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BEFORE THE WASHINGTON UTILITIES AND

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TRANSPORTATION COMMISSION

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In the Matter of the Continued)

Costing and Pricing of)

Docket No. UT-003013

4

Unbundled Network Elements and)

Volume XVI

Transport and Termination.)

Pages 1785 to 1803

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A prehearing conference in the above matter

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was held on March 21, 2001, at 10:00 a.m., at 1300 South

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Evergreen Park Drive Southwest, Room 108, Olympia,

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Washington, before Administrative Law Judge LAWRENCE

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BERG.

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The parties were present as follows:

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COVAD COMMUNICATIONS COMPANY, by DAVID RICE,

Attorney at Law, Miller Nash, LLP, 601 Union Street,

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Suite 4400, Seattle, Washington 98101.

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THE WASHINGTON UTILITIES AND TRANSPORTATION

COMMISSION, by GREGORY J. TRAUTMAN and MARY TENNYSON,

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Assistant Attorneys General, 1400 South Evergreen Park

Drive Southwest, Post Office Box 40128, Olympia,

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Washington, 98504-0128.

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QWEST CORPORATION, by LISA ANDERL, Attorney

at Law, 1600 Seventh Avenue, Suite 3206, Seattle,

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Washington 98191.

21

PUBLIC COUNSEL, via bridge line, by ROBERT

CROMWELL, Assistant Attorney General, 900 Fourth Avenue,

22

Suite 2000, Seattle, Washington 98164.

23

VERIZON NORTHWEST, INC., by JENNIFER L.

MCCLELLAN, Attorney at Law, Hunton and Williams, 951

24

East Byrd Street, Richmond, Virginia 23219.

25

Joan E. Kinn, CCR, RPR

Court Reporter

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1 RHYTHMS LINKS, INC. AND TRACER, by ARTHUR A.
2 BUTLER, Attorney at Law, Ater Wynne, LLP, 601 Union
3 Street, Suite 5450, Seattle, Washington 98101.

4 ELECTRIC LIGHTWAVE INC.; ADVANCED TELECOM
5 GROUP, INC.; AT&T COMMUNICATIONS OF THE PACIFIC
6 NORTHWEST, INC.; MCLEOD USA TELECOMMUNICATIONS SERVICES
7 INC.; FOCAL COMMUNICATIONS CORPORATION OF WASHINGTON;
8 AND XO WASHINGTON, INC.; by MARY E. STEELE, Attorney at
9 Law, Davis, Wright, Tremaine, LLP, 1501 Fourth Avenue,
10 Suite 2600, Seattle, Washington 98101.

11 WORLDCOM, INC., by ANN HOPFENBECK, Attorney
12 at Law, 707 - 17th Street, Suite 3600, Denver, Colorado
13 80202.

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

2 JUDGE BERG: This is a prehearing conference
3 in Docket Number UT-003013 captioned In the Matter of
4 the Continued Costing and Pricing of Unbundled Network
5 Elements and Transport and Termination. My name is
6 Lawrence Berg. I'm the presiding officer in this
7 proceeding. I will be presiding along with the
8 commissioners and other advisors at the hearing that is
9 scheduled to begin on Monday, March 26, 2001.

10 Today's date is March 21st, 2001. This
11 prehearing conference is being held in Room 108 at the
12 Commission's headquarters pursuant to notice initially
13 served as part of the 12th Supplemental Order on
14 November 28th, 2000, and later amended by notice served
15 to the parties on March 13, 2001.

16 At this time, we will take appearances from
17 the parties, and we will just start with the left of the
18 room and work our way over to the right, and then I will
19 take an appearance from Mr. Cromwell, Public Counsel's
20 Office, who is on teleconference via the telephone in
21 the back of the room. I will just caution other counsel
22 that anybody that has a private conversation in the
23 vicinity of that teleconference, Mr. Cromwell may be
24 able to listen in.

25 So with that, we will start with you,

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1 Ms. Tennyson.

2 MS. TENNYSON: Thank you. My name is Mary M.
3 Tennyson, Assistant Attorney General, representing
4 Commission Staff.

5 MR. TRAUTMAN: Greg Trautman, Assistant
6 Attorney General for Commission Staff.

7 MS. MCCLELLAN: Jennifer McClellan with
8 Hunton and Williams, representing Verizon.

9 MS. ANDERL: Lisa Anderl, in-house attorney
10 representing Qwest Corporation.

11 MR. RICE: David Rice with Miller Nash
12 representing only Covad.

13 MR. BUTLER: Arthur A. Butler, Ater Wynne,
14 LLP, representing Rhythms Links, Inc. and Tracer.

15 JUDGE BERG: Say that once more, sir.

16 MR. BUTLER: Rhythms Links, Inc. and Tracer.

17 JUDGE BERG: So that Teligent would not be
18 appearing or you're not representing Teligent here?

19 MR. BUTLER: No.

20 MS. HOPFENBECK: Ann Hopfenbeck, in-house
21 counsel for WorldCom, Inc.

22 MS. STEELE: Mary Steele, Davis, Wright,
23 Tremaine, LLP, associated with Greg Kopta of Davis,
24 Wright, Tremaine, representing AT&T, ATG, ELI, Focal,
25 McLeod, and XO. I believe we are also record counsel

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1 for Global Crossing. They would like us to continue
2 receiving service for them, but they will not be
3 participating in the proceeding.

4 JUDGE BERG: All right.

5 Now is your turn, Mr. Cromwell.

6 MR. CROMWELL: Thank you, Judge Berg. For
7 the record, Robert Cromwell, Assistant Attorney General
8 for Public Counsel. Judge Berg, would you like my
9 complete appearance information?

10 JUDGE BERG: Yes, why don't you present that,
11 Mr. Cromwell.

12 MR. CROMWELL: All right. For the record,
13 again, my address is 900 Fourth Avenue, Suite 2000,
14 State Mail Stop TB-14, in Seattle, Washington, zip code
15 98164-1012. My telephone number is area code (206)
16 464-6595. My facsimile number is (206) 389-2058. My
17 E-mail address is robertcl@atg.wa.gov. For purposes of
18 this proceeding, I am appearing on behalf of Public
19 Counsel at the prehearing conference today. I would ask
20 that for purposes of the service list and notice that
21 Mr. ffitich remain the contact attorney for Public
22 Counsel.

23 JUDGE BERG: And my understanding,
24 Mr. Cromwell, is Public Counsel may have a limited
25 participation in Part B of this proceeding; is that

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1 correct?

2 MR. CROMWELL: That is my understanding as
3 well.

4 JUDGE BERG: All right, thank you. I will
5 just advise Mr. Cromwell and other parties that from
6 this point forward Mr. Cromwell will be listening in,
7 but he will not be participating.

8 I will also advise the parties that I was
9 contacted by attorney Paul Hudson on behalf of his
10 client WinStar. WinStar may be monitoring the hearing
11 via teleconference, but he does not intend to actively
12 appear and represent his client in Part B.

13 On the agenda that's been distributed, the
14 parties will note that there is a cross-examination
15 matrix that has been distributed to the parties. I
16 intend to use this as a control document during the
17 course of the hearing.

18 At this point in time, why don't we go off
19 the record for a discussion regarding the timing and the
20 schedule as reflected in this document.

21 (Discussion off the record.)

22 JUDGE BERG: There's been a discussion off
23 the record regarding use of FCC orders, Commission
24 orders, or court orders as cross-examination exhibits.
25 It's not necessary that the parties file those orders

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1 with the Commission as an exhibit during the course of
2 the proceeding. Parties may make use of those various
3 orders during cross-examination. Parties should bring a
4 minimum of let's say six copies, four copies for the
5 Bench, one copy for the witness, and one copy for
6 witness's counsel. Minimally, those orders should not
7 be excerpted but should be presented in their entirety.

8 And the Commission prefers but does not
9 require that parties discuss among themselves their
10 intent to make reference of such orders during
11 cross-examination for the sake of expediency and
12 ensuring that witnesses to be questioned are prepared
13 and can provide the level of interpretive response that
14 may be sought.

15 Anything else that I may have missed that
16 parties want to state on this issue?

17 MS. HOPFENBECK: It's not on this issue, but
18 it is related to the use of documents in the course of
19 the hearing, and this is really a question of
20 clarification. I am assuming that we are free to use
21 documents that have not been exchanged as exhibits,
22 cross exhibits, to refresh recollection provided we are
23 not intending to move the admission of those exhibits.
24 Would that be a fair understanding?

25 JUDGE BERG: Well, I think that is something

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1 that the Commission would deal with when it came up, you
2 know, deal with whatever objections there might be, and
3 there would probably be some sort of balancing test that
4 the Commission would conduct. I'm not so versed in this
5 aspect of the APA that I can just tell you what the APA
6 says about the use of documents to refresh parties'
7 recollection.

8 MS. HOPFENBECK: For purposes of this
9 question, I'm assuming that the proper foundation is
10 laid for refreshing recollection. My question really
11 goes to that I didn't include for distribution today
12 every conceivable document that might -- the idea is
13 that if cross-examination goes forward and a witness has
14 made a statement in another context that they or, you
15 know, testified to a fact in another context that they
16 aren't -- don't have present recollection of at the
17 hearing, and that I assume that you can present that
18 witness with their statement in another context to
19 refresh their recollection. You wouldn't -- they would
20 just read the document, you would take it away, and then
21 you would ask the question again, if their recollection
22 has, in fact, been refreshed, and that we wouldn't have
23 a need for marking those. I mean in that instance, I
24 would not have introduced that document as an exhibit.
25 Rather it's just to aid the witness in providing

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1 accurate testimony. And so I was assuming that I didn't
2 have to produce all of those today and mark them as
3 exhibits, because you don't know when that's going to
4 happen really.

5 JUDGE BERG: Certainly if it's for the
6 purpose of impeachment, it can be used in that fashion.
7 I just think that the Commission will have to reserve a
8 decision on whether or not a document where a witness
9 says I can't recall or I don't know and then to the
10 extent that there is another document that would suggest
11 that the witness does know but isn't saying, it may fall
12 under impeachment. I think we just have to deal with a
13 really pure inability to refresh recollection when it
14 comes up.

15 And I understand the situation, and I think
16 that the Commission would prefer that parties not
17 present every conceivable exhibit as a cross exhibit,
18 rather that they use and mark those cross exhibits that
19 they reasonably think will be necessary, and they don't
20 mark those that they reasonably think won't be necessary
21 because of a history with the witness or a preexisting
22 record. But I think the Commission will want to deal
23 with any unusual situations on a case-by-case basis.

24 MS. HOPFENBECK: Okay.

25 JUDGE BERG: Anybody else want to say

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1 anything about that?

2 Ms. Tennyson.

3 MS. TENNYSON: My reaction is that if we're
4 anticipating that it is possible to be used, it's better
5 to make it an exhibit than not. But like you said, we
6 can't anticipate every circumstance, but if you
7 anticipate several questions relating to some prior
8 testimony or something, I would prefer it be made an
9 exhibit.

10 JUDGE BERG: Counsel are usually pretty
11 skilled at setting up those instances as an impeachment
12 if need be, and I don't expect that other counsel will
13 be resisting an effort to make a record more clear and
14 reliable.

15 MS. ANDERL: Your Honor, I guess I would only
16 say that even if it's not for impeachment purposes but
17 for clarification or elucidation of the witness's
18 testimony, if there are anticipated to be extensive
19 questions on a transcript from long ago or pre-filed
20 testimony from another state, I think it would be very
21 helpful to have again maybe at least advanced notice of
22 something like that as opposed to if not a full-fledged
23 exhibit, and I just don't know how much of that
24 Ms. Hopfenbeck has in mind.

25 MS. HOPFENBECK: I will tell you right now

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1 what it is, and it really had to do with the fact that I
2 didn't have this information, haven't had access to this
3 information, because my colleague who has it has been
4 out of the office. We have not been in the office at
5 the same time for the last month. But essentially it's
6 Terry Million's testimony, or I don't know if it's Terry
7 Million's testimony, it's the Arizona cost study on
8 non-recurring cost, and I would have made that an
9 exhibit in fact, but I don't have it, wasn't able to get
10 it because Tom has it and he's not in the office.

11 MS. ANDERL: Well, that, and it's 400 pages
12 long.

13 MS. HOPFENBECK: Right, I really don't want
14 to introduce it. There are a few factual items in that
15 exhibit that the witness who is sponsoring should be
16 able to answer and could probably have her recollection
17 refreshed as to that factual information, so it wouldn't
18 be examination on the document, but rather just a
19 listing of information that she probably knows, or if
20 not, can just look at this and then would know it again.

21 MS. ANDERL: That seems fair, and it's very
22 helpful to know that now. I think I'm content with
23 letting Ms. Hopfenbeck ask the questions and not ask
24 that the document be made an exhibit at this point, and
25 it just depends on where it goes in the hearing.

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1 JUDGE BERG: All right. And if a similar
2 situation does come up during the course of the hearing,
3 we would probably look for counsel to just take a break
4 and talk about it and come back. That seems to have
5 been a very productive way of addressing these problems
6 in the past. We know that sometimes it's hard to make a
7 call right on the spot in front of the commissioners.
8 If we have problems that we think parties can resolve
9 themselves during breaks, we will manage the proceedings
10 to provide that opportunity.

11 Let's stay on the record for the next agenda
12 item, and that is there was a question about Commission
13 Staff work papers that had been admitted in UT-960369,
14 and Mr. Trautman or Ms. Tennyson, is there something
15 further you can say about that?

16 MR. TRAUTMAN: Yes, Your Honor, we have
17 looked into that further, and we have a cross exhibit
18 that should take care of that, so we won't need to be --

19 MS. TENNYSON: We don't need to address that
20 issue.

21 MR. TRAUTMAN: We won't need the work papers.

22 MS. MCCLELLAN: Your Honor, that actually
23 raises a question from me for Verizon. It was my
24 understanding at a prior prehearing conference that we
25 discussed whether or not the record from that prior

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1 docket would also be a part of the record in this
2 docket. I thought the answer was yes, but I also
3 received a Bench request from the Commission asking for
4 a copy of the Bench request that we gave the Commission
5 in that prior docket. So now I guess I'm back to the
6 question to find out whether my understanding is
7 incorrect.

8 JUDGE BERG: Well, I did go back to the
9 supplemental orders entered in 3013 to look for that one
10 piece of definitive text that would say that the record
11 from 960369 was made a part of this proceeding, and I
12 didn't find anything that said that parties could, for
13 example, freely make use of the documentary record in
14 this proceeding as if it were a pre-admitted exhibit.

15 The Bench request that was served on parties
16 was generated by Dr. Gable, and quite frankly it came in
17 and it was reviewed for grammar and to make sure there
18 were no obvious policy issues or concerns, but it was
19 not considered in this context before it was served on
20 the parties. At the same time, we all know that if
21 there is a Phase IV, there was a Phase I, II, and III,
22 and I don't think these commissioners are going to
23 address and resolve these issues in a vacuum.

24 If there are other documents from 960369,
25 exhibits that were admitted into the record that have

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1 some special relevancy in this proceeding, it may be
2 good for the parties to think about that and bring it up
3 in one of our administrative sessions at the start of
4 the hearing, and we would just ensure that there was no
5 unfairness to any party by the use of an exhibit in this
6 proceeding.

7 MS. MCCLELLAN: Which raises my second
8 administrative question, and that is in that Bench
9 request and also a couple of other times, reference has
10 been made to exhibits by their exhibit number from Phase
11 I, and to be perfectly frank, everyone from the former
12 GTE who was involved with Phase I who would have kept
13 that information is either retired or moved on, and it
14 would be helpful to us if we could get an exhibit list
15 from Phase I.

16 JUDGE BERG: All right, unless you have a
17 plane to catch right immediately after we --

18 MS. MCCLELLAN: I don't need it right now but
19 just at some point.

20 JUDGE BERG: All right. There should be an
21 exhibit list available through the records center.

22 MS. MCCLELLAN: Okay.

23 JUDGE BERG: And if you would initiate that
24 contact, I would appreciate it. And if you need any
25 further help on that, by all means let me know.

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1 MS. MCCLELLAN: Okay.

2 JUDGE BERG: And I will follow through on
3 that with you.

4 MS. HOPFENBECK: I think that does, however,
5 raise a question, or I just have a suggestion, and that
6 is that if parties do between now and the start of the
7 hearing or even between now and the time they begin a
8 cross-examination of a witness identify the fact that
9 they would be using a document that's been admitted at
10 previous phases, it would be certainly helpful to me and
11 I assume other parties to have copies of those documents
12 provided in this setting.

13 Our records, we are also in a similar
14 position to Verizon, no one that was involved in the
15 earlier phases of this docket is still around at
16 WorldCom that I know of, and it's very difficult to put
17 your hands on those documents, and certainly they're
18 contained within numerous boxes, and I wouldn't have
19 access to them easily from here, so I would just ask
20 that as a courtesy.

21 JUDGE BERG: I think parties know that this
22 Commission wants to make fully informed decisions based
23 on all relevant evidence, and if in the course of the
24 proceeding it appears there's some other documents that
25 have previously been presented in a proceeding here at

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1 the Commission, the Commission will look for some way to
2 consider those documents without causing prejudice to
3 parties. And I will just ask the parties to help the
4 Commission in this regard along the lines that
5 Ms. Hopfenbeck suggested.

6 Again, I don't think this is a point that I
7 should attempt to resolve here in any definitive way
8 other than to enlist all of the parties in helping make
9 this a complete record. And if as a result of the
10 creative process or just hard work there are other
11 documents that take on a new meaning or relevance to
12 what we're working on here, let's bring it up, and we
13 will see if, in fact, it requires some special
14 treatment.

15 MS. STEELE: There is one issue that relates
16 to this. Mr. Gillan testimony Part A that was
17 designated as Part A/Part B because he was unsure as to
18 what issues were going to be addressed, a few of those
19 issues are, in fact, in this Part B. Because it has
20 previously been admitted, we did not list it on our list
21 of exhibits, but I'm wondering whether that was --

22 JUDGE BERG: Yes, exhibits that have been
23 admitted in Part A have a different legal status than
24 exhibits that were admitted in some other docket. The
25 numbering of exhibits in Part B will pick up off of Part

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1 A, and the Commission is going to regard Part A exhibits
2 in this Part B as if they are also part of this hearing.
3 And certainly if parties have objections, they can raise
4 them at the time, and the Commission will take a fresh
5 look at whether or not it's appropriate.

6 Anything else? Any other issues that parties
7 have brought to the conference or thought about since we
8 started?

9 Ms. Anderl.

10 MS. ANDERL: Your Honor, it was an oversight
11 on my part. I do have three additional exhibits to
12 distribute that are not cross exhibits, and I assume we
13 could just take those up as we numbered the direct
14 exhibits, but I have updated pricing exhibits for both
15 Mr. Kennedy and Ms. Brohl as well as an errata from
16 Mr. Kennedy.

17 JUDGE BERG: Updated price exhibits for?

18 MS. ANDERL: Ms. Brohl and Mr. Kennedy.

19 JUDGE BERG: And errata for?

20 MS. ANDERL: Mr. Kennedy.

21 JUDGE BERG: Okay, we will take that up when
22 we go through and mark the exhibits, and if there is
23 something we need to make a record of, we will.

24 I will also state for the parties the
25 Commission's preference that where there are corrections

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1 to be made either to testimony or to exhibits that
2 parties prepare an errata sheet. And I will just say
3 that once more just to be sure it's loud and clear. In
4 the past, we have allowed witnesses to take the stand
5 and to make corrections to their testimony on the record
6 orally without requiring any additional documentation or
7 follow up. The Commission's preference at this point is
8 that counsel either themselves make corrections on
9 exhibits or pre-filed testimony that will be admitted
10 into the record or that they present errata sheets to be
11 attached to, for example, pre-filed testimony.

12 The practice that we're looking to move away
13 from is where some person, whether it be an
14 administrative law judge or someone else, goes into the
15 record and makes a notation on a pre-filed document to
16 be filed and sent up on review, and either it's not
17 clear who that person is, or it's a person not
18 representing the party. So while we have done that
19 practice in the past, we believe that there may be a
20 better way to go forward, and so your help on that will
21 be greatly appreciated.

22 If it turns out that, you know, a witness
23 comes and just reread their testimony the night before
24 and realized that they should have put in the word not
25 or some other glaring omission and needs to make the

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1 record clear, we will certainly allow parties the
2 opportunity to follow up with written erratas.

3 MS. ANDERL: Your Honor, the only other thing
4 that we mentioned earlier was to discuss also the order
5 of questioning witnesses, and I didn't know if we needed
6 to touch on that as well.

7 JUDGE BERG: Let's just take that up on a
8 witness-by-witness basis, and we will discuss that off
9 the record.

10 All right, then we will be off the record to
11 work on the marking of documents at this time.

12 (Discussion off the record.)

13 JUDGE BERG: Parties have been engaged in a
14 typically lengthy process of marking pre-filed direct
15 exhibits and exchanging and marking cross exhibits.

16 Numerous items have been identified for the
17 parties to follow up with at or before the hearing.
18 However, it's not necessary to identify those specific
19 matters on the record at this time. We will just
20 address them as the hearing proceeds.

21 Anything else that the parties would like to
22 raise at this time?

23 Hearing nothing, the conference is adjourned.

24 (Hearing adjourned at 4:20 p.m.)

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