 been some dispute about when it's been over, so let's
10 make sure it's really over and then give ATTI notice,
11 and that seems very sensible to us.

12 As far as the combinations issue goes,
13 gosh, this can be a kind of tricky one, too. That
14 Rule 315(B) that this centers on says something to
15 the effect of, An ILEC shall not separate elements in
16 its network which it currently combines. And there
17 are those words, currently combines. That's an
18 active present tense.

19 And what I believe state commissions will
20 be seeing in coming months is an issue about what
21 does currently combines mean? Does it mean elements
22 in combinations that have already been put together,
23 does it mean elements in combinations that could
24 conceivably technically be put together, or does it
25 mean something in between the two.

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1 And it's a question that has enormous
2 practical import for CLECs such as ourselves and
3 enormous import for US West, because they have to
4 design their OSS systems to provide what state
5 commissions require them to provide.

6 And when US West moves through its 271
7 applications, you'll be addressing the question of is
8 their OSS system adequate. And one touchstone for
9 analyzing that adequacy will be does their OSS system
10 permit CLECs to order and obtain UNE combinations,
11 and what range of those. Can they just obtain the
12 exact specific combination that Customer Smith has?
13 If Customer Smith has voice mail, that's what they
14 get, or if Customer Smith has call waiting, that's
15 exactly what they get, or do they get to order a
16 combination that allows flexibility in that.

17 Do they get to order combinations that US
18 West isn't currently offering any of its customers.
19 Can it ask for anything that US West offers to be
20 combined with anything that the CLEC offers. These
21 are enormous questions of great practical
22 significance, and I think what was driving ATTI in
23 arbitrating this issue was to try and push it a bit,
24 because until clear messages are sent to incumbent
25 LECs about what they must do, they won't engage in

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1 developing the provisioning methodologies and systems
2 necessary to actually provide those.

3 So I do think it's important to move ahead
4 in this -- in dockets like this on this issue so as
5 to make it a practical possibility. So rather than
6 waiting until the Supreme Court ultimately resolves
7 this issue, I think the Washington Commission has
8 pretty squarely said that it has the authority to
9 order UNE combinations, and you don't need to hang
10 there and wait for the Supreme Court. And I'm not so
11 sure you could do that without showing some measure
12 of lack of deference to the Ninth Circuit.

13 So I hope that responds to some of the
14 questions that I heard coming from you. I'd be happy
15 to address them further.

16 CHAIRWOMAN SHOWALTER: I was wondering what
17 your response might be on the resource question. The
18 agreement requires you to pay for the recombination,
19 but what about the point that resources, meaning
20 people, labor pool, in this area is genuinely short.
21 That is, it's not easy for companies, including US
22 West, to find all of the people they need for all
23 their jobs.

24 So what about the point that even though
25 they're paid for it, they're deploying somebody to

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1 your job that they might want to be deploying to
2 their own job or another job?

3 MR. OXLEY: I guess I have a couple of
4 different responses to that. And in no particular
5 order of importance or how satisfying they might be
6 as explanations, I think, one, there's been a value
7 judgment made by Congress and by the state
8 legislature that says that telephone competition and
9 local service is very important. And the importance
10 that you place on an end is one of the principles
11 that you should guide your allocation of resources.

12 So if we've got our legislature saying
13 you've got to move in that direction, then I think
14 that's an answer to the allocation problem. Some
15 things don't get done if resources are tight, but
16 where the public interest lies, that gets done.
17 Another answer I guess I'd give is we've had a long
18 run of prosperity, I know. God hope it doesn't end
19 any time soon, but it can, and maybe there will be
20 resources around, but if the direction isn't given at
21 some point in time, then those resources never get
22 directed there.

23 Then I guess the third point I'd make is
24 that US West is a very large company, and if its
25 merger with Qwest goes ahead, it will be a very, very

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1 large company. And in the scope of all the
2 activities that they're proposing to do, building out
3 their broad band network internationally, I wouldn't
4 think that what we're asking on the wholesale
5 provisioning front is that dramatic a request for
6 resources. Yes, it does take resources, but in light
7 of everything else that the company is doing, it's
8 not that huge. Those are my responses.

9 CHAIRWOMAN SHOWALTER: Then, on your
10 earlier comments on 271, is in effect what you're
11 saying, Well, look, the Company's going to have to
12 comply with 271 anyway, so make this agreement and
13 our order harmonious or consistent with where
14 everything needs to go, which is OSS and
15 interconnection abilities for everybody. Is that
16 kind of what you're saying?

17 MR. OXLEY: I think I'm saying something
18 like that. I'm saying that your orders about this
19 arbitration aren't being made in a vacuum that just
20 affects us and US West, but there's an important
21 message being given by the way you decide these cases
22 as to what are the requirements you will be placing
23 on US West to make local competition happy.

24 CHAIRWOMAN SHOWALTER: Thanks. Any other
25 questions? Thank you. Comment from Staff?

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1 MS. ROTH: Staff does not have any
2 additional comments. Our recommendations are
3 provided in the memo, and if the Commissioners have
4 any questions, legal questions, Shannon Smith is
5 here. Anything other than that, I will be available
6 to answer them.

7 CHAIRWOMAN SHOWALTER: Ms. Smith, you look
8 as if you have a comment.

9 MS. SMITH: I do have a comment to make,
10 and this comment is in response to the comments Ms.
11 Anderl made on behalf of US West with respect to what
12 this Commission can do, should do with the issue
13 about the Ninth Circuit's decision and its decision
14 to affirm this Commission's decision in the MFS case.

15 Essentially, US West is asking this
16 Commission to disregard the effort this Commission
17 undertook in the MFS case. The Commission made a
18 decision in the MFS case that US West would combine
19 and MFS would pay for the functions necessary to
20 combine network elements.

21 That issue was litigated at the district
22 court and the district court affirmed this
23 Commission's decision. That issue was litigated at
24 the Ninth Circuit, and the Ninth Circuit affirmed
25 this Commission's decision. US West asked for

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1 re-hearing, that was denied, and US West is now
2 asking this Commission to step away from those
3 efforts and not follow that course and, instead, wait
4 until the eighth circuit has an opportunity to review
5 Rules 315(C) through (F).

6 The Commission Staff's position is that the
7 commission should not step away from that course,
8 that we were affirmed, the Commission was affirmed on
9 that issue, and we should stand by the Ninth
10 Circuit's decision affirming this Commission's
11 action.

12 Ms. Anderl also mentioned that it is US
13 West's position that the Ninth Circuit's -- the
14 Supreme Court's decision not to reinstate Rules
15 315(C) through (F) is a strong message. Commission
16 Staff disagrees with that.

17 The Commission Staff believes that the
18 language the Supreme Court used in its AT&T decision,
19 in fact, undermines the Eighth Circuit's rationale
20 for vacating all of the combination rules, not just
21 Rule 315(B). We believe that the policy reasons the
22 Supreme Court enunciated in its 315(B) decision also
23 support the -- also undermine the Eighth Circuit's
24 decision with respect to Rules 315(C) through (F).

25 In addition, there are other issues pending

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1 before the Ninth Circuit with respect to combinations
2 of network elements. And the issues are slightly
3 different, but this Commission did offer the Ninth
4 Circuit's decision in the MFS case in support of its
5 positions in the other Ninth Circuit cases.

6 And for this Commission to step away from
7 the Ninth Circuit decision would not send a strong
8 message to the Ninth Circuit that, in those other
9 cases that are pending, and the Commission Staff
10 would ask that this Commission not wait and see what
11 the Eighth Circuit does, but instead follow the
12 course by the Ninth Circuit, which is it is not
13 inconsistent with the act to require US West to
14 combine network elements on behalf of the CLEC when
15 that CLEC agrees to pay for the work necessary to
16 combine those elements.

17 CHAIRWOMAN SHOWALTER: Thanks. I have one
18 last question of Ms. Anderl, and that's on this word
19 collocation. If you look at the rule itself, the FCC
20 rule --

21 MS. ANDERL: 323?

22 CHAIRWOMAN SHOWALTER: Yeah, 51.323(K)(3).
23 Well, there, it certainly speaks in terms of LEC
24 property. An incumbent LEC must make available,
25 where space is legitimately exhausted in a particular

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1 -- no, it doesn't. No, it says where it's exhausted
2 on the LEC premises, then it must make available
3 collocation.

4 So I'm just interested in whether there's
5 actually any place that suggests that collocation
6 means on ILEC property? Why shouldn't collocation
7 mean somewhere together, and then the rule is if you
8 can't provide it on your own property, then it's got
9 to be somewhere together, which should be adjacent,
10 which might mean next to and might mean nearby.

11 MS. ANDERL: Your Honor, it may well be in
12 another one of the subsections of Rule 51.323, but I
13 also believe that the act itself, under Section
14 251(6), which defines the obligation to offer
15 collocation as a duty to provide rates, terms and
16 conditions that are just, reasonable and
17 nondiscriminatory for physical collocation of
18 equipment necessary for interconnection or access to
19 unbundled network elements at the premises of the
20 local exchange carrier.

21 So to me, it is the act itself which limits
22 collocation to something that happens at the LEC
23 premises.

24 CHAIRWOMAN SHOWALTER: Okay, thanks. Any
25 other questions? Thanks very much.

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MS. ANDERL: Thank you.

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MR. OXLEY: Thank you.

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CHAIRWOMAN SHOWALTER: The meeting is

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adjourned, or hearing is adjourned.

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(Proceedings adjourned at 11:23 a.m.)

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