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1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Petition for)
Arbitration of an Interconnection)
4 Agreement Between)Docket No. UT-003006
SPRINT COMMUNICATIONS COMPANY, LP,)Volume I
5 and)Pages 1 - 29
U S WEST COMMUNICATIONS, INC.,)
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8 An oral argument in the above matter
9 was held on August 17, 2000, at 9:05 a.m., at 1300
10 South Evergreen Park Drive Southwest, Olympia,
11 Washington, before Chairwoman MARILYN SHOWALTER, and
12 Commissioners RICHARD HEMSTAD AND WILLIAM GILLIS.

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The parties were present as follows:

14

U S WEST COMMUNICATIONS, INC., by MARY ROSE
15 HUGHES, Attorney at Law, Perkins Coie, 607 Fourteenth
Street Northwest, Washington, D.C. 20005-2011.

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SPRINT COMMUNICATIONS COMPANY, LP, by ERIC S.
17 HEATH, Attorney at Law, 330 South Valley View
Boulevard, Mailstop NVLSVB0110, Las Vegas, Nevada
18 89107.

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Also Present for the Washington Utilities and
Transportation Commission: Jing Roth, Glenn Blackmon.

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24 Kathryn T. Wilson, CCR

25 Court Reporter

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

2 CHAIRWOMAN SHOWALTER: We are here for oral
3 argument in Docket No. UT-003006, which is a matter of
4 the petition for arbitration of interconnection rates,
5 terms, conditions, and related arrangements between
6 Sprint Communications Company and U S West
7 Communications, and specifically, we have the
8 arbitrators' report, and Qwest, or U S West, has
9 requested a review of some of those conditions. Before
10 we begin, why don't we introduce ourselves; that is, I
11 think you know us. Why don't you introduce yourselves.

12 MS. HUGHES: Thank you, Madam Chairwoman and
13 Commissioners. My name is Mary Rose Hughes. I am
14 outside counsel for Qwest. I am with the law firm of
15 Perkins Coie, and I practice mainly in Washington, D.C.
16 My colleague, John Devaney, has been the lead attorney
17 for Qwest in the arbitration of this interconnection
18 agreement with Sprint. Mr. Devaney had intended to be
19 here today. He had planned to be here today. He was
20 looking forward to talking with you today. However, he
21 had a family medical emergency late last week, which,
22 unfortunately, still has not resolved itself, so I'm
23 here today in his stead. I am familiar with the issues
24 in this arbitration and specifically with the issues
25 raised in Qwest's petition for review.

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1 MR. HEATH: Thank you, Madam Chairwoman and
2 the Commissioners. Eric Heath, H-e-a-t-h, for Sprint.

3 CHAIRWOMAN SHOWALTER: Staff is here in an
4 advisory capacity, not as a party, but we have here
5 with us Glenn Blackmon and Jing Roth. Since Qwest is
6 raising the challenges -- it is appropriate to call you
7 Qwest not U S West?

8 MS. HUGHES: Yes.

9 CHAIRWOMAN SHOWALTER: Qwest is raising the
10 challenges, so I think the easiest thing to do would be
11 to have Qwest present the issues for 15 minutes and
12 with a response for 15 minutes, and that leaves us a
13 little time for more questions. Were these
14 simultaneous briefs?

15 MS. HUGHES: Yes.

16 CHAIRWOMAN SHOWALTER: Which means we do have
17 the briefs, and I think you either hit the highlights,
18 or perhaps this gives you a little chance to join the
19 issues that the other brief has raised.

20 MS. HUGHES: Thank you, and I can be brief.
21 I would like to say at the onset that although several
22 terms of the parties' interconnection agreement are in
23 dispute, and, of course, that's why we are here, the
24 vast, vast majority of the terms and conditions of the
25 agreement are not in dispute.

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1 When the parties began their negotiation,
2 there were literally hundreds and hundreds of terms and
3 conditions to discuss, and there were many, many terms
4 and conditions about which the parties held differing
5 views. As a result of extensive negotiations, however,
6 and negotiations that continued, in fact, throughout
7 the arbitration process, the parties were able to
8 resolve all but several issues in dispute, and I do not
9 want to underestimate the importance of the achievement
10 that we have an interconnection agreement to present to
11 this commission that is largely negotiated, and despite
12 the fact that there were literally hundreds of terms
13 and conditions originally up for discussion and
14 originally in dispute, the parties have through mutual
15 negotiation and compromise decided between themselves
16 the terms and conditions that will govern their
17 business relationship in the State of Washington for
18 the next few years.

19 Having said that, there are two issues on
20 which the parties were unable to reach an agreement and
21 that are the subject of Qwest's petition for review
22 that's before the Commission today. The issues are
23 whether or not reciprocal compensation should be paid
24 on ISP-bound traffic and whether or not Qwest must
25 combine unbundled network elements in any technically

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1 feasible manner for Sprint, and as I said, I have very
2 brief comments on both issues as the record and the
3 briefing submitted to the Commission is extensive.

4 With respect to reciprocal compensation on
5 ISP-bound traffic, our arbitrators recommend that
6 reciprocal compensation be paid on this traffic. They
7 base their recommendation on the observation that
8 nothing in current law precludes this commission from
9 ordering reciprocal compensation for this traffic, and
10 they also, of course, base their recommendation on the
11 prior decisions of this commission, and further, while
12 the arbitrators acknowledge the public policy arguments
13 that Qwest has made against awarding reciprocal
14 compensation on this traffic, the arbitrators have
15 concluded that this arbitration is not the place to
16 resolve those arguments.

17 Qwest comes before you today very, very
18 respectful of past Commission decisions on the issue of
19 reciprocal compensation for ISP-bound traffic. Qwest
20 submits, however, that there is new evidence, and there
21 is compelling new experience with reciprocal
22 compensation on ISP-bound traffic that Qwest presented
23 in this arbitration and that provide a new and
24 compelling basis for this commission to reconsider its
25 past view in the context of this new interconnection

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1 agreement between Sprint and Qwest and to decide that
2 no reciprocal compensation should be awarded in the
3 context of this new interconnection agreement, based on
4 essentially the same evidence that was presented here.
5 Both the Colorado Commission and the Arizona Commission
6 have ruled that no reciprocal compensation will be paid
7 on ISP-bound traffic in the new interconnection
8 agreement between Qwest and Sprint that is going
9 forward in the State of Colorado and in the State of
10 Arizona.

11 Now, perhaps of particular interest to this
12 commission is the Colorado decision, because the
13 Colorado Commission, like this commission, had
14 previously ruled a number of times and in a number of
15 contexts that reciprocal compensation must be paid on
16 ISP-bound traffic, but the Commission, looking at the
17 same record as Qwest presented here, substantially the
18 same record, the Colorado Commission distinguished its
19 prior decisions by stating that what the Colorado
20 Commission decided in the past was based on the record
21 before it in the past, and that no one, including the
22 Colorado Commission, had appreciated the economic
23 ramifications of ordering call termination payments for
24 Internet-bound traffic.

25 Qwest respectfully submits today that these

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1 economic ramifications, as Qwest established in the
2 arbitration, provide compelling reasons for this
3 commission to decide that in this new interconnection
4 agreement between Sprint and Qwest, no reciprocal
5 compensation should be paid on ISP-bound traffic.
6 Internet traffic has increased dramatically, almost
7 exponentially. Looking at figures for January 2000 and
8 February 2000 alone, figures that Qwest presented in
9 this arbitration, over 91 percent of the minutes that
10 Qwest hands off to CLEC's in the State of Washington
11 are ISP-bound minutes, and Qwest's evidence established
12 that there is an enormous, an overwhelming imbalance in
13 the traffic flowing between Qwest and CLEC's in the
14 State of Washington.

15 CHAIRWOMAN SHOWALTER: If that's the case,
16 does your argument rest on the fact that the payment is
17 imbalanced, or this is Internet, and therefore, not for
18 us to -- what part of your argument rests on this has
19 an interstate quality?

20 MS. HUGHES: Much of our argument, Madam
21 Chairwoman, is that this is interstate traffic. It is
22 not local traffic; therefore, as the FCC ruled in the
23 ISP order, reciprocal compensation under 251-B of the
24 Act is not due on this traffic. However, you may
25 recall, and as our arbitrators correctly pointed out,

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1 in that ISP order, the FCC said, We believe this
2 traffic is predominantly interstate. We believe no
3 reciprocal compensation is owing, therefore, on it,
4 under the local reciprocal compensation provision of
5 the Act. Nevertheless, until we make a final rule on
6 this issue, state commissions are free to decide this
7 issue essentially as they wish.

8 CHAIRWOMAN SHOWALTER: Then in addition
9 though, that's true, so there is that leeway that the
10 FCC gave, but what about the D.C. circuit opinion?

11 MS. HUGHES: The D.C. circuit vacated the ISP
12 order and sent it back for more explanation as to how
13 it was or how it was that the FCC arrives at its
14 conclusion using an end-to-end analysis that this
15 traffic is, in fact, predominantly interstate and not
16 local.

17 CHAIRWOMAN SHOWALTER: But also with some
18 fairly strong analysis, I would say. They didn't say,
19 It's not interstate, but they seem to cast some doubt
20 on rationale. It seems like we have leeway both from
21 the FCC and really a little bit of encouragement maybe
22 from the Second Circuit to find our way that either
23 this is intrastate, or whatever it is, we have the
24 right to make an appropriate reciprocal payment if we
25 find it appropriate.

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1 Was the Colorado order, did it come out
2 before or after the Second Circuit opinion?

3 MS. HUGHES: The Colorado order came out
4 after the circuit opinion, but I hope I have responded
5 to your question. Qwest believes the traffic is
6 interstate and that the FCC will, as it has been quoted
7 as saying, be able to satisfy the circuit court that
8 this traffic is, in fact, interstate, so as I said, we
9 believe that because the traffic is interstate, it is
10 wholly and utterly inappropriate to award reciprocal
11 compensation on it as local traffic, but setting that
12 aside, because we do agree that the arbitrators
13 correctly pointed out that nothing precludes this
14 commission from ordering reciprocal compensation on
15 this traffic if it so desires based on the state of the
16 law right now, but we believe, separate from the
17 argument that this is interstate traffic and therefore
18 ought not to be subject to reciprocal compensation,
19 that there are overwhelming, compelling economic
20 reasons for not awarding reciprocal compensation on
21 this traffic.

22 And as I was saying earlier, the minutes
23 speak for themselves. When over 91 percent of the
24 traffic flowing from Qwest to CLEC's is Internet-bound
25 traffic, you can readily see that CLEC's in Washington

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1 State are specializing in Internet traffic. They are
2 signing up ISP's at a rate that far exceeds their
3 service to local end-user telephone voice customers.
4 Extrapolating out the January and February figures
5 alone and assuming no growth in the use of the
6 Internet, which is an extraordinarily and perhaps
7 unreasonable assumption, but even assuming no growth in
8 the use of the Internet, Qwest projects that in the
9 year 2000 in the State of Washington, it will pay 45
10 million dollars in reciprocal compensation on this
11 traffic. This is an enormous transfer of dollars that
12 will inevitably have consequences.

13 CHAIRWOMAN SHOWALTER: Can I ask you a
14 question? Supposing we decide, as we have decided in
15 the past, that some kind of compensation is owed,
16 either because really it is actually intrastate or it
17 has some kind of mixed quality or it's unique and it's
18 owed, aren't we in the position of this is sort of an
19 all or nothing or it's yours or theirs option so that
20 we don't have any other alternative, do we, or do we?
21 If we decide that reciprocal compensation is
22 appropriate, isn't our only choice what Sprint has
23 offered, because you said none is appropriate, as
24 opposed to the parties could have decided it was
25 appropriate and come up with some other mechanism?

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1 MS. HUGHES: The parties could have come up
2 with some other mechanism. Qwest disagrees that it's
3 an all or nothing proposition. A method of reciprocal
4 compensation, and I think we've kind of been using it
5 as a buzz word, assuming cash reciprocal compensation
6 for ISP-bound traffic, a method of reciprocal
7 compensation is bill and keep, and it is, in fact, bill
8 and keep that the Colorado Commission found to be the
9 most appropriate way to deal with this traffic right
10 now as did the Arizona Commission. Both commissions
11 ordered that there would be reciprocal compensation but
12 that it would be not cash and office voice rate
13 reciprocal compensation, but it would be bill and keep.

14 CHAIRWOMAN SHOWALTER: I just want to be
15 clear on what our options are. What did Qwest in those
16 proceedings propose, nothing or bill and keep?

17 MS. HUGHES: Qwest proposed, as it proposed
18 here, nothing. Nothing because for all the reasons
19 we've stated here, it would be inappropriate.

20 CHAIRWOMAN SHOWALTER: So those commissions
21 did not accept either position? They went ahead and
22 found their own bill and keep?

23 MS. HUGHES: Alternatively, Qwest proposed
24 bill and keep, as we have alternatively proposed here.

25 CHAIRWOMAN SHOWALTER: So your position is,

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1 if there is going to be reciprocal compensation, then
2 it should be bill and keep.

3 MS. HUGHES: Correct. As Qwest set forth in
4 its testimony, when reciprocal compensation is paid on
5 Internet-bound traffic, those who don't use the
6 Internet at all are subsidizing those who use the
7 Internet a lot. There are many people who use the
8 Internet for hours at a time, daily. In determining
9 that reciprocal compensation was not appropriate, cash
10 reciprocal compensation was not appropriate to award in
11 this new interconnection agreement in the State of
12 Arizona, the Arizona Commission was especially
13 concerned and troubled by the enormous subsidy that
14 awarding cash reciprocal compensation on this traffic
15 was represented from non Internet users to Internet
16 users.

17 For these and other reasons that are fully
18 set forth in Qwest's testimony, we respectfully submit,
19 again, with due acknowledgment to this commission's
20 past ruling, that the record created here is a
21 different record, and that on this record, no cash
22 reciprocal compensation is appropriate going forward
23 with this new interconnection agreement between Qwest
24 and Sprint.

25 The second issue, and I can be very brief, on

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1 which Qwest has petitioned for review is the issue of
2 whether or not Qwest must combine UNE's in any
3 technically feasible manner for Sprint. Here again,
4 Qwest comes before you respectful of your past
5 decisions and respectful of the rulings of the Ninth
6 Circuit Court of Appeals in the MCI and MFS cases.
7 Again, Qwest respectfully submits that new developments
8 bear this commissions reconsideration of its past
9 views.

10 After the arbitrators made their decision
11 here, and their decision here was that the parties'
12 interconnection agreement should incorporate Rule
13 315-C, the Eighth Circuit issued its decision on remand
14 on July 18th, so that was after our arbitrators had
15 issued a report here, and in its decision on remand on
16 July 18, the Eighth Circuit said again that Rule 315-C
17 violates the Federal Telecommunications Act; that Rule
18 315-C is inconsistent with the provisions of the Act
19 when it requires ILEC's to combine and use the CLEC's.
20 This ruling on remand expressly and explicitly
21 considered the Ninth Circuit ruling in the MCI case and
22 in the MFS case, and it expressly and explicitly
23 disagreed with those rulings.

24 What's important here is that the Eighth
25 Circuit has vacated Rule 315-C, and the Eighth Circuit

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1 has exclusive statutory jurisdiction under the Hobbs
2 Act to interpret Rules 315-C through F, as it has now
3 done twice. Whatever we respectfully submit,
4 Commissioners, whatever ambiguity there may have been
5 before the July 18th ruling as to how the Ninth
6 Circuit's ruling on these issues might be squared with
7 the Eighth Circuit's ruling and which rulings were in
8 control here, the Eighth Circuit has now definitively
9 removed that ambiguity by saying, We meant what we
10 said. Rule 315-C violates the Act.

11 CHAIRWOMAN SHOWALTER: Has the time period
12 for requesting a stay in that ruling elapsed or not?
13 I'm just wondering what the status of the Eighth
14 Circuit ruling is today.

15 MS. HUGHES: Madam Chairwoman, I don't know
16 the answer to that question, but I can find out.

17 CHAIRWOMAN SHOWALTER: If their decision is
18 not stayed, is it your opinion that this commission is
19 bound by the Eighth Circuit's ruling?

20 MS. HUGHES: Yes. It is our position that
21 because the Eighth Circuit has exclusive jurisdiction
22 under the Hobbs Act to interpret these rules, as it has
23 interpreted these rules twice now, this commission is
24 bound by the Eighth Circuit's interpretation.

25 COMMISSIONER HEMSTAD: I don't understand.

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1 Are you asserting that the Eighth Circuit decision, in
2 effect then, overrules the Ninth Circuit decision in
3 binding other commissions outside of the Eighth
4 Circuit?

5 MS. HUGHES: That's correct, Commissioner.
6 Again, because of the analysis that the Eighth Circuit
7 is the circuit vested with exclusive jurisdiction to
8 interpret these rules, we think that's very clear.
9 Also I would point out that the --

10 COMMISSIONER HEMSTAD: I guess I'm troubled
11 by that. For that to have a nationwide application, if
12 there is, in effect, a conflict between the decision of
13 the Ninth Circuit and the Eighth Circuit, how could
14 another court in another circuit or state commission be
15 bound by that and told there was a definitive ruling on
16 that issue?

17 MS. HUGHES: As I said, our analysis is that
18 because the Ninth Circuit overstepped its authority in
19 reporting to interpret these rules and because the
20 Eighth Circuit has now in its July 18th ruling
21 specifically looked at what the Ninth Circuit said, and
22 specifically said the Ninth Circuit was wrong, we
23 disagree with the Ninth Circuit. We are telling you,
24 again, Rule 315-C is in violation of the Act.

25 But Qwest obviously shares your concern,

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1 Commissioner, that this potential split in the circuits
2 our service territory covers, the Ninth Circuit as well
3 as the Eighth Circuit and other circuits, and Qwest has
4 petitioned the Supreme Court for a writ of certiorari
5 to the Ninth Circuit. Qwest's petition for certiorari
6 was denied. However, the denial came days before the
7 Eighth Circuit's decision on remand on July 18th, so
8 Qwest has now petitioned for reconsideration of the
9 order to deny, and that is now before the Supreme
10 Court, and Qwest is obviously hopeful that the Supreme
11 Court will take this up so we have a more definitive
12 ruling, but in the absence of the Supreme Court ruling
13 on this, we suggest, again, respectfully to this
14 commission, that the better analysis of Rule 315-C and
15 whether it is viable or not resides with the Eighth
16 Circuit and not with the Ninth Circuit, and I would
17 also point out one last point on this and then I really
18 am done, is that the FCC has not sought in any respect
19 to reinstate Rule 315-C. The FCC has said we defer to
20 the Eighth Circuit. It has not said, We defer to the
21 Ninth Circuit, or we think we like what the Ninth
22 Circuit did, so therefore, we are going to allow it.

23 And finally, although it was not the basis
24 for Arbitrators Moss or Berg's decision that Rule 315-C
25 should be implemented here, there has been some

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1 suggestion by Sprint that even if Rule 315-C has been
2 vacated and violates the Act, this commission has
3 independent state authority to order 315-C
4 combinations, and we respectfully suggest that that's
5 not what the arbitrators concluded. They did not
6 address this commission's state law authority at all.
7 However, we believe that this commission does not have
8 state law authority to impose Rule 315-C here when the
9 Eighth Circuit has expressly ruled that 315-C violates
10 the Act.

11 COMMISSIONER HEMSTAD: I'd like to pursue
12 that. Is it Qwest's position that this commission does
13 not have independent state authority to order even any
14 combination; that is, that we are prohibited from doing
15 that?

16 MS. HUGHES: It's Qwest's position,
17 Mr. Commissioner, that a rule by this commission that
18 is directly inconsistent with the governing law, as
19 interpreted by the Eighth Circuit, would be
20 preemptable; that this commission has state law
21 authority to order combinations that are not
22 inconsistent with the Act.

23 COMMISSIONER HEMSTAD: I'm trying to
24 remember. This commission has so determined in the
25 past that matter has been litigated and without

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1 outcome.

2 MS. HUGHES: This issue was not briefed in
3 the context of this arbitration, so I'm not
4 specifically prepared to answer that question. My
5 understanding is that when the issue went up to the
6 Ninth Circuit earlier, the Ninth Circuit resolved the
7 matter based on its interpretation of Rule 315-C on
8 reference to what the Supreme Court had done in
9 reinstating Rule 315-B. In other words, the Ninth
10 Circuit's analysis was not an analysis of this
11 commission's independent state authority, but it was an
12 analysis of Rule 315-B and 315-C.

13 COMMISSIONER HEMSTAD: But the Ninth Circuit
14 in its ruling, because it wasn't in front of it, I
15 assume, did not address the question of the states that
16 preempted from an independent state authority to
17 address that question.

18 MS. HUGHES: That is correct. That issue was
19 not before the Eighth Circuit.

20 CHAIRWOMAN SHOWALTER: But it seems like your
21 argument is because the Eighth Circuit found that 315-C
22 violates the Telecommunications Act, if we do something
23 that's similar or identical under our state authority,
24 it, according to the Eighth Circuit, also violates the
25 Telecommunications Act, and the problem there is why

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1 are we bound by the Eighth Circuit on our
2 interpretation of the Act if it's not by means of the
3 rule?

4 MS. HUGHES: That's correct.

5 CHAIRWOMAN SHOWALTER: So there is a jump
6 there. We should move to Mr. Heath.

7 MR. HEATH: Thank you very much. As
8 Ms. Hughes stated, the parties did extensively
9 negotiate and extensively agreed to a large part of
10 this interconnection agreement, and these two issues
11 which Qwest has requested reconsideration of are indeed
12 just a very small portion, and I would like to express
13 Sprint's gratitude to the Administrative Law Judges
14 Berg and Moss for their help in getting this moved
15 forward and before you today.

16 With regard to Ms. Hughes' remarks on the
17 issue of reciprocal compensation payments for ISP
18 traffic, the Commission has, in the comments and the
19 questions that were asked of Ms. Hughes, dissected or
20 properly bisected the issue, and that is there is a
21 question of whether or not it is legal, and there is a
22 question of whether or not the facts mandate a
23 different outcome. Sprint respectfully submits, as it
24 has in its brief, that this commission's prior
25 decisions on this matter, as well as the District of

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1 Columbia Circuit Court of Appeal's decision, reinforces
2 those that reciprocal compensation should be due on ISP
3 traffic.

4 COMMISSIONER HEMSTAD: But the issue or the
5 argument presented, assuming we have discretion to
6 determine this, the issue is whether we should change
7 our position from earlier based upon the argument of an
8 overwhelming imbalance in the payments here or in the
9 flow, the assertion 91 percent of the minutes to CLEC's
10 are ISP-bound traffic, so what is your response to
11 that?

12 MR. HEATH: In response to your question,
13 Mr. Commissioner, I submit that of the imbalance in
14 traffic, Qwest has proposed or Qwest claims that it's
15 all ISP traffic, and Sprint questions, and does so on
16 the record, whether or not it is verifiable how much of
17 that is ISP traffic and whether or not that can be
18 accurately and appropriately segregated and identified
19 as ISP bound, and therefore, despite the imbalance,
20 which Sprint admits does exist, the capability of
21 defining that traffic as ISP bound or tagging it as ISP
22 bound is not there at this point. The Commission, as
23 the Administrative Law Judges remark in their
24 recommendation, is considering reciprocal compensation
25 in the generic costing docket, UT-003013, where, as the

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1 parties stipulated, if the Commission were to order
2 reciprocal compensation should be paid on ISP traffic,
3 that a rate for that should be determined in the
4 costing docket.

5 COMMISSIONER HEMSTAD: The premises behind
6 reciprocal compensation is that there is some
7 approximate balance of traffic both ways, but if there
8 is a substantial imbalance, why isn't bill and keep a
9 better methodology to apply?

10 MR. HEATH: Mr. Commissioner, Sprint
11 respectfully disagrees with your suggestion in that
12 bill and keep would be appropriate if the traffic were
13 roughly in balance, but when the traffic is imbalanced,
14 which Qwest admits that there is, then there must be
15 some form of compensation to the party terminating the
16 majority of the traffic, which, in this case, would be
17 a CLEC, and if that traffic is local in nature, as this
18 commission has determined ISP traffic to be, then
19 reciprocal compensation is due on that traffic.

20 CHAIRWOMAN SHOWALTER: So some of this gets
21 to either the history or the practice of how the
22 companies are compensated.

23 MR. HEATH: That is correct.

24 CHAIRWOMAN SHOWALTER: It's a question of
25 whether that fits the new mode and then further,

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1 whether we should try to resolve that in this
2 proceeding or the broader one.

3 MR. HEATH: Right. The parties have agreed
4 that the broader proceeding would be a more appropriate
5 venue. It's Sprint's position that an industry-wide
6 solution would be more equitable and nondiscriminatory,
7 and I would also point out that the FCC has opened up a
8 proceeding to reconsider the remand from the D.C.
9 Circuit Court of Appeals and has received comments on
10 this very issue as well, so there is a tandem
11 proceeding going on which will be considering the same
12 issue.

13 I would also point out that with regard to
14 this new evidence which Qwest has submitted that in
15 answering Commissioner Hemstad's question, as I pointed
16 out, it is not conclusively proved in the record that
17 this traffic is all ISP bound. It's not conclusively
18 proven that Qwest has the ability to identify and
19 segregate this traffic for billing purposes, and it is
20 also, and accordingly, Sprint would recommend that
21 these issues be deferred to the general costing and
22 pricing docket.

23 With regard to the Arizona and Colorado
24 transcripts of the hearings which are submitted into
25 the record in this docket in order to avoid having a

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1 hearing here, Sprint submits that although those
2 Commissions did rule in Qwest's favor on this issue
3 that the importing of those hearing transcripts does
4 not import those commissions' rulings, those states'
5 laws on this issue, and that on the basis of the law
6 and this commission's prior rulings that reciprocal
7 compensation is appropriate for ISP traffic.

8 COMMISSIONER HEMSTAD: You are not suggesting
9 that we don't have the opportunity to at least look at
10 those decisions as we address this question?

11 MR. HEATH: No, Your Honor, I'm not.

12 CHAIRWOMAN SHOWALTER: You are just saying we
13 are not bound by them, which we agree.

14 COMMISSIONER GILLIS: On your previous point,
15 if there were conclusive evidence that the traffic were
16 dominantly ISP traffic, 91 percent, what would be your
17 recommendation to the Commission that would be
18 appropriate in that situation?

19 MR. HEATH: I would recommend that the
20 Commission follow its previous rulings. I believe that
21 the Administrative Law Judges' recommendation addresses
22 your question in that as an interim solution,
23 reciprocal compensation should be paid; that this issue
24 should be addressed generically so that a different
25 compensation scheme or that this question can be

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1 addressed on an industry-wide basis.

2 COMMISSIONER GILLIS: Would the issue then go
3 to the appropriate rate, or would it go to the
4 mechanism set for reciprocal compensation itself?

5 MR. HEATH: Well, I suppose it could go to
6 both. There are varying proposals out there for how
7 reciprocal compensation should be structured, so I'm
8 not exactly sure that both of those wouldn't be
9 appropriate. Once the decision has been made that ISP
10 traffic should be subject to reciprocal compensation,
11 how that reciprocal compensation is structured, whether
12 it's just a rate, whether it's a bifurcated switching
13 charge or whatever, that could be a subject of the
14 generic proceeding.

15 COMMISSIONER GILLIS: The whole mechanism
16 might be in question.

17 MR. HEATH: I would agree.

18 COMMISSIONER GILLIS: Would bill and keep, in
19 your opinion, ever be appropriate in a situation where
20 there is -- just taking the fact situation asserted
21 that there is 91 percent of the traffic being
22 terminated on CLEC traffic that is ISP bound, would
23 bill and keep ever be an appropriate mechanism?

24 MR. HEATH: No, sir. Bill and keep, as I
25 mentioned, is only appropriate where the traffic is

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1 roughly imbalanced, and that situation is definitely
2 out of balance, and I don't see how a company incurring
3 cost to terminate such traffic could survive for very
4 long if it wasn't allowed some sort of compensation for
5 that.

6 COMMISSIONER GILLIS: What about the response
7 that the CLEC has the opportunity to recover revenues
8 directly from ISP's themselves as opposed to from the
9 wholesale purchaser in this concept?

10 MR. HEATH: Well, I guess my response would
11 be it would all determine on who has the margin to
12 reduce their prices to ISP's. I don't know generally
13 how those products are priced. I would surmise that
14 they are very close to or they have very thin margins
15 associated with them.

16 COMMISSIONER GILLIS: Would those two
17 approaches have two alternatives, one collecting the
18 revenues from the ISP's directly, and the alternative
19 approach is collecting the cost recovery from the
20 wholesale purchase of the network that they be equally
21 acceptable from a competitively neutral consideration,
22 or does it matter? Should we be concerned about that
23 to the competitive implications?

24 MR. HEATH: I think you should be concerned
25 about the competitive implications because CLEC's don't

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1 necessarily have their own facilities if they are
2 leasing them from another provider, and to the extent
3 that facilities-based CLEC's are becoming more and
4 more -- a greater presence in the marketplace, perhaps
5 it really wouldn't matter, but in this stage of things,
6 I think that's it's important to consider that they are
7 fewer in number.

8 CHAIRWOMAN SHOWALTER: We should wrap up. If
9 you have --

10 MR. HEATH: I have some comments on the
11 Eighth Circuit ruling, if I might.

12 CHAIRWOMAN SHOWALTER: Okay.

13 MR. HEATH: With regard to the Eighth Circuit
14 ruling, I would just point out that while the Hobbs Act
15 does designate the Eighth Circuit Court of Appeals as
16 having exclusive jurisdiction over the questions raised
17 on the original IOU board versus the FCC decision, and
18 the Eighth Circuit did vacate FCC Rule 51.315-C through
19 F in its initial order. That vacatur was not appealed
20 to the Supreme Court, and the Supreme Court did not
21 reinstate those rules because they were not before it.
22 The Supreme Court did reinstate Rule 315-B, the
23 analysis of which the Ninth Circuit reviewed in ruling
24 that state commissions could require combinations of
25 UNE's under the Act.

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1 I would submit that the Eighth Circuit's most
2 recent order, its order on remand, does not change the
3 legal landscape at all; that 315-C through F remain
4 vacated. The Ninth Circuit decision was made under the
5 same circumstances, and while the Eighth Circuit did
6 disagree with the Ninth Circuit, it did not overrule
7 it, and I will point out that in its rulings on the MFS
8 and the MCI case, the Ninth Circuit did note that the
9 Act does not say or remotely imply that elements must
10 be provided only in unbundled fashion and never in
11 combined form. That is a quote from the Supreme Court
12 which the Ninth Circuit -- In fact, that's a quote from
13 the Supreme Court's analysis of the 315-B reinstatement
14 that the Ninth Circuit used to justify its upholding
15 the combinations requirement.

16 In light of the static landscape with regard
17 to 315-C through F, I would also point out to the
18 Commission that the California Public Utilities
19 Commission has heard this same argument with regard to
20 Pacific Bell, and the draft arbitrator's report which
21 was filed on May 19th, 2000, the arbitrator found in
22 Sprint's favor in this regard that as long as the state
23 commission has independent state authority to require
24 combinations that the Eighth Circuit's disagreement
25 with the Ninth Circuit's rulings do not implicate or

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1 otherwise cause problems or undermine the combinations
2 requirement that this commission has imposed in the
3 past.

4 CHAIRWOMAN SHOWALTER: If that was May 19th,
5 why hasn't the California PUC accepted or rejected the
6 arbitrator's report by this state?

7 MR. HEATH: That's a good question, Your
8 Honor, and I beg your pardon. The application was
9 filed on May 19th. That's in the caption. Apparently,
10 the date of this decision is August 8th, 2000. I
11 apologize.

12 CHAIRWOMAN SHOWALTER: It just seems like
13 with those dates that PUC would have acted on this
14 state thing. They probably haven't.

15 MR. HEATH: Right.

16 CHAIRWOMAN SHOWALTER: If you have a burning
17 need to respond, go ahead, and in just a couple of
18 minutes.

19 MS. HUGHES: Just one brief comment on the
20 issue of reciprocal compensation. Bill and keep
21 reciprocal compensation, of course, involves both the
22 CLEC and the ILEC's terminating traffic of the other.
23 Both sides in bill and keep arrangement terminate
24 traffic of the other. However, as I know the
25 Commissioners understand, in that arrangement, each

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1 side simply does not bill the other for its cost in
2 terminating the traffic of the other, and what bill and
3 keep does in a situation like the one before the
4 Commission, the one presented by ISP-bound traffic is
5 it removes any particular perverse economic incentive
6 to go after ISP-bound traffic to the exclusion of other
7 kinds of traffic, and in a regime, we respectfully
8 submit that the numbers are quite clear that in a
9 regime in which cash reciprocal compensation is paid on
10 ISP-bound traffic, CLEC's overwhelmingly seek out ISP's
11 as their customers in order to reap the benefits of
12 cash reciprocal compensation on this traffic.

13 The bill and keep arrangement does involve
14 both parties terminating traffic, but it removes any
15 particular perverse economic incentive to serve ISP's
16 to the exclusion of other types of traffic.

17 CHAIRWOMAN SHOWALTER: Thank you very much.
18 Very good arguments, and we will take this under
19 advisement and provide an opinion by the appropriate
20 deadline.

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22 (Oral argument concluded at 9:50 a.m.)

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