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1 BEFORE THE WASHINGTON UTILITIES AND
2 TRANSPORTATION COMMISSION
3 In the Matter of the)
4 Application of)
5 QWEST CORPORATION)
6) Docket No. UT-021120
7 Regarding the Sale and)
8 Transfer of Qwest Dex to) Volume XII
9 Dex Holdings, LLC, a) Pages 1516 to 1556
10 non-affiliate,)
11 _____)

9 A hearing in the above matter was held on
10 October 17, 2003, from 9:20 a.m to 10:40 a.m., at 1300
11 South Evergreen Park Drive Southwest, Room 206, Olympia,
12 Washington, before Administrative Law Judge DENNIS MOSS
13 and Chairwoman MARILYN SHOWALTER and Commissioner
14 RICHARD HEMSTAD and Commissioner PATRICK J. OSHIE.

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16 The parties were present as follows:

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25 Court Reporter

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

2 JUDGE MOSS: Good morning, everyone. We are
3 convened again in the matter of the application of Qwest
4 Corporation regarding the sale and transfer of Qwest Dex
5 to Dex Holdings LLC, Docket Number UT-021120, and we are
6 convened today on Staff's motion to apply the per line
7 bill credit mandated in the Qwest Dex settlement
8 agreement to Qwest's retail and resale access lines. We
9 will take appearances momentarily, and I will have a few
10 words of background explanation, and then we will hear
11 some argument and have inquiry from the Bench.

12 Before I begin with the appearances I will
13 simply note for the record this matter came up on short
14 notice, and we did get word to every active participant
15 and indeed the one inactive party, XO Washington, and we
16 heard this morning from Mr. Kopta for XO that it takes
17 no position on the motion and will not appear and also
18 from Mr. Harlow for Dex Holdings that that party takes
19 no position on the motion and wishes to be excused and
20 is excused from participation this morning.

21 So with that, let's take appearances from
22 those in the room, and since it's your motion we will
23 begin with you, Mr. Trautman.

24 MR. TRAUTMAN: Greg Trautman, Assistant
25 Attorney General for Commission Staff.

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1 MR. CROMWELL: Robert Cromwell, Assistant
2 Attorney General on behalf of Public Counsel.

3 MS. ANDERL: Lisa Anderl representing Qwest.

4 JUDGE MOSS: And I have noticed some activity
5 on the conference bridge line, are there any parties on
6 the conference bridge line who wish to enter an
7 appearance?

8 MR. SHERR: Yes, Your Honor, Adam Sherr for
9 Qwest.

10 JUDGE MOSS: Any others?

11 MR. ROSEMAN: Ron Roseman for AARP.

12 JUDGE MOSS: Others?

13 Apparently not.

14 MR. CROMWELL: Your Honor, at this time I
15 should note that I did speak with Mr. Melnikoff who
16 represents the Department of Defense and the Federal
17 Executive Agencies as well as Mr. Butler who represents
18 WeBTEC, and both indicated that they had other matters
19 that they could not avoid this morning and authorized me
20 to make representations on their behalf this morning.

21 JUDGE MOSS: Okay, well, thank you, that
22 pretty well covers the bases on our parties, which
23 brings me to the point where I wish to provide some
24 background to this matter for the record. This matter
25 first came to my attention yesterday afternoon. I

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1 received a telephone call early in the afternoon from
2 Mr. Cromwell inquiring about my availability to have a
3 conference call with the parties later in the afternoon.
4 Mr. Cromwell was rightly circumspect in not discussing
5 with me the merits of the pending matter.

6 At approximately 4:15 I did receive a call
7 from Mr. Cromwell and Mr. Trautman, a conference call,
8 and at that time Mr. Trautman indicated Staff's desire
9 and intention to file the pending motion. We discussed
10 the possibilities for scheduling, opportunities for
11 response. It became apparent that Qwest was in the
12 situation whereby we might say caught between a rock and
13 a hard place in the sense that the implementation
14 schedule under the terms of the Tenth Supplemental Order
15 which incorporates and adopts the settlement agreement
16 as its own as a part of the order is such, the
17 implementation schedule is such that Qwest needs to, to
18 put it colloquially, push the button today on its
19 billing system in order for that to be implemented
20 consistently with the timelines. Therefore it would be
21 necessary to either act on the motion today in a timely
22 way so that the matter could be resolved and/or grant an
23 extension of time as a practical matter because, well,
24 the time is just too short.

25 So on that basis, considering the

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1 circumstances, it seemed appropriate to convene this
2 proceeding on short notice, and we did not get an
3 official notice out, for which I apologize. It was
4 after 5:00 by the time these procedural matters were
5 resolved. I did send an E-mail to all parties of record
6 in the proceeding. Mr. Cromwell committed to
7 telephoning all the parties, and that was done, so
8 everyone was informed, and based on what we have heard
9 this morning, everyone is aware, and so I'm not
10 concerned about the notice matter. We do have the
11 principals assembled here for purposes of argument.

12 And I think with that we can move to our
13 argument. Mr. Trautman, would you like to present
14 Staff's motion.

15 MR. TRAUTMAN: Thank you, Your Honor. Your
16 Honor and Commissioners, Staff has brought the present
17 motion, which is one to apply the per line bill credit
18 that's mandated in the Qwest Dex settlement that was
19 adopted by the Commission to apply this to all of Qwest
20 lines, retail and resale access lines to both, to both
21 categories, and to not exclude the resale lines and that
22 this is entirely consistent with the agreement itself
23 that was filed with the Commission. As we indicated in
24 the motion, the agreement itself makes no distinction
25 anywhere within that agreement between resale and retail

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1 lines in calculating the per line credit.

2 CHAIRWOMAN SHOWALTER: Mr. Trautman, I want
3 to stop you there and ask a question. Can you turn to
4 page 3 of the settlement agreement.

5 MR. TRAUTMAN: Mm-hm.

6 CHAIRWOMAN SHOWALTER: If you look in C-1
7 where it describes the bill credit, it says it goes to
8 active customers of record during the billing cycle who
9 currently subscribe to services identified in Appendix
10 1. My question to you is, are you saying that AT&T is
11 one of those customers or are you --

12 MR. TRAUTMAN: Yes.

13 CHAIRWOMAN SHOWALTER: Okay. So that AT&T is
14 a customer who subscribes to the services in Appendix 1?

15 MR. TRAUTMAN: They may not subscribe to
16 every service in Appendix 1, but they do subscribe to
17 one or more of the services, yes.

18 CHAIRWOMAN SHOWALTER: And can we just then
19 turn to Appendix 1 and you can tell me, I'm interested
20 in how they qualify as a customer who subscribes to a
21 service in Appendix 1.

22 MR. TRAUTMAN: Well, as a business, as a
23 resaler, they're a business, they would purchase one or
24 more of these types of lines and then resell them
25 further to customers of their own, but the resaler

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1 itself is a customer of Qwest.

2 CHAIRWOMAN SHOWALTER: I understand AT&T is a
3 customer of Qwest. What I'm interested in is whether
4 AT&T is a customer who subscribes to the services in
5 Appendix 1, because that's what the literal language
6 says. So I would like you to tell me, just trying to
7 connect the dots, how is it that AT&T is a customer who
8 subscribes to the services in Appendix 1, and I'm now
9 looking at Appendix 1.

10 MR. TRAUTMAN: I believe they would subscribe
11 by purchasing the service indicated at whatever the
12 price is in Qwest's tariff for that service.

13 CHAIRWOMAN SHOWALTER: So the --

14 MR. TRAUTMAN: Now rather than purchase --
15 they may purchase that out of the resale tariff for
16 these services, and that would define the terms and
17 conditions for purchasing these services on a resale
18 basis.

19 CHAIRWOMAN SHOWALTER: So you're -- so if I'm
20 looking at Appendix 1, your interpretation is that the
21 services are not limited to retail customers of Qwest.

22 MR. TRAUTMAN: Correct, because it's defined
23 by any customers that would purchase one or more of the
24 services that are listed in the table.

25 CHAIRWOMAN SHOWALTER: All right, thank you.

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1 MR. TRAUTMAN: And as the settlement
2 agreement in fact in Section 3-C-1, part of which we
3 were just referring to says, that the bill credit shall
4 be provided to the customers identified in Appendix 1 of
5 the agreement in its entirety, and it does not in any
6 place exclude resale customers. Now the approach that
7 is taken by Public Counsel in the response that was
8 filed, and I assume the approach of the other parties,
9 seems to be that, well, the appropriate starting point
10 is that one needs to assume if nothing else is said that
11 the starting point is that you exclude resale customers
12 and that only if you have particular language somewhere
13 that would reinsert resale customers into the agreement
14 that they're not there.

15 CHAIRWOMAN SHOWALTER: Well, just on that
16 question then, I'm still looking at Appendix 1, and it
17 says, to illustrate this methodology, this is page 1 of
18 Appendix 1, the number of residential access lines as of
19 March 1, 2003, is 1,589,036. Does that include or
20 exclude resale lines?

21 MR. TRAUTMAN: We don't have any way of
22 knowing by looking at that number itself.

23 CHAIRWOMAN SHOWALTER: Do you agree that if
24 it excludes, then, if we determine that somehow, if it
25 excludes, then the presumption of what is in front of us

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1 on the settlement itself would exclude, whereas if this
2 number includes resale, you would presume it includes?

3 MR. TRAUTMAN: Well, it's an illustrative
4 table, and I don't know that it would -- I don't know
5 that that would be determinative in any event if it's
6 not further explained that -- and, in fact, below the
7 table, it simply says, the above calculation is only an
8 estimation and that the methodology and service
9 categories are as agreed to by the parties. So I guess
10 if it's not made clear that that includes or does not
11 include resale lines, there would be no basis for the
12 Commission to assume that the agreement excludes resale
13 simply by the table.

14 CHAIRWOMAN SHOWALTER: But, well, I gather we
15 might need to resort to extrinsic evidence. I don't
16 know that we will need to do that, but if we do, if it
17 turns out that this is the number that on March 1st
18 reflects Qwest retail customers and not resale, do you
19 believe that would be probative?

20 MR. TRAUTMAN: It may be one factor. I don't
21 believe it's determinative.

22 CHAIRWOMAN SHOWALTER: Okay.

23 MR. TRAUTMAN: And the main -- and as to the
24 use of extrinsic evidence or parole evidence as it's
25 sometimes called, again the approach of Public Counsel

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1 is to say, well, essentially they agree that if you look
2 at the -- if you look at the agreement, you won't find
3 the interpretation of resale that is now being espoused.
4 And what they say is, well, just give us some time and
5 we'll all file new declarations and we'll all tell you
6 now after the fact that this is what -- this is what the
7 intent was and what we --

8 JUDGE MOSS: Let's stop there, Mr. Trautman,
9 I appreciate the candor in your motion in noting that
10 the only evidence that you are aware of in the record,
11 and indeed the only evidence I am aware of in the
12 record, and having said that I will say I didn't have
13 the opportunity to review the thousands of pages of the
14 full record, but we have Mr. Brosch's supplemental
15 testimony in support of the settlement agreement that
16 you noted in your motion, and I looked at that. At page
17 2 of that testimony, this is a matter of record, the
18 agreement provides substantial one time customer credits
19 to Qwest Washington retail customers at closing, so on
20 and so forth. Now that is the only evidence we have in
21 our record at this time. Ultimately our concern is what
22 is the Commission's intent in adopting the settlement.
23 That is the evidence of record. Now my question to you
24 is, did Staff inquire about that at hearing; is there
25 something that I'm missing?

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1 MR. TRAUTMAN: I don't believe we did partly
2 because -- and when you -- there was reference, well,
3 there was reference made by Mr. Cromwell in his motion
4 to additional time being granted to the parties to
5 discuss the terms of the settlement. Staff did not
6 address this particular issue first of all because in
7 terms of the magnitude of the issues that were being
8 presented, this was -- this was a minor issue at the
9 time. I mean the issue we were delving into was the
10 sale of a \$1.3 Million business. This was not a -- this
11 was -- this issue lowers the per line credit by about 17
12 cents. It was also --

13 JUDGE MOSS: It seems to have become a small
14 matter of great principle to have been raised by a
15 motion the day before the implementation date.

16 MR. TRAUTMAN: Well, partly the question of
17 the timing again on that ground is that Mr. -- this was
18 the only -- this was the only statement we could find
19 was retail. None of the other parties, in particular
20 Qwest or the Department of Defense or Dex Holdings, none
21 of the other parties took any position that it was
22 exclusively limited to retail customers, nor did
23 Mr. Brosch, he did not specifically say that, nor did
24 the agreement say that.

25 JUDGE MOSS: Well, that's what his testimony

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1 says.

2 CHAIRWOMAN SHOWALTER: Well, actually, Judge
3 Moss's question went to the timing, which I wanted to
4 inquire into at some point here too. And it appears to
5 me that the proposal was made available September 29th,
6 and I guess there's something in Public Counsel's
7 response that mentioned some date of October 10th. And
8 my question is why are you bringing, why did you bring
9 this at 4:50 yesterday afternoon and not earlier?

10 MR. TRAUTMAN: Well, we did have a meeting
11 last week with Public Counsel and other parties, and we
12 discussed various implementation questions, and Staff
13 did not know that this would -- did not know that this
14 would be -- that this would be disputed until then.
15 And, in fact, we asked for information on the number of
16 resold lines and other resaler based questions, and I
17 don't believe we got the answers back to those questions
18 until it was either very late on Friday afternoon or on
19 Monday. I was -- now Dr. Blackmon was out earlier this
20 week, I was out ill earlier this week, but so I'm not
21 sure how much -- if you're asking about the time between
22 basically October 10th and October 15th, that would
23 explain the delay. We did not receive the information
24 until either very late at the end of the day on Friday
25 or on Monday, and we still had to determine what course

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1 we would take.

2 CHAIRWOMAN SHOWALTER: Why is your motion
3 limited to resale customers? If you say this applies to
4 customers, are they the only wholesale customers who you
5 think also subscribe to some of these other services, is
6 that the reason?

7 MR. TRAUTMAN: Yes.

8 And again, in terms of the use of extrinsic
9 evidence, there is the well established rule that while
10 you can bring in evidence to explain an agreement, you
11 can't bring in evidence to contradict it or modify or to
12 add to what the agreement would already say. And we
13 would submit that bringing in a declaration now to
14 exclude resale when the agreement itself does not say
15 that and does not indicate they should be excluded would
16 in fact be changing the terms of the agreement. Now --

17 CHAIRWOMAN SHOWALTER: I have a different
18 area of inquiry, which is the purpose behind the credit.
19 Isn't this in essence a distribution of a regulatory
20 asset or a partial distribution of a regulatory asset.
21 And my question is, why is AT&T or its retail customers
22 entitled to part of that distribution? And I'm not
23 interested in the argument on precedent of other
24 credits, because your argument there had to do with a
25 very different kind of credit. I mean it is a word

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1 credit, but that's it. But why is this pot of money
2 owed to AT&T, well, AT&T the question is?

3 MR. TRAUTMAN: Well, I guess -- well, and
4 this kind of coincides with Public Counsel's section of
5 the brief where it says, the purpose of the settlement
6 is to compensate Qwest rate payers. Well, AT&T is a
7 rate payer. A resaler is a rate payer.

8 CHAIRWOMAN SHOWALTER: Okay.

9 MR. TRAUTMAN: Along with other rate payers.
10 And you could compare this in addition to the revenue
11 credits. As you recall, there's a bill credit up front,
12 and then there's a revenue credit that's booked for 15
13 years of \$110 Million to \$103 Million. Now that credit
14 applies, over a 15 year period, would have to apply to
15 both retail and resale. I mean you can't -- because of
16 the -- the law mandates that there's parity between
17 retail and resale services, so that credit is going to
18 be applied for the benefit of retail and resale
19 services.

20 CHAIRWOMAN SHOWALTER: But that's not a bill
21 credit to individuals.

22 MR. TRAUTMAN: No.

23 CHAIRWOMAN SHOWALTER: That's a revenue
24 credit to the company's costs.

25 MR. TRAUTMAN: Right, well, and the bill

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1 credit again is to customers, and AT&T is a customer.
2 And it fits -- and it also -- it does in fact fit within
3 the scheme that's set forth in 3-C-1. I mean part of
4 the argument was that somehow say AT&T or a resaler can
5 not be a customer having a billing cycle that receives a
6 bill and therefore this mechanism couldn't apply to
7 them, but in fact it does.

8 CHAIRWOMAN SHOWALTER: Well, but I'm
9 interested, so your view is that AT&T as a resaler is a
10 customer entitled to this regulatory asset called the
11 Yellow Pages, I mean I want to get more specific, that
12 if they bore risk or basically stand in the same shoes
13 as a retail customer with respect to this regulatory
14 asset called the Yellow Pages?

15 MR. TRAUTMAN: Yes, there's no reason to
16 treat them as a customer any differently, because they
17 buy the same services. They buy at the same price
18 although minus a resale discount. Other than that,
19 there's no distinction between what they're buying.

20 CHAIRWOMAN SHOWALTER: But it's wholesale
21 versus resale?

22 MR. TRAUTMAN: Correct.

23 JUDGE MOSS: Along this line, you make the
24 argument that the result would be anticompetitive if the
25 resale customers were excluded, and I'm a little puzzled

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1 by that. In what sense would it be anticompetitive? I
2 mean there's nothing that ensures that if this bill
3 credit is paid to AT&T, for example, not to pick on AT&T
4 but that's the example we have been using, that AT&T
5 will in turn pass it through to its retail customers,
6 and so those customers at least see no impact or effect
7 from it, so I'm curious as to how it's anticompetitive.

8 MR. TRAUTMAN: Well, along the question that
9 there's no guarantee or mechanism to ensure that they
10 will pass it through, well, they're a competitive
11 company, and so that would be left to the market. I
12 mean that would be the mechanism for passing that
13 through to their customers.

14 JUDGE MOSS: Well, let's talk about it on a
15 practical level. A one time bill credit, is that going
16 to in your view affect the marketing in the industry for
17 some period of time? I mean if we were talking about
18 something that was changing the retail rates and
19 therefore the resale rates, then I could see your
20 argument. But in terms of a one time bill credit, it's
21 difficult for me to see how that impacts on
22 competitiveness in the industry, and I just want to
23 understand that.

24 MR. TRAUTMAN: Well, again, I guess I argue
25 in two ways. First, there must be a general assumption

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1 once a company is classified as competitive that it will
2 act in a competitive manner and that the market will
3 pass through these moneys to further customers. But the
4 same -- the same problem or the same issue of will --
5 the same issue could apply say to a business. I mean a
6 business receives this type of -- receives a credit, but
7 there's no -- there's no guarantee that that business is
8 going to pass through the benefit of that credit to its
9 ultimate customers any more than AT&T. I mean let's
10 take Boeing if they receive a credit or a hotel if they
11 receive a credit.

12 JUDGE MOSS: Well, but that goes to a
13 different issue, because we're not talking about their
14 customers being the sought after purchasers in the
15 telecommunications industry, we're talking about
16 something different here. I mean the competition we're
17 concerned about is in the telecommunications industry,
18 the competition for telephone service. So the fact that
19 Boeing doesn't reduce the price of a 707 or whatever
20 they're making these days is beside the point.

21 MR. TRAUTMAN: Well, by classifying the
22 companies as competitive, the Commission has essentially
23 made the decision to leave it to the market to determine
24 whether the credits are passed through. And the
25 assumption once a company is classified as such is that

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1 the market will in fact do that. Otherwise, they likely
2 would not have been classified competitively.

3 And as we did indicate, although I understand
4 that the Chair has indicated some -- referred to this at
5 one point, that there are -- there have been credits
6 that came out of the Qwest service quality performance
7 program, and those were macro level credits, and those
8 credits, as we -- as Qwest confirmed in discussions with
9 us, those -- the payments that have been made by Qwest
10 under that program from 2001 to 2003 were divided over
11 all the lines, both retail and resale.

12 CHAIRWOMAN SHOWALTER: Yes, but I mean the
13 reason -- yes, it has the name called credit, and it
14 implies, but you have to look to what the purpose of the
15 credit is. The fact that a credit for one purpose was
16 spread among one class of customers I don't think means
17 that every credit for every purpose is spread, must be
18 spread across the same class of customers. You've got
19 to get a little more specific than that, which is why I
20 asked the more specific questions.

21 MR. TRAUTMAN: Right, and that may be, I
22 don't deny that, Your Honor. But in this situation, we
23 don't see anything unique about the retail customer base
24 that would entitle it to a credit that does not apply to
25 the resold lines. And so as we have indicated and for

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1 the reasons that we have set out in our motion, we would
2 ask that the Commission determine that the per line bill
3 credit in the settlement agreement should apply to the
4 retail and the resale access lines as that agreement
5 itself provides.

6 JUDGE MOSS: Everyone else may understand
7 this thoroughly, and so I hope I'm not going over ground
8 that is perfectly clear to the commissioners but not to
9 me. How does this resale work? Does AT&T go out into
10 the marketplace and put up a sign, get your telephone
11 services here, and a customer comes up and AT&T says,
12 we'll sell you AT&T telephone service, or do they say,
13 okay, you want to sign up for residential flat line
14 services listed in Table 1 to Appendix 1, and AT&T says,
15 fine, we can get that, we'll buy that from Qwest and
16 resell it to you? How does it work, I just want to know
17 the -- I mean is it AT&T that's holding itself forth as
18 selling an AT&T service, or is it AT&T holding itself
19 forth as selling a Qwest service at a good price?

20 MR. TRAUTMAN: It would be the former.

21 JUDGE MOSS: So from the customer's, from the
22 ultimate customer's perspective, the user's perspective,
23 let's assume for the sake of argument that we agree and
24 grant your motion and the approximate \$30 per line bill
25 credit goes through to the resale customer. So AT&T has

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1 1,000 customers, it gets \$30,000, and it goes to its
2 customers and says, surprise, here's a \$30 check. Is
3 the ultimate user customer going to associate that with
4 Qwest in any way in the sale of this regulatory asset,
5 or is the customer going to say, gosh, that was nice of
6 AT&T to do that? And if it's the latter, doesn't that
7 give AT&T an unfair competitive advantage?

8 MR. TRAUTMAN: Well, we don't believe there
9 would be an unfair competitive advantage because in this
10 case AT&T's competitor, who is Qwest, they will
11 essentially be passing out free money and --

12 JUDGE MOSS: To the existing customers.
13 Let's change the scenario. AT&T is free to use this
14 money however they wish, so they can instead of passing
15 it through to their existing customers put up a sign
16 that now says, new customers only, one month free.

17 MR. TRAUTMAN: Right, but if they didn't get
18 the credit, they wouldn't have anything at all that they
19 could pass through to their -- even though they're a
20 customer.

21 JUDGE MOSS: Let's focus on the competitive
22 thing.

23 MR. TRAUTMAN: Right.

24 JUDGE MOSS: Qwest is in the position of
25 giving its existing customers the credit, whatever it

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1 turns out to be, let's call it \$30, let's keep it
2 simple. So all of Qwest's existing customers will get
3 the \$30. Qwest can't use it as a marketing tool to get
4 new customers or regain lost customers. AT&T by
5 contrast under the scenario that I modified would be
6 able to advertise and say, new customers, one month
7 free, they could use the money in that way. That's
8 where I'm concerned about giving the resaler a
9 competitive advantage.

10 MR. TRAUTMAN: Well, AT&T's credits, whatever
11 the amount of the credit they get, are based on the
12 amount of lines they have.

13 JUDGE MOSS: Right, but they can use the
14 money however they wish, they don't have to pass it
15 through on a line by line basis the way Qwest does.

16 MR. TRAUTMAN: Well, again, because they're
17 competitively classified, the Commission I believe would
18 assume that the market would determine appropriately how
19 those moneys are passed through, as it would in all pass
20 through situations.

21 JUDGE MOSS: Did you complete your argument?

22 MR. TRAUTMAN: I did, Your Honor, thank you.

23 JUDGE MOSS: Thank you, we appreciate it.

24 I'm in a quandary whether I should hear first
25 from Public Counsel or from Qwest, so since you all are

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1 aligned, I will let you decide who wants to go first.

2 MR. CROMWELL: I would be happy to go first,
3 Your Honor.

4 JUDGE MOSS: Okay.

5 MR. CROMWELL: For the record, Robert
6 Cromwell on behalf of Public Counsel. And also for the
7 record at 8:00 a.m. this morning I filed with the
8 Commission a responsive pleading, which I believe was
9 distributed at that time by the records center. I also
10 when I completed the document last night, I did E-mail
11 it out. I attempted to do so directly to yourself and
12 the Commissioners and all the interested parties so that
13 if they were still also on E-mail they would have an
14 opportunity to look at it before they came in this
15 morning.

16 JUDGE MOSS: And we did receive that in a
17 timely way and had an opportunity to read it before
18 coming in this morning, Mr. Cromwell. And I will say in
19 respect to that to perhaps focus your arguments a bit,
20 what we have got before us here is the Commission's
21 Tenth Supplemental Order including the Appendix, which
22 is the stipulation and settlement agreement. As you
23 know, once the Commission enters such an order accepting
24 and adopting and approving a settlement agreement, that
25 becomes the Commission's order, part of the Commission's

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1 order. So the principles of law with which we are
2 primarily concerned are those of statutory construction,
3 not contract. Now there's a considerable overlap,
4 however there is no Berg case on the statutory
5 interpretations of which I'm aware, so I don't know that
6 you need to go there particularly, but you might
7 consider focusing your argument on the Commission's
8 intent in implementing this whole thing through its
9 Tenth Supplemental Order.

10 MR. CROMWELL: And I will be as equally
11 candid as Mr. Trautman was. The majority of the legal
12 argument that I presented was I will confess cribbed
13 from other matters regarding enforcement of settlements
14 that we have been involved in in the past, and it was
15 the simplest and most direct analysis that I had
16 available to me given the timing regarding
17 interpretation, so.

18 JUDGE MOSS: And considering that you
19 received this motion sometime after 4:50 yesterday
20 afternoon, I think it was a marvelous effort, that you
21 were able to assemble a cogent argument and file it
22 early this morning, and I know you must have burned a
23 little midnight oil.

24 MR. CROMWELL: Thank you.

25 I do have just a few points I would like to

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1 make, and I will also attempt to respond to some of the
2 questions that have been presented by the Bench. I
3 should note that I have been authorized to state the
4 concurrence of Department of Defense, WeBTEC, and AARP,
5 although I believe Mr. Roseman is on the line and can
6 represent his own client's interests in this hearing.

7 First, it is our position that the settlement
8 is clear on its face and that resale companies are not
9 intended third party beneficiaries of the settlement
10 which this Commission adopted by its Tenth Order. We
11 believe that it's also clear from the language of the
12 settlement that this Commission adopted in its Tenth
13 Order that the intent of the parties was to benefit
14 Qwest's retail residential and business customers as set
15 forth in Appendix 1 with bill credit.

16 I am hopeful that Mr. Brosch is also
17 available on the bridge line. If the Commission wishes
18 to take extrinsic evidence at this time, he could be
19 sworn in over the phone. As was raised I believe by
20 yourself, Judge Moss, Commission Staff does concede this
21 point, that it is a matter of record through Mr. Bosch's
22 supplemental testimony that the intent of the parties
23 was to benefit Qwest's retail customers.

24 I will also note that given the timing, I did
25 not have the opportunity to thoroughly review the record

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1 to see if there were other possible references to the
2 intent of the parties at the time that the settlement
3 was presented to the Commission and when the settling
4 parties presented witnesses and made them available to
5 the Commission for cross-examination.

6 Further, it's our position that the bill
7 credit represents an extraordinary remedy which has no
8 anticompetitive effect. I should mention also as an
9 aside that we believe that resale companies do in fact
10 benefit by the settlement agreement which this
11 Commission adopted in its Tenth Order through the effect
12 of the annual revenue credit found in Section 3-C-2,
13 because it's prospective effect will be to maintain
14 reasonable retail rates from which the discounted rate
15 which resalers avail themselves of is derived.

16 Lastly, we believe that the motion, I
17 shouldn't say lastly, the motion that Commission Staff
18 filed we believe is untimely as I set forth in some
19 detail in my responsive pleading, and for all these
20 reasons we believe that the motion should be denied.

21 As to the questions raised, I believe the
22 Chairwoman focusing on Appendix 1 and the illustrative
23 use of numbers from March 1, 2003, it is my
24 understanding that those numbers do not include resale
25 customers, those are in fact Qwest's retail residential

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1 and business customers who subscribe to the services
2 identified in Table 1 of Appendix 1.

3 CHAIRWOMAN SHOWALTER: You know, on that
4 point, it strikes me that these numbers may be the most
5 objective information that we have, that is the number
6 is in there, but it's not clear that it includes or
7 excludes resale customers. I'm wondering if it is in
8 the record somewhere what that number is, and I don't
9 know, I imagine the parties may have just looked to some
10 number at some point when they were having their
11 discussions. On the other hand, there is an awful lot
12 of information in the record. I don't know that, I
13 don't know, we would have to think about it, how unusual
14 it is to go confirm what that number is, but the number
15 is here.

16 MR. CROMWELL: I believe that the number is
17 there. I believe because the settlement was admitted
18 into evidence by the Commission and eventually adopted
19 in the Tenth Order that it is in the record through this
20 document. And to the degree you have a question as to
21 what this number represents, I believe Mr. Reynolds
22 could testify to that this morning. I will defer to
23 Ms. Anderl to address that, I think it would be best
24 addressed by the company, but that is my understanding.

25 Again, to the point raised regarding timing,

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1 again, Madam Chair, as I set forth in responsive
2 pleading, this is an issue which could have been raised
3 at any time during this proceeding after the filing of
4 the settlement stipulation. I concur in Mr. Trautman's
5 analysis that this in relation to the number of issues
6 in this case and the amount of money at stake in this
7 proceeding is a very small issue. But that said, it
8 appears to be a significant one for Staff, and if it was
9 significant enough to file this motion at this date, we
10 believe it was incumbent upon them to raise it at an
11 earlier point in the proceeding when the record was
12 still open and parties could have addressed it either
13 upon cross-examination of witnesses on the stand, upon
14 briefing after the hearings, in a motion for
15 clarification after the issuance of the Tenth
16 Supplemental Order. Those would have been naturally
17 appropriate times to raise this issue. We believe that
18 this motion is untimely at this point and can be denied
19 solely on that basis.

20 JUDGE MOSS: On that point, Mr. Cromwell,
21 just to clarify, I think there was some reference
22 earlier to October the 10th. My recollection of your
23 pleading is that I believe it says that Public Counsel
24 and Staff, more specifically yourself and Dr. Blackmon,
25 discussed this precise issue on October the 8th; is that

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1 correct?

2 MR. CROMWELL: That is correct, Your Honor,
3 and for the record the week before, the week of, well,
4 no, just so that I'm precise, I believe it was several
5 weeks prior to that, either the week of the 15th or the
6 22nd --

7 JUDGE MOSS: Of September.

8 MR. CROMWELL: -- of September, shortly after
9 Qwest publicly announced the closing of the second half
10 of the Dex transaction, Ms. Anderl and I exchanged
11 informal communications by E-mail suggesting that, and I
12 think it might have been my suggestion, that it would be
13 good for the settling parties to have a conference call
14 just to clarify what schedule Qwest was going to be
15 operating on to make sure that if we had any questions
16 about how they were going to implement them that we
17 would be able to resolve that amicably through a
18 discussion.

19 At that time by conferring with parties and
20 by E-mail again and arriving at scheduling, we scheduled
21 a conference call and meeting in my offices on 3:30 of
22 October 8th. I made a bridge line available through my
23 office. As a courtesy, we included Commission Staff and
24 their counsel in that discussion. It was -- the purpose
25 of the discussion was for the settling parties to

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1 resolve any questions they had regarding Qwest's
2 implementation.

3 Without going into any detail as to the
4 content of those conversations, I did reflect in
5 responsive pleadings that that was the first time that
6 any of the settling parties gained an awareness that
7 this was an issue for Commission Staff, and which is why
8 I made a record of it in the responsive pleadings.

9 Does that help?

10 JUDGE MOSS: Thank you, yes, that clarifies
11 it.

12 MR. CROMWELL: Mr. Trautman stated in
13 response to your questions, Judge Moss, that AT&T for
14 example would be a competitive company and it's best
15 left to the market to deal with this. It's our position
16 that the bill credit as a one time benefit and truly an
17 extraordinary remedy that's intended to, you know, pass
18 through I believe as the Chairwoman said a portion of
19 the value of a regulatory asset to Qwest's rate payers,
20 that it does not have an anticompetitive effect. The
21 bill credit does not and is not contingent upon the
22 future selection of a carrier. Because it does not
23 affect the decision making of the customers as to who
24 their carrier would be, we don't believe there's any
25 anticompetitive effect from the bill credit.

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1 I can tell you that many of us joked about
2 signing up for, you know, 20 lines on the eve of the
3 bill credit to get 20 credits, but it was a joke.
4 Because as a practical matter, there's the transactional
5 costs would certainly outweigh the benefit of doing so
6 for one month. So as to the anticompetitive effect, we
7 don't believe there is one.

8 As to the assumptions that Commission Staff
9 expressed regarding the market passing through these
10 benefits, we believe those assumptions are misplaced.
11 There was a front page Wallstreet Journal article
12 yesterday regarding the wholesale shrimp market and how
13 wholesale shrimp prices have declined at the docks, but
14 the retail pricing of that product in a completely
15 unregulated environment as to pricing, the market is not
16 passing through those costs. And I think it's very much
17 a dubious assumption that any of the resalers would in
18 fact choose of their own volition to pass through this
19 bill credit to their customers.

20 I can tell you that it was the intent of the
21 parties to the settlement who represent customer groups
22 that this bill credit go to Qwest's retail residential
23 and business customers. That's why we were quite
24 careful in delineating precisely what groups of Qwest
25 retail customers were entitled to the credit in Appendix

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1 1.

2 CHAIRWOMAN SHOWALTER: Do you know if, we are
3 using AT&T as an example here, if AT&T is a resaler that
4 sells say a residential flat line, is that end use
5 customer entitled to the Dex Yellow Pages/White Pages
6 combo?

7 MR. CROMWELL: I do not know whether AT&T as
8 a resaler passes through any customer identification
9 information to Qwest's directory operations, I guess it
10 would now be Dex Holding's operations, so that that
11 customer is provisioned with a Dex directory. Was that
12 your question?

13 CHAIRWOMAN SHOWALTER: Yes.

14 MR. CROMWELL: I don't know, the company may.

15 I think the only other issue I would raise on
16 this point of anticompetitive is that I think this
17 Commission can reasonably conclude based on its
18 experience that the most likely outcome if this motion
19 were granted would be that the resalers would simply
20 drop this quantity to the bottom line. I think it's
21 highly speculative to assume that it would be passed
22 through to existing customers in any fashion.

23 I don't want to belabor the points that I
24 made in my responsive pleading because you do all have
25 it and you have had the opportunity to review it. I'm

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1 happy to answer any other questions or to make
2 Mr. Brosch available if you so desire.

3 CHAIRWOMAN SHOWALTER: I just have another
4 question that you or anyone can answer, but were any of
5 the resale companies parties to this proceeding?

6 MR. CROMWELL: Not to my knowledge. XO may
7 purchase resale services, I don't know, you would have
8 to ask either the company or Mr. Kopta.

9 CHAIRWOMAN SHOWALTER: Thanks.

10 JUDGE MOSS: Ms. Anderl, I'm going to take
11 your deference to Mr. Cromwell in the order of things to
12 be tantamount to a decision that you would like to go
13 last in this group, so I am going to ask Mr. Roseman if
14 he wishes to comment on the motion.

15 MR. ROSEMAN: AARP doesn't have anything to
16 add in addition to what Mr. Cromwell said.

17 JUDGE MOSS: Thank you, Mr. Roseman.

18 And, Mr. Sherr, I'm not ignoring you, but of
19 course Qwest is represented here in the room, so we'll
20 hear from Ms. Anderl.

21 MR. SHERR: Thank you, Your Honor.

22 MS. ANDERL: Thank you, Your Honor. To
23 address some of the specific points that were raised
24 earlier, the numbers that the Chairwoman asked about in
25 Appendix 1 do not include resold lines. And to the

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1 extent that the Commission would like sworn testimony
2 affirmation of that, Mr. Reynolds is here and can
3 testify to that. He was directly involved in gathering
4 those numbers and preparing the calculations both for
5 purposes of the settlement initially and for purposes of
6 the actual implementation of the credit.

7 CHAIRWOMAN SHOWALTER: But on that point, you
8 don't think that same information rests somewhere in the
9 record of this case?

10 MS. ANDERL: I doubt that it does.

11 CHAIRWOMAN SHOWALTER: Okay.

12 MS. ANDERL: I doubt that it does.

13 And with regard, Chairwoman Showalter, to
14 your question about whether AT&T or other resaler
15 customers are entitled to either directory listings or
16 receipt of the actual physical White and Yellow Pages
17 book, I know that the testimony in this case establishes
18 that Dex now does deliver to all households and
19 businesses in an area without regard to whom the
20 customer subscribes. So whether that customer is a
21 resold customer or a UNE-P customer or a customer of
22 AT&T through their cable telephony services, those
23 customers are going to get a Yellow and White Pages on
24 their doorstep because Dex delivers to everyone.

25 CHAIRWOMAN SHOWALTER: Okay, so it's not as a

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1 resale customer, it is as a resident of an area?

2 MS. ANDERL: It is having a physical location
3 where a phone book can be left.

4 CHAIRWOMAN SHOWALTER: I see.

5 JUDGE MOSS: That explains why I got four.

6 MS. ANDERL: Yes, it does. I got a Verizon
7 one in Seattle just the other day.

8 So those issues I just wanted to address. We
9 do concur with Public Counsel's arguments with regard to
10 the entitlement of resale customers to the credit. We
11 do believe that the credit should be limited in
12 accordance with the settlement agreement to Qwest's
13 retail rate payers end users.

14 Our main concern, and this is why I deferred
15 to Mr. Cromwell, is while we do concur with Public
16 Counsel and the other parties on that issue, our main
17 concern with this motion at this point is the timing.
18 We think not only is it untimely from a practical
19 standpoint, it is technically untimely as well. The
20 settlement agreement, which is now embodied as a
21 Commission Order, required Qwest to file its description
22 of the proposed bill credit at least 15 days in advance
23 of the implementation. Qwest filed that on September
24 29th. 15 days later was October 14th, and so I guess
25 technically on the 14th or 15th we could have flipped

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1 the switch had we been ready to do that at that time,
2 and then these credits would already be churning away in
3 process, and maybe we could say, well, Staff is really
4 just too late.

5 But I think that that 15 day requirement was
6 put in the settlement agreement for a reason. It was
7 put in there to draw some time lines, to give some
8 cutoffs, to give us some assurance that after we filed
9 the notice of bill credit and 15 days passed, we could
10 go forward and implement that credit. And, you know, to
11 have things brought to a screeching halt like this by
12 Staff's motion, which is filed I think really months
13 after it first should have been raised but certainly at
14 least two days after what I think is a hard deadline set
15 forth in the settlement agreement is very troubling to
16 us, and we believe that the timeliness issue really
17 ought to -- could form a basis for just rejecting the
18 motion out of hand.

19 As it turned out, of course, we were, you
20 know, 12 or 24 hours away from having flipped the
21 switch, and so on very short notice we can all be here
22 and discuss this issue. But just in terms of how these
23 things roll out in the future, I know there will
24 probably never be another thing like this, but there
25 needs to be some ability for parties to be able to rely

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1 on some timelines and operationally go forward with
2 their business.

3 CHAIRWOMAN SHOWALTER: Well, I guess I would
4 like to interrupt you for just a minute and ask
5 Mr. Trautman, what about the deadline, 15 days went by
6 and no motion was filed.

7 MR. TRAUTMAN: Well, I guess I would just
8 reiterate. I mean Qwest again says they filed with the
9 Commission a description of the bill credit on September
10 29th and October 3rd. What we would simply say is again
11 the description does not exclude resale. I mean so
12 there is no -- there's nothing from the face of it that
13 would flag you automatically and say this is an issue.

14 We then did have a meeting, Staff was
15 available to meet before October 8th although Qwest also
16 had to get other parties to be available for that
17 meeting if I recall, but we were available before
18 October 8th. When we did have the meeting, we then
19 asked for information on the resale, and we did not get
20 that until late in the day on October 10th. But as far
21 as immediately, supposedly immediately responding to the
22 letter sent to the Commission, it does not flag the
23 issue.

24 CHAIRWOMAN SHOWALTER: But there is no
25 additional information you had after the 14th, that you

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1 gathered after the 14th?

2 MR. TRAUTMAN: After the 14th?

3 CHAIRWOMAN SHOWALTER: Which if you assume
4 that the 14th was 15 days after the 29th, you were in a
5 position by that date to file some kind of objection.

6 MR. TRAUTMAN: I don't know. I was -- I
7 personally, I was ill, I was ill, I was not in the
8 office, so.

9 MS. ANDERL: Your Honor, the other thing that
10 I would like to raise just as a practical matter is it
11 is not as though we have not done any work up until now.
12 There has been a lot of preparatory work to determine the
13 appropriate line counts and to have our IT systems ready
14 to pull the accounts and start applying the credits.
15 That work was done with the assumption that resold lines
16 would be excluded. If the rules now change, we can not
17 go forward. The only thing we can do today is implement
18 the credit the way we were planning on implementing the
19 credit. If we are told to include resold lines, we
20 would need another week at least to be able to implement
21 the credit to include those lines. So if the Commission
22 is entertaining that notion at all, we would ask that
23 you consider that and if you grant Staff's motion enter
24 an order granting us the additional time so that we're
25 not in violation of the settlement agreement.

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1 CHAIRWOMAN SHOWALTER: And just on the
2 question of timing, we can either deny the motion in
3 which case you go forward or either grant the motion or
4 take more time in which case you would need more time.
5 But what is the deadline for that decision, what o'clock
6 are we dealing with here today?

7 MS. ANDERL: Today, noon Pacific time.

8 CHAIRWOMAN SHOWALTER: Okay.

9 MS. ANDERL: And then the deadline, well, the
10 settlement agreement states that we are to begin issuing
11 the bill credits no later than 45 days after the
12 closing, and that in our calculation is the 23rd of
13 October, so it's really next Thursday by when we would,
14 let me see if I can just find it, during a complete
15 billing cycle commencing not later than 45 days
16 following the closing of the sale. So the complete
17 billing cycle that commences not later than 45 days
18 following the closing of the sale, the last day you
19 could do that and comply is the 23rd. So to the extent
20 that we needed to flip the switch today and begin
21 posting credits to customer accounts on Monday or
22 Tuesday, that gave us a little bit of a cushion, you
23 know, but not a lot.

24 CHAIRWOMAN SHOWALTER: Ms. Anderl, do you
25 have any thoughts on the underlying principle here,

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1 which is as to whether AT&T as a resaler stands in the
2 same shoes as a Qwest retail customer with respect to
3 the regulatory asset at issue?

4 MS. ANDERL: We agree that they do not. We
5 agree with the principle that they do not stand in the
6 same shoes. Staff in their motion states that the
7 credit amount is intended to compensate customers for
8 the loss of the directory publishing business. We don't
9 -- and resale services since they are priced at a
10 discount from retail prices are just as affected by the
11 loss of directory revenues as are retail services. We
12 don't think that that's entirely correct.

13 AT&T has perhaps the ability to purchase our
14 retail services at a discount off the retail rate but
15 also has other revenue opportunities associated with
16 that resold line. They may resell that line to a
17 customer, say a customer who has bad credit, they may
18 resell it for \$40 or \$50. Now I know AT&T doesn't do
19 that, but other resalers do, and so they're simply not
20 in the same position as are retail end user customers
21 who have been the rate payers paying the rates all along
22 any more so than a customer who is a UNE-P customer or a
23 wholesale customer, you know, a pure UNE loop customer.

24 JUDGE MOSS: We will be in recess for a few
25 minutes, let's say 15 minutes, and I will check back

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1 with you then and let you know where we are.

2 (Recess taken.)

3 JUDGE MOSS: The Commission has had an
4 opportunity to deliberate having considered both the
5 written materials submitted by the parties and also
6 considering the excellent argument presented on all
7 sides this morning. Considering the settlement package
8 as a whole in the context of our record, the Commission
9 finds and concludes that the bill credit applies to
10 Qwest retail customers and not to the resale customers,
11 so the Staff motion is denied.

12 That being the case, then Qwest should be
13 able to implement the bill credit consistent with the
14 timelines provided in the Tenth Supplemental Order in
15 this proceeding.

16 And with that, unless there's anything
17 further, we're off the record, thank you.

18 (Hearing adjourned at 10:40 a.m.)

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