

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE ANALYSIS INTO
QWEST CORPORATION'S COMPLIANCE WITH
SECTION 271(C) OF THE TELECOMMUNICATIONS
ACT OF 1996

TC01-165

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Transcript of Proceedings
March 28, 2002

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
JIM BURG, CHAIRMAN
PAM NELSON, COMMISSIONER
ROBERT SAHR, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest
John Smith
Karen Cremer
Greg Rislov
Harlan Best
Keith Senger
Dave Jacobson
Michele Farris
Heather Forney
Mary Giddings
Sue Cichos
Debra Elofson

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**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

APPEARANCES

Timothy L. Thomas, Black Hills Fibercom
David A. Gerdes, Midcontinent
John L. Munn, Qwest

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

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 27 APPEARANCES
 28 Timothy L. Thomas, Black Hills Fibercom
 29 David A. Gerdes, Midcontinent
 30 John L. Munn, Qwest
 31
 32 Reported By Cheri McComsey Wittler, RPR
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1 APPEARANCES BY TELEPHONE
 2 Mary Lohnes, Midcontinent
 3 Janet Browne, AT&T
 4 Jeff Carmon, Qwest
 5 Mary Hobson, Qwest
 6 Larry Toll, Qwest
 7 Tom Welk, Qwest
 8 Steven Weigler, AT&T
 9 = = = = =
 10 TRANSCRIPT OF PROCEEDINGS, held in the
 11 above-entitled matter, at the South Dakota State
 12 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
 13 South Dakota, on the 28th day of March 2002, commencing
 14 at 1:30 p.m.
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1 CHAIRMAN BURG: TC01-165, In The
 2 Matter Of The Analysis Into Qwest Corporation's
 3 Compliance With Section 271 Of The
 4 Telecommunications Act of 1996.
 5 Today shall the Commission grant the Motion
 6 for Order Denying the Petition and shall the
 7 Commission grant the Motion to Remove Document from
 8 the Commission's records. Also how shall the
 9 Commission proceed regarding the Motion for
 10 definition of Track A Analysis, and shall the
 11 Commission schedule additional time for the hearing
 12 and how shall the Commission schedule issues and/or
 13 witnesses for the hearing.
 14 We will take the order of those questions. We
 15 will take number -- the first one we take will be
 16 the second one listed. So the question before us
 17 is shall the Commission grant the Motion to Remove
 18 Document from Commission record?
 19 We'll let Qwest go first as to why it should
 20 be removed.
 21 MS. HOBSON: Thank you,
 22 Mr. Chairman. This is Mary Hobson. Again, that
 23 document was filed inadvertently. It was not
 24 intended to be part of the evidentiary record in
 25 this case.

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	<p>MR. THOMAS: Tim Thomas on behalf of Black Hills Fibercom. We have no objection on that either.</p> <p>CHAIRMAN BURG: Any comment from staff?</p> <p>MS. CREMER: Staff's only comment was the matrix was merely filed in the Docket. It's not a part of the record yet. That can only happen at the hearing itself. So leaving it in is harmless, and removing it is harmless.</p> <p>CHAIRMAN BURG: With that, I'll move we remove the document from the Commission record as requested.</p> <p>COMMISSIONER SAHR: I will second.</p> <p>COMMISSIONER NELSON: Concur.</p> <p>CHAIRMAN BURG: Now the first one listed is shall the Commission grant the Motion for Order Denying Petition and how shall the Commission respond regarding the Motion for Definition of Track A Analysis.</p> <p>We'll take those two together so anybody commenting can kind of reflect on both of them. Again, let's see who should go first on this one.</p> <p>MS. AILTS WIEST: Black Hills or Midcontinent.</p>
	<p>CHAIRMAN BURG: Midcontinent first.</p> <p>MR. GERDES: Mr. Chairman, since we're in a legislative hearing room I am going to hand out a handout.</p> <p>(Mr. Gerdes hands out document)</p> <p>MR. GERDES: Mr. Chairman, members of the Commission, my name is Dave Gerdes. I'm a lawyer from Pierre, and I am the attorney for Midcontinent Communications. In this proceeding we have made a Motion that the Commission define the evidence relevant to the Track A Analysis that relates to this proceeding. We have filed a brief and a reply brief.</p> <p>I will not go in to detail as far as the contents of the brief. They're available for you to read, and I'm sure that you have .. you can draw your conclusions from the brief.</p> <p>For the benefit of those on the telephone, what I have handed out is .. the first three pages of the handout are Subsection (C) of Section 271. And then the balance of the handout is 271 in its entirety. So you've got .. I want to talk about Subsection (C), but for context I've also given you a complete copy of Section 271.</p> <p>I'd like to start out by talking about at</p>
	<p>least my understanding of what Section 271 is all about. And it's simply this, that that section of the law basically says this, and that is in subparagraph (A), "Neither a Bell operating company nor any affiliate of a Bell operating company may provide interLATA services except as provided in this section."</p> <p>So in order for Qwest to provide interLATA services it must comply with this section. And what we're specifically talking about here is in-region interLATA services. So they have to comply with this.</p> <p>Well, we go over to Subsection (C), and Subsection (C) is the one that says .. now if you look at the first three pages, I've highlighted some parts of Subsection (C) because they're the ones that I want to talk about. Subsection (C) says it is, "Requirements for providing certain in-region interLATA services." That's what this proceeding is talking about.</p> <p>And I want to respond to Qwest's brief on Page 2 where it is said, "But interveners' reading of the law is assuredly not right. Interveners have confused two different requirements of Section 271. The question of whether Qwest has met</p>
	<p>the Track A requirements under Section 271(C)(1) is entirely different from the question of whether Qwest has satisfied the competitive checklist under Section 271(C)(2)."</p> <p>Okay. We're looking at 271(C) right here, the first three pages. All right. Section 271(C)(1) says that there must be an agreement or statement, "A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B)."</p> <p>Okay. That's or. So let's go to subparagraph (A). There either has to be the presence of a facilities-based competitor, that's A, Track A, or there has to be a failure to request access.</p> <p>Now if you look at the language in B .. and I think everybody agrees that this is a Track A case, but look at the language in A. "A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A)."</p> <p>I believe everybody understands that this doesn't apply because there has been interconnection. But it goes on to say, "and a</p>

statement of terms and conditions that the company generally offers," an SGAT. And under Track B the paragraph is satisfied if there is no request for access, no request for interconnection and, secondly, there is a statement of generally accepted terms and conditions.

But we're not talking about Track B. We're talking about Track A. So under Track A, "A Bell operating committee meets the requirements of this subparagraph if it has entered into one or more binding agreements." Okay. That's here. That's Section (C)(1)(A).

All right. Then if you go down to subparagraph (2), it says there are specific interconnection requirements. That's at the bottom of the first page. Now it says there has to be an agreement. Remember, we're on Track A, agreement required, Track A, subparagraph (A). "A Bell operating company meets the requirements of this paragraph if, within the State" .. South Dakota .. "for which the authorization is sought such company" .. Qwest .. "is providing access and interconnection pursuant to one or more agreements described in paragraph (A)" above, okay, or "such company is generally offering access and

the FCC in a number of proceedings has specifically held that the .. for a Track A Analysis that there has to be quality evidence to prove compliance with the checklist. And what we're really talking about here is compliance with the checklist, the 14 point competitive checklist. Because these things have to exist for there to be competition in the loop.

Really the competitive checklist is the issue here. And how do you prove compliance with the checklist? Can you prove compliance with the checklist with just an SGAT?

I would submit no because an SGAT is nothing more than an opportunity for performance, as we said in our brief. The SGAT is not proof of performance. It's an opportunity for performance. Because all it is is words on a piece of paper.

Let me give you a specific example. In prefiled testimony that you will hear in this case Mr. Simmons has talked about the fact that they have had problems with the fact that collocation facilities have been found by them not to be as agreed upon in their Interconnection Agreement.

Now Qwest wants us to believe that the SGAT is nothing more than a proxy for an Interconnection Agreement. Well, accepting that for what it is,

interconnection pursuant to a statement" of generally accepted terms, an SGAT. That's an or between those two phrases.

Now we know that the first sentence applies because that's what we're doing here, such company is providing access or interconnection pursuant to one or more agreements described in paragraph (A), Track A; right? So the or doesn't apply.

But then if you look after the second clause, it says and, "and such access and interconnection meets the requirements of subparagraph (B) of this paragraph."

So in order for there to be compliance, number one, the company has to be providing access and, number two, the access meets the requirement of subparagraph (B). What is subparagraph (B)? It's the 14 point checklist.

So what 271 says is that, number one, you have to have Interconnection Agreements and, number two, you have to comply with the competitive checklist. The statement of generally available terms is a component of the Track B Analysis clearly, not the Track A Analysis. So the statute itself proves the point.

Secondly, in our brief and as we've mentioned,

the SGAT simply tells us what Qwest proposes to give us. It does not prove what we have been given. And the 14 point checklist requires proof of what we have been given.

I'll give you another example. If I sign a notarized piece of paper and give it to Karen Cremer and that notarized piece of paper says I have buried a chest of gold in your backyard under the old oak tree, now I'll ask Ms. Cremer does she believe that because I said that in the piece of paper that that chest of gold is there?

Of course not. The proof is going and looking under the old oak tree and seeing if there's a hole there or if there's a buried chest under the old oak tree.

That's what we're talking about. We're saying you simply can't say that because it's in the SGAT that means we've complied to the 14 point checklist. The 14 point checklist contemplates proof that you're, in fact, doing it, not that you propose to do it.

Now why did they require an SGAT in the Track B Analysis? Well, if you think back, when the '96 Act was passed the idea was to get competition into the local loop, into the

1 telecommunications business. And the carat for the
 2 Bell operating companies was if you permit
 3 competition in your network, the reward is that you
 4 will then be able to provide in-region long
 5 distance service. And so you have to do these
 6 things in order to get competition in the local
 7 loop, these 14 points.

8 But they also had to provide what if nobody
 9 came? What if nobody asked to come into the local
 10 loop and be that competition? What if all of the
 11 potential competing local exchange carriers stayed
 12 away because they wanted to keep Bell out of the
 13 long distance service? So they all conspired, if
 14 you will, but just stayed away. Nobody wanted to
 15 hook up.

16 Well, there had to be an avenue for Bell even
 17 under those circumstances to eventually provide
 18 long distance service. That's Track B. So if
 19 nobody signed up, then Bell could say, look, we're
 20 open for business, we've got the statement of
 21 generally available terms, and if you folks want to
 22 come in and do business, we'll do business with
 23 you. And that would satisfy the requirement for
 24 competition, if nobody came.

25 Now as it turned out, everybody came and

1 CHAIRMAN BURG: Okay. I was under
 2 the impression it was Track B, and I was going to
 3 say why wasn't it --
 4 MR. GERDES: It's part of both.
 5 Because if you look at the language at the top of
 6 the second page of what I passed out, it says under
 7 Track A or Track B you must meet the competitive
 8 checklist.

9 I mean, I've highlighted that language and it
 10 doesn't say it that way. It says the company -- it
 11 must show that the company is providing access or
 12 interconnection pursuant to one or more agreements,
 13 Track A, or the company is generally offering
 14 access under a statement of generally available
 15 terms and access and interconnection meets
 16 requirements of --

17 CHAIRMAN BURG: So can I go back and
 18 ask what relief are you requesting in the question
 19 how shall the Commission respond regarding the
 20 Motion of Definition for Track A Analysis?

21 Are you looking for a definition from the
 22 Commission that both the SGAT be there and the 14
 23 point checklist and that is not clear without our
 24 determination?

25 MR. GERDES: Well, what we're asking

1 everybody wanted to sign up. So there has been no
 2 Track B Analysis. But that doesn't change the fact
 3 that the SGAT is nothing more than another piece of
 4 evidence. It does not have any greater weight than
 5 any piece of evidence. And in this case it is a
 6 weak piece of evidence because it is simply a
 7 promise of performance rather than proof it
 8 occurred.

9 So from our standpoint we say that Qwest
 10 cannot simply say look at the SGAT and that proves
 11 that we did it. That's our point. My point is the
 12 Commission should order that for any point on the
 13 14 point checklist to be given that Qwest must come
 14 forward with evidence in addition to the written
 15 word to show that this has been done.

16 And the proof, as I mentioned, is that simply
 17 because they promise to do it, that doesn't mean
 18 that it's done. And the 14 point checklist
 19 requires that it be done, not that it be promised.

20 CHAIRMAN BURG: Now you've argued
 21 that if you're going to use Track A, you also have
 22 to meet the 14 point checklist, which is part of
 23 Track B.

24 MR. GERDES: No. The 14 point
 25 checklist is part of either Track A or Track B.

1 for, Mr. Chairman, is this. The Commission decide
 2 the question of whether or not an SGAT provision
 3 standing alone is sufficient to prove compliance
 4 with any one of the 14 point checklist items.

5 COMMISSIONER NELSON: And your
 6 argument today is you don't believe it is?

7 MR. GERDES: Right.

8 COMMISSIONER NELSON: Because it's
 9 only an offer of what they might be able to do but
 10 not proof they've done that.

11 MR. GERDES: That's right. I would
 12 agree that the SGAT shows what they propose to do,
 13 but we submit that they can't simply say, well,
 14 it's in the SGAT so we've satisfied this point of
 15 the 14 point checklist by providing this in our
 16 SGAT.

17 COMMISSIONER NELSON: But whether w
 18 ruled on that or not, what do you say to the
 19 argument that Qwest ought to be able to put on its
 20 case any way it wants and if they want to rely on
 21 the SGAT and if we were to believe what you said,
 22 clearly they're not putting on a not adequate case.

23 So the choice would still be theirs to come in
 24 with an offer rather than proof, and you'd have to
 25 give it the weight it deserves. But it's their

1 case, and they should be able to make it whatever
 2 way they want.

3 MR. GERDES: Under ordinary
 4 circumstances I agree with you any party having the
 5 burden is entitled to try the case as they wish.
 6 The potential peril being they might lose.

7 COMMISSIONER NELSON: Right.

8 MR. GERDES: But here there's no
 9 appeal. There's no final order that this
 10 Commission is granting. You are simply making a
 11 recommendation to the FCC that, yes, the company
 12 has or no the company has not fulfilled the
 13 requirements of Section 271.

14 And so there's no -- if, for instance, the
 15 Commission decided to accept this SGAT evidence
 16 only, then we have no place to go. We don't have
 17 an appeal, and we can't change the way we put on
 18 our case.

19 And so we think that it's fair to the parties
 20 for them to know what standard Qwest will be held
 21 to, what standard of proof Qwest will be held to in
 22 this proceeding, because it's not like any other
 23 proceeding this Commission will have. There's no
 24 appeal. It's just simply after you're done you
 25 make this recommendation under the statute to the

1 Here the Commission is simply going to listen
 2 to evidence and make a recommendation to the FCC,
 3 and that will be the last this Commission ever has
 4 to do with it.

5 COMMISSIONER NELSON: But it was my
 6 understanding our burden as the Commission is to be
 7 able to produce record of evidence and a
 8 recommendation to the FCC they met their burden.
 9 If they choose the SGAT, it seems they might not
 10 have met their burden.

11 MR. GERDES: I understand that but
 12 I'm sure the Commission would never do it but let's
 13 assume this Commission went ahead and accepted the
 14 SGAT language and met their burden. Then we have
 15 no place to appeal to suggest that this Commission
 16 made a mistake. We can't go to the Supreme Court.

17 MS. AILTS WIEST: Well, you go to
 18 the FCC.

19 MR. GERDES: All right. We can go
 20 to the FCC.

21 MS. AILTS WIEST: Well, I was just
 22 wondering when you were interpreting the statute
 23 said clearly SGAT is a component of Track B and not
 24 of Track A, and I was just wondering, you know,
 25 looking at those FCC orders clearly they have

1 FCC.

2 COMMISSIONER NELSON: Well, if we
 3 didn't say choose between deciding today that they
 4 have to do an SGAT or interconnection and we just
 5 let them put on the case the way they want and give
 6 it the weight it deserves, your burden would be
 7 then to produce for the record the evidence that
 8 supports that that's not an adequate case to
 9 justify saying that they made their 14 point
 10 checklist.

11 Wouldn't you see that as a foolish -- I think
 12 the choice is theirs, but it would seem to be a
 13 foolish thing.

14 MR. GERDES: It would be a foolish
 15 thing, in my opinion, but it also has to do with
 16 what evidence we would plan to come forward with in
 17 the first instance. So we think because of the
 18 fact --

19 As an example, the US West access rates case
 20 went, you know, to the Supreme Court and back down
 21 a couple of times before that was finally resolved
 22 before this Commission. And it had to do with
 23 deficiencies in proof and a few things like that.
 24 But that was all within the confines of the
 25 jurisdiction of the State of South Dakota.

1 allowed reliance on model Interconnection
 2 Agreements and tariffs. I agree along with
 3 Interconnection Agreements.

4 MR. GERDES: That's right.

5 MS. AILTS WIEST: But under your
 6 theory SGATs belong in Track B and not in Track A.
 7 The FCC has clearly considered them in Track A.

8 MR. GERDES: They have considered
 9 them along with other evidence. And that's what
 10 I'm saying. I'm saying you can't just point to the
 11 SGAT and say this proves the point. There has to
 12 be evidence along with it that says that this
 13 provision in the SGAT will, in fact, do what we say
 14 it will.

15 As an example, I mentioned where one of the
 16 complaints that Midcontinent says that in
 17 collocation issues US West has agreed to provide
 18 electrical power in collocation locations, but when
 19 we get there, we don't find it. Okay. Well,
 20 that's evidence that they are not complying with
 21 what they agreed to comply with.

22 The point is that simply because you agreed to
 23 do it on a piece of paper doesn't mean you've done
 24 it and it doesn't mean you have, in fact, satisfied
 25 one of the points of this 14 point checklist. So

1 you have to have evidence along with the SGAT.

2 MS. AILTS WIEST: So you have no
3 objection to the SGAT being allowed to provide some
4 evidence of checklist items?

5 MR. GERDES: It's like any other
6 garden variety piece of evidence, that's right, but
7 it carries with it no additional weight. It
8 doesn't carry the same weight as it does in the
9 Track B Analysis.

10 MS. AILTS WIEST: Right. But now
11 you're talking about weight as opposed --

12 MR. GERDES: I said in my earlier
13 presentation it's just like any other piece of
14 evidence, and .. I think what I said is it's just
15 like any other piece of evidence, and it's very
16 weak evidence because it only shows what they
17 propose to do, not what they are doing.

18 MS. AILTS WIEST: So nothing
19 prevents the Commission from looking at the SGAT.

20 MR. GERDES: No.

21 MS. AILTS WIEST: Your argument is
22 it's weak evidence. Why wouldn't we decide that
23 after the hearing then? Don't we have to wait
24 until after the hearing to decide how weak the
25 evidence is?

1 MR. GERDES: That's true. But I
2 would say that the SGAT without more does not prove
3 anything. I guess what I'm saying is you have to
4 have evidence to go along with .. evidence that
5 meets these 14 points along with the SGAT. You
6 can't just rely on the SGAT alone.

7 COMMISSIONER NELSON: I thought
8 that's the question I tried to ask, but maybe I
9 didn't ask it well.

10 Although you can't appeal what we decide,
11 can't you appeal what the FCC decides?

12 MR. GERDES: I'm not sure about
13 that.

14 COMMISSIONER NELSON: I'm not sure
15 why it would be any different than any other FCC
16 decision, and certainly they've been appealed in
17 court.

18 MR. GERDES: I guess I would argue,
19 Commissioner Nelson, that it's a little bit unfair
20 for a South Dakota company to have to go to
21 Washington, D.C. and appeal what the FCC has done
22 to a federal court in Washington, D.C.

23 COMMISSIONER NELSON: Commissioners
24 are in that position all the time.

25 MS. AILTS WIEST: Going to Track B,

2 you mentioned Track B was put in place so companies
3 couldn't conspire to not ask for interconnection.
4 But what if a CLEC does not request one of the
5 checklist items? What does Qwest do then? Such as
6 for directory assistance. What does Qwest do then?
7 Track B is gone, they're stuck with Track A, but
8 you're saying it's not good enough because you have
9 to have actual proof.

10 MR. GERDES: Yes. I'm not going to
11 tell them how to try their case, but if I were
12 them, I would say, number one, we're providing it
13 in the SGAT and this is how we would implement it.
14 We've got 63 people sitting out there in this case,
15 and they would do such and such and whatever. I
16 would have actual evidence of what I am going to do
17 to implement that provision.

18 CHAIRMAN BURG: Bob.

19 COMMISSIONER SAHR: Mr. Gerdes, does
20 your client have the ability to send
21 Interrogatories to Qwest?

22 MR. GERDES: Yes.

23 COMMISSIONER SAHR: And have they
24 sent any Interrogatories on how Qwest does intend
25 to prove its case, as far as do they intend to
offer additional evidence along with the SGAT?

1 MR. GERDES: No.

2 COMMISSIONER SAHR: So at this point
3 in time we don't know if Qwest intends to offer
4 additional evidence in addition to the SGAT?

5 MR. GERDES: Obviously, if our
6 Motion is granted and if they do, in fact, offer
7 additional evidence, our Motion will be fulfilled.
8 If they choose not to, then obviously they .. the
9 Commission would have to decide whether that's
10 sufficient.

11 I mean, yes, we would be able to provide ..
12 ask for such information. It's not usual to do
13 that kind of thing, but we could.

14 COMMISSIONER SAHR: I mean, is your
15 main concern presenting your case at hearing and
16 knowing what to expect, or is your main concern not
17 having an avenue to appeal?

18 Which one of those are you most concerned
19 with?

20 MR. GERDES: The former, not being
21 able to anticipate what kind of a case to put on.

22 COMMISSIONER SAHR: Would you be
23 able to .. through Interrogatories or some other
24 means of discovery would you be able to make a
25 better determination of what Qwest does intend to

1 put on as their chief case?
 2 MR. GERDES: I suppose we could
 3 serve an Interrogatory and ask them do you propose
 4 to offer evidence on the 14 points, and they could
 5 say yes.

6 COMMISSIONER NELSON: Then what?

7 MR. GERDES: Well, yeah. I mean, I
 8 question whether I can ask what evidence you
 9 propose to offer on each and every point because
 10 that proves the case.

11 CHAIRMAN BURG: The question that I
 12 have probably fits here a little bit. From the
 13 arguments you've made here are you indicating that
 14 you feel that they want to just depend on the SGAT
 15 and they did not intend to or you don't know that?

16 MR. GERDES: I have seen some
 17 indication from some of their filings that -- and
 18 some of the prefilled testimony seemed to indicate
 19 they're relying solely on SGAT for some aspects of
 20 their proof.

21 CHAIRMAN BURG: Of the 14 point
 22 checklist?

23 MR. GERDES: Yes.

24 CHAIRMAN BURG: Any other questions?

25 MR. GERDES: So I guess to that

1 might put in as far as proof that the 14 point
 2 checklist has been met?

3 MR. GERDES: To a certain extent,
 4 yes.

5 COMMISSIONER SAHR: What I'm getting
 6 at is what is the prejudice to us saying, Qwest, go
 7 forward and try to prove your case and leaving it
 8 up to you and the other parties and interveners to
 9 decide how to challenge what they may put on at
 10 hearing? I guess that is the question.

11 MR. GERDES: That's a good question,
 12 Commissioner Sahr. Maybe I'm just being a good guy
 13 and trying to help Qwest to put on their case. I
 14 don't know.

15 But it seems to me there's more certainty if
 16 they have a requirement to provide evidence on the
 17 compliance with the 14 points. That's a good
 18 point.

19 CHAIRMAN BURG: Okay. Any other
 20 questions? Staff have anything?

21 MS. AILTS WIEST: Black Hills, I
 22 think, should go next.

23 CHAIRMAN BURG: Go ahead,
 24 Black Hills.

25 MR. THOMAS: Thank you, and good

1 extent it also answers Commissioner Sahr's question
 2 and that is from what I have seen from their
 3 application it appears they're relying simply on
 4 the SGAT for some things.

5 CHAIRMAN BURG: Before I dismiss
 6 you, do you have any comment on the first question,
 7 shall the Commission grant the Motion for Order
 8 Denying Petition?

9 I believe that was Black Hills's Motion.

10 MR. GERDES: I have no comment
 11 either way.

12 COMMISSIONER SAHR: I think I have
 13 one more question. If the client is looking at --
 14 let me put it this way. If Qwest simply puts on
 15 the SGAT, your client would be prepared to go
 16 forward and challenge that; is that correct?

17 MR. GERDES: We would challenge it
 18 as being not sufficient to prove whatever point
 19 they were trying to prove of the 14 point
 20 checklist, yes. I don't think we have the burden
 21 to go forward and offer their evidence, but we
 22 certainly point out we don't think it proves the
 23 checklist point.

24 COMMISSIONER SAHR: Are you also
 25 prepared to challenge other evidence that they

1 afternoon Commissioners. My name is Tim Thomas
 2 with Morrill, Thomas, Nooney & Braun in Rapid City
 3 representing Black Hills Fibercom, and I'm really
 4 pinch-hitting for my partner Greg Bernard who's
 5 been the one involved in this proceeding.

6 Essentially Black Hills's Motion, the legal
 7 basis for the Motion, really parallels
 8 Midcontinent's Motion. The difference is the
 9 relief requested here.

10 And so, you know, we do agree with
 11 Mr. Gerdes's comments today as far as his analysis
 12 of Section 271 and what needs to be proved in this
 13 instance. And I'm not going to repeat his
 14 arguments, but we'll, you know, adopt them on
 15 behalf of the Black Hills Motion.

16 There are two things I want to do or two or
 17 three things I want to mention in addition to what
 18 Mr. Gerdes talked about. One was the issue we were
 19 just getting into here at the end, and that is
 20 essentially -- and Ms. Ailts spoke on this issue,
 21 is in the prior FCC -- or the FCC has looked at a
 22 combination of SGATs and Interconnection
 23 Agreements.

24 And I think the difference in this case is
 25 what Qwest has set forth in their brief in this

case in that -- it appears on Page 16 of their brief and they say they're making a difference between the Ameritech case and they say Qwest has proffered SGATs to demonstrate checklist compliance and not individual Interconnection Agreements.

So I take that to mean that Qwest is going to rely solely on SGATs in this case and not on the 34 Interconnection Agreements that have already been approved by this Commission and the 31 that are pending. But they intend to rely on SGATs.

And the so what of that, I guess -- and that was part of the question that came out here is, you know, why does this make a difference.

Well, I think it makes a difference because, you know, Section 271 itself, the language of the statute says this is how you can prove compliance in these particular areas and if they're going to rely exclusively on SGATs to prove compliance and the language of the statute is at some point in time determined by the FCC or a court at some point later down the road not to allow that, then we'll be back here again. And I think that's the so what is this has got to be done correctly under the law.

And as Mr. Gerdes argued, you know, the plain language of the statute allows in a Track A

So what this says is you get there two different ways. We all agreed the only way we can get here is if this case is Track A. Subsection (D) says in order for the Commission to approve that application they've got to show with respect to access and interconnection that the competitive checklist has been fully implemented through the use of Interconnection Agreements.

Now if you mix these up, essentially what you're doing is you're reading Subsection (D) out of the statute. And generally the rules of statutory construction tell us that Congress does not pass legislation that is meaningless. So there's no way to read -- no other way to read Subsection (D). If you've got Track A, you've got to show competitive checklist was implemented through the Interconnection Agreements.

The last point I want to make is the legislative history of this statute -- although we rely on the plain language of the statute. But to the extent Qwest is saying it's ambiguous by giving it a different reading, the legislative history, Section 271, which is quoted in our reply brief talks about why Section 271 -- why Track A and Track B were passed.

proceeding -- which nobody argues that this is not. This is a Track A proceeding. The plain language of the statute allows showing compliance with the checklist through the Interconnection Agreement.

Not only does Subsection (C) that Mr. Gerdes pointed out today support that argument, but also Subsection (D) of the same statutes, Section 271. And Mr. Gerdes's handout on Page 6 is the full statute. And I'm looking at Subsection (D)(3), which appears on Page 6.

And I'll just quote from that a little bit. It says, "The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that, Subsection (A), the petitioning Bell operating company has met the requirements of Subsection (C)(1)." That's the competition.

And "with respect to access and interconnection provided pursuant to," Track A of this section, "has fully implemented the competitive checklist" or "with respect to access and interconnection generally offered pursuant to a statement," that's the SGAT, "such statement offers all the items included in the competitive checklist."

And this is quoted on Page 3 of our brief, but the legislative history, the conference report of Section 271 says, "For the purposes of Track A the Bell operating company must have entered into one or more binding agreement under which this is providing access to or to one or more competitors providing telephone exchange service."

"The requirement that the Bell operating company is providing access and interconnection means the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist the appropriate state Commission in providing its consultation and the explicit factual determination by the Commission under new Section 271(D)(2)(B) that the requesting Bell upgrading company has fully implemented the Interconnection Agreement elements set out in the checklist.

Then it goes on to say specifically with respect to Track B Analysis -- and this was the same point Mr. Gerdes was making is that, "New Section 271(C)(1)(B)" -- and that's Track B -- "also was adopted from the House Amendment and it is intended to ensure that a Bell operating company is not effectively prevented from seeking entry

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1 into the interLATA services market simply because
 2 no facilities-based competitor meets the criteria,"
 3 if Track A has sought to enter the market.

4 And that's the same point Mr. Gerdes was
 5 making was that Track B Analysis -- the Track B was
 6 passed to provide interLATA relief if there were no
 7 competitors. In this case there's no doubt there's
 8 all kinds of competitors that jumped into the
 9 market.

10 And what the Congress was concerned about is
 11 actual competition. They want to see actual
 12 competition. Not theoretical competition under an
 13 SGAT. They want, you know, to prove actual
 14 competition. And the only way to do that is to
 15 look at the actual Interconnection Agreements to
 16 see that they meet the 14 point checklist.

17 Other than that, I have no further comments,
 18 Chairman.

19 CHAIRMAN BURG: My question would be
 20 then why do you feel it's necessary to go to the
 21 degree of a Motion Denying a Petition to achieve
 22 this?

23 MR. THOMAS: Well, I think the
 24 essence of the Motion was to really refine the
 25 legal question and the -- you know, the Motion was

1 can do on that is to say that while we're at this
 2 proceeding it behooves all parties, Qwest,
 3 Fibercom, Midco, everyone that's involved, and the
 4 Commission, to proceed down the correct legal path.

5 Otherwise, as I say, if we get, you know, a
 6 year or two down the road and the FCC or a court or
 7 some final port of resort decides that this
 8 particular issue -- you know, that you cannot prove
 9 compliance with Track A under the Track B Analysis,
 10 that we would be back here again. So I guess it's
 11 a matter of what's the correct legal way to
 12 proceed.

13 CHAIRMAN BURG: But I suppose what
 14 I'm saying is our denying the Motion today and our
 15 saying that they did not -- after your arguments
 16 that they did not meet the requirement would have
 17 the same result.

18 MR. THOMAS: Right.

19 CHAIRMAN BURG: Okay. Any other
 20 questions?

21 Rolayne or John, do you have anything?

22 MS. AILTS WIEST: No.

23 MR. SMITH: No.

24 CHAIRMAN BURG: Staff? Or do we go
 25 to Qwest?

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1 to deny the application because it was clear that
 2 the application was -- in our opinion, anyway, was
 3 based upon an improper use of Track B Analysis to
 4 prove Track A.

5 And so, as I say, our Motion and the Motion of
 6 Midcontinent are legally related. The only
 7 difference is the relief requested. And I suppose
 8 at the end of the day you would get to the same
 9 place if the Motion was granted and they had to
 10 refile the Petition.

11 CHAIRMAN BURG: Okay. Any other
 12 questions?

13 I still have the same question Mr. Sahr was
 14 basically pursuing, that you would have the
 15 opportunity to argue vigorously in any way you want
 16 that they did not meet -- as you argue before us
 17 now to require them to, you'd have the same
 18 opportunity to require them they did not meet that
 19 and, thus, it should be denied.

20 And I'm trying to understand why this is
 21 better relief than that would be, and I'm at the
 22 same time concerned about telling them how to do
 23 their case.

24 MR. THOMAS: Well, I guess I thought
 25 I attempted to explain that, but the best I guess I

1 MS. AILTS WIEST: Well, does AT&T
 2 have any comments?

3 CHAIRMAN BURG: Yes. I forgot.

4 MR. WEIGLER: This is Steve Weigler
 5 from AT&T, and maybe my comment would be after
 6 Qwest. But Qwest after reading their -- Qwest
 7 says, well, we have Interconnection Agreements that
 8 are analogous to the SGAT and so their motion's not
 9 well taken because (Inaudible) Interconnection
 10 Agreement.

11 And my only comment is it becomes kind of a
 12 procedural issue on, well, what do we do if Qwest
 13 says, okay, we're going to rely on something else
 14 other than the Interconnection Agreement and we're
 15 preparing our case as if Qwest was relying on SGAT?

16 And so my concern is much more of a procedural
 17 one, and I think that's why it has to be decided by
 18 the Commission today. Are we going to go forward
 19 on the SGAT, or are we going to go forward on
 20 Interconnection Agreements that Qwest claims are
 21 analogous but Qwest hasn't yet proffered?

22 COMMISSIONER SAHR: Mr. Weigler,
 23 this is Bob Sahr.

24 MR. WEIGLER: Yes, Mr. Commissioner
 25 Sahr.

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1 COMMISSIONER SAHR: I would ask the
 2 same question that I asked Mr. Gerdes; why don't
 3 you send out an Interrogatory or try to determine
 4 if they're going to put on their case through SGATs
 5 or Interconnection Agreements?

6 If it's simply a question of knowing what sort
 7 of evidence you should put on the day of the
 8 hearing, it seems to me the way to find out is to
 9 ask the other side which route do you intend to go
 10 and try to clarify it that way.

11 MR. WEIGLER: What we've done is
 12 Qwest filed materials on the -- based on the SGAT,
 13 and so we're proceeding on that route. But then
 14 this Motion came up, and Qwest said, well, we might
 15 rely on the Interconnection Agreement. So I don't
 16 know.

17 I mean, for a matter of judicial efficiency we
 18 should probably determine which way they're going
 19 to go. And I guess I agree with Midcontinent and
 20 Black Hills on the way they're supposed to go. But
 21 if Qwest decides to take that route, I mean, I
 22 guess it's at their peril.

23 But I want to make sure -- we already filed
 24 our responsive testimony based on the SGAT. Now
 25 Qwest is saying we might have Interconnection

1 concerned to pursue beyond one of those two
 2 remedies that are being sought today.

3 MR. WEIGLER: I think that's why
 4 maybe my comments are premature. I'd like to hear
 5 what Qwest is thinking about doing. I just read
 6 their response, and their response is, well, we
 7 have these Interconnection Agreements. And I don't
 8 know if it's even ..

9 They've already had the opportunity to put on
 10 their case, and they put it on through an SGAT.
 11 They've had an opportunity to provide testimony,
 12 and they put it on through an SGAT.

13 COMMISSIONER SAHR: Thank you.

14 CHAIRMAN BURG: Do you want to go
 15 before or after ..

16 MS. CREMER: After.

17 CHAIRMAN BURG: -- Qwest's response?
 18 Let me interfere just one minute. We did have
 19 another hearing at 3 o'clock, and if anybody is
 20 joining us, we're finishing up with the end of our
 21 Commission meeting and it might take another 10 or
 22 15 minutes. Just hold on, and we will get to it as
 23 soon as we're finished here.

24 (Discussion off the record)

25 CHAIRMAN BURG: Go ahead.

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1 Agreements that either are pending or have been
 2 passed by this -- or approved by this Commission
 3 and we want to know. So I want to make sure that I
 4 know what to walk into coming up and it's not my
 5 burden. And they already filed their testimony, we
 6 filed responses, so I don't know if there's a need
 7 for Interrogatories on that particular subject.

8 COMMISSIONER SAHR: Well, would you
 9 modify your prefiled testimony based on whether
 10 they're going with the SGAT or Interconnection
 11 Agreements?

12 MR. WEIGLER: I guess I'd be in a
 13 position where I'd have to modify my testimony.
 14 But we have kind of an administrative issue, you
 15 know, housekeeping issue, is Qwest going to modify
 16 their testimony, and if they are, what kind of time
 17 period do they have to modify responses. Because
 18 right now all of this stuff is T.O.

19 COMMISSIONER SAHR: Right now with
 20 the Motion we have before us one is to completely
 21 throw the case out, and the other one is to
 22 determine a track for someone to prove their case.

23 It seems to me if the problem is prefiled
 24 testimony or it's putting on evidence at hearing,
 25 there are some other routes for all the other

1 MR. MUNN: Mr. Chairman,
 2 Commissioners, my name is John Munn, and I'm
 3 appearing on behalf of Qwest today. And I would
 4 like to thank you for the opportunity to be able to
 5 try to address these issues and clear up some
 6 questions that may be out there.

7 First of all, to put it bluntly, in order for
 8 the interveners' legal argument to be correct, then
 9 every one of the FCC approval orders, which is
 10 eight orders for 10 states, has to be incorrect as
 11 well as the 12 states Qwest's completed checklist
 12 compliance workshops to date.

13 Because the FCC orders have clearly stated
 14 that not only are Interconnection Agreements
 15 evidence of checklist compliance but also SGATs,
 16 model Interconnection Agreements, like SBC used,
 17 which is either like the T2A for Texas or K2A for
 18 Kansas, et cetera, same thing as an SGAT or
 19 tariffs, which are just publicly available.
 20 Verizon relied on tariffs and SGATs.

21 So, for example, in the SBC-Texas Order at
 22 paragraph 341 footnote 952 the FCC actually noted
 23 that they met the customized routing that satisfied
 24 checklist item 6 through the T2A, not through
 25 Interconnection Agreements and the T2A.

1 Another example would be paragraph 216 of
 2 SBC-Texas they found compliance with checklist item
 3 2 based on "legal obligation to provide such access
 4 as established in the T2A", which is the SGAT.
 5 They didn't say in addition to Interconnection
 6 Agreements with individual CLECs.

7 The same thing can be found at paragraph 106
 8 of the Arkansas Missouri order where the FCC found
 9 SBC satisfied the line splitting obligation just
 10 through the M2A. And, again, we've -- so I guess
 11 the key point here is that the FCC has not said you
 12 have to have Interconnection Agreements and SGATs
 13 together for each checklist item as we walk along.

14 That's decidedly not how the FCC has applied
 15 271 through all of its orders. And Verizon would
 16 be another -- since I've just mentioned SBC states,
 17 Verizon, for example, in Connecticut,
 18 paragraph 66, with respect to checklist item 5,
 19 there again they cite to specific and concrete
 20 legal obligations through many things other than
 21 individual Interconnection Agreements. They also
 22 talk about SGATs and tariffs.

23 So I think the first point is clearly the FCC
 24 has disagreed and the other 12 states, although
 25 clearly you don't have to follow the other

1 signed on the back of it, everything's the same.
 2 So, for example, if Qwest's direct or rebuttal
 3 testimony refers to Section 9.23, the section
 4 number and the exact words are the same. If it's
 5 the SGAT or KMC Interconnection Agreement, there is
 6 no difference. So there's no substantive change.
 7 So there would be no reason to need to do anything
 8 differently on the part of the interveners.

9 I just wanted to clear up that I think that is
 10 a nonissue. Because there are no changes to the
 11 SGAT language from these Interconnection
 12 Agreements. And I think that's a testament to the
 13 SGAT process itself. But I think that's a key
 14 point to remember.

15 The next point I'd like to make briefly is
 16 that it seems to me there's been a lot of blurring
 17 of distinctions between Track A, Track B on the one
 18 hand, which is section -- we can look at
 19 Mr. Gerdes's handout. On Page 2 of his handout --
 20 well, actually Page 1 has 271(C)(1)(A), the Track A
 21 Analysis here, Track B here. A separate section of
 22 the Act 271(C)(2) addresses the checklist.

23 And for Track A, to show compliance with
 24 Track A, the FCC has been clear there are four
 25 requirements to establish compliance with Track A.

1 12 states just to inform you of what's occurred
 2 there, we proceeded through with the same process
 3 that we have today.

4 Secondly, I've heard some discussion about
 5 whether Qwest will proceed with Interconnection
 6 Agreements or an SGAT or both. I'd like to clear
 7 up something right now just so I can answer that
 8 question that you have. I think in the testimony
 9 that we will file next week we'll attach, for
 10 example, the KMC Interconnection Agreement, which
 11 is one of the CLECs who have opted into the SGAT.

12 And I think the key thing -- because I've
 13 heard this, I believe, from each of the three prior
 14 speakers, but certainly at least one of them, that,
 15 you know, we need to know how to prepare our case
 16 and, you know, things would change or we would need
 17 to be able to respond.

18 We've put in our pleading, but just to make
 19 sure everyone's clear the KMC Interconnection
 20 Agreement they just opted in to the October 2001
 21 version of the SGAT that was attached to Qwest's
 22 petition in South Dakota when we filed here in
 23 November. It's the exact same wording. Other than
 24 the fact that KMC is mentioned on the front of
 25 their document and there's a signature that's

1 Track A does not require a showing of performance.
 2 It addresses some specific elements, and we've
 3 addressed that in our Track A Affidavit we filed
 4 with the Commission.

5 A completely separate analysis is whether
 6 Qwest has established a concrete and specific legal
 7 obligation to comply with the checklist items. The
 8 SGAT is in effect in the State of South Dakota
 9 under 252(F), and it's subject to pick and choose
 10 under 252(I). Qwest can't pull this back -- I
 11 mean, it's already the Interconnection Agreement of
 12 two CLECs we've mentioned. That's the current
 13 version that's been the Interconnection Agreement
 14 of VarTec for quite a long time.

15 So, I mean, that's primarily the concern of
 16 the FCC here. And I think the interveners have
 17 tried to simply smash 271(C)(1), Track A, into
 18 271(C)(2), which is the checklist. And they're
 19 just -- they're two different things.

20 CHAIRMAN BURG: Let me have one
 21 minute.

22 MR. MUNN: Yes.

23 CHAIRMAN BURG: I presume there are
 24 several people that have gotten on because I've
 25 heard the beeping for the hearing. Let me say it's

1 going to take us a little longer for the Commission
 2 meeting that's on. Why don't we have you call back
 3 at 3:30, and that way you don't have to hang on the
 4 phone.

5 (Discussion off the record)

6 CHAIRMAN BURG: Go ahead.

7 MR. MUNN: Thank you, Mr. Chairman.

8 I believe it was Mr. Gerdess who indicated that
 9 Qwest must show performance in addition to the
 10 written word. That seemed to be a constant theme
 11 that he would kind of come back to.

12 And I would agree with his statement. I think
 13 maybe he's either -- there's just a disconnect here
 14 or the issues have just gotten clouded. Neither
 15 the SGAT nor another piece of paper which would be
 16 an Interconnection Agreement with an individual
 17 CLEC, which he's proposing you'd have to use, would
 18 establish performance.

19 I mean, they're both just pieces of paper, and
 20 one an individual CLEC is signed and the other is a
 21 binding obligation under 252(F) and 252(I). But
 22 neither of those documents would show performance.
 23 So the solution or the suggestion from the
 24 interveners, I think, falls flat on that point.

25 But the good news here is Qwest does discuss

1 combination of Interconnection Agreements and the
 2 SGAT to establish compliance with the competitive
 3 checklist. I mean, as you go through, for example,
 4 for checklist item No. 1 the Midco brief says,
 5 "Qwest appears to rely on both approved
 6 Interconnection Agreements and its SGAT to
 7 demonstrate its compliance." The same thing is
 8 just repeated throughout.

9 I think that the distinctions that he tries to
 10 make with respect to the statute itself is just
 11 reading something that's not there. For example,
 12 for 271(C)(2) -- and we deal with the checklist.
 13 Obviously, (C)(2)(A) you can either proceed
 14 pursuant to one or more agreements that are
 15 described in Track A, or you can proceed under a
 16 statement, like an SGAT described in
 17 paragraph (1)(B). There's no prohibition on the
 18 face of this statute because you're proceeding
 19 under Track A, for Track A as opposed to Track B.

20 And let's be honest, since about 1998 or 1997,
 21 late '97, it probably became apparent nobody was
 22 going to be proceeding under Track B. That's sort
 23 of a dormant area of the Act. So everybody's a
 24 Track A state. This is not about Track A
 25 compliance, this Motion. It's simply focused on

1 performance in other affidavits. For example, the
 2 affidavit of Mike Williams is addressed to
 3 performance. I mean, we address performance
 4 indicator definitions and actual performance
 5 throughout South Dakota in that affidavit and the
 6 evidence presented with the Williams affidavit that
 7 we filed in November of 2001.

8 Additionally, the FCC has indicated that OSS
 9 tests will evaluate how Qwest's OSS systems will
 10 perform for CLECs. We have the affidavits of
 11 Lynn Notoriani to address the actual operation of
 12 Qwest OSS systems to perform and provide this
 13 access and interconnection to a network elements.

14 And, of course, South Dakota is a member of
 15 the Rock OSS test process with KPMG. That process
 16 is designed to evaluate the performance of our OSS
 17 test systems with -- you know, of that process.

18 So I don't want you to hear Qwest saying we
 19 don't think that we need to bring to you evidence
 20 of performance. And we have. That's something
 21 completely separate from SGAT versus another piece
 22 of paper called an Interconnection Agreement with
 23 XYZ Corp.

24 And I think Midco has conceded actually in its
 25 brief at Pages 2 through 4 that Qwest relies on a

1 271(C)(2)(B), which I think clearly says that you
 2 can proceed with either Interconnection Agreements
 3 or SGATs. So I think that point should be
 4 addressed there.

5 Additionally, there have been some criticisms,
 6 I believe, of the -- of, for example, the KMC
 7 Interconnection Agreement because there's a point
 8 that Black Hills and, I believe, Midco both made in
 9 their replies either filed yesterday or the day
 10 before saying that you can't rely on the KMC
 11 Interconnection Agreement because they're not
 12 actually furnishing services under that
 13 Interconnection Agreement.

14 The FCC has been very clear that the BOC does
 15 not actually have to be furnishing a checklist item
 16 to a CLEC in order for an Interconnection Agreement
 17 to be evidence necessary to establish checklist
 18 compliance. And this specifically is in the
 19 paragraphs that they're citing to you. It's
 20 paragraphs 114 and 115 of the Michigan Order.

21 And there, for example, they say that, "We
 22 believe that Congress did not intend to require a
 23 petitioning BOC to be actually furnishing each
 24 checklist item." And they said that the term
 25 provide either means to furnish or to make

1 available. So, I mean, this discussion in the
2 reply briefs is directly contradicted by the FCC.

3 In summing up the last couple of points, I
4 think something else we shouldn't lose sight of is
5 there's simply nothing preventing this Commission
6 as part of its consultative role -- because,
7 obviously, you've got to consult with the FCC on
8 271(C)(1) Track A or B, and (C)(2), the competitive
9 checklist. There's nothing that prevents this
10 Commission from using a pattern Interconnection
11 Agreement like an SGAT as its procedural vehicle
12 for reviewing Qwest's compliance and for
13 articulating Qwest's obligations as it goes
14 forward.

15 Since the SGAT has gone into effect it is that
16 type of concrete and specific legal obligation that
17 the Commission wants Qwest to have. And that's
18 really the focus here on showing this part
19 Interconnection Agreement versus SGAT, this part of
20 compliance with the checklist.

21 We also show actual performance through the
22 other affidavits that haven't been mentioned by the
23 interveners but those affidavits were filed in
24 November as well and they're in the record.

25 The Black Hills had mentioned some legislative

1 CHAIRMAN BURG: Staff?

2 MS. CREMER: I'll be quick. To
3 address -- and I missed his name, but the Qwest --
4 where the other 21 states have approved that,
5 keeping in mind that's subject to the OSS. So, I
6 mean, they have, but everything is subject to the
7 OSS.

8 Secondly, I think it's a little drastic to say
9 everybody else is wrong. When I have talked to
10 other states about this matter with the Track A,
11 Track B the response I tend to get is, you know,
12 that's an interesting take on it, nobody's thought
13 about it that way. I've heard I didn't think of it
14 that way before.

15 So I don't think we should penalize the
16 interveners because they've been able to articulate
17 an issue that maybe someone else had not
18 necessarily thought of before.

19 Chairman Burg has asked, you know, the
20 opportunity to argue it later. And I think the
21 response there is the problem I have with that is
22 we're shifting the burden to the interveners and
23 staff here to prove that Qwest didn't make their
24 case, whereas the burden of proof lies with Qwest
25 proving that there is access to the market in a

1 history, and in its reply that it filed I'd like to
2 point out two things on that. First of all, the
3 legislative history that was brought up by
4 Black Hills was the same legislative history that
5 was rejected by the FCC in paragraph 115 of the
6 Ameritech Michigan Order where they specifically
7 reject the legislative history and the argument by
8 IXEs that said you have to furnish these things
9 under the Interconnection Agreement and the FCC
10 said, no, that's absolutely incorrect.

11 And the second thing is whatever is in this
12 nonauthoritative legislative history, at best we
13 have an ambiguous statutory provision and the FCC's
14 interpretation of this ambiguous statutory
15 provision should be afforded chevron deference,
16 meaning the FCC should be allowed the deference to
17 interpret it's statute, 271, and clearly its
18 interpreted to say model Interconnection Agreements
19 can be considered in evaluating checklist
20 compliance.

21 I appreciate your time. If you have any
22 questions of me, I would be more than happy to
23 answer them.

24 CHAIRMAN BURG: Any questions?
25 (No audible response)

1 nondiscriminatory manner. And I think that's the
2 problem that I have is the shifting of the burden
3 here.

4 And then Commissioner Sahr has asked about
5 Interrogatories. My understanding is your decision
6 is to be based on the application, the whole point
7 being to stop the clock. And they stopped the
8 clock when they filed this in October or November,
9 whenever they filed it, and they can't continue to
10 supplement the record all the way along. They can
11 if a specific question is asked.

12 I think that's been raised or that's been
13 answered, but my point is what the FCC and everyone
14 was trying to do is stop the clock so you knew at
15 what period of time to look here.

16 I think the reason we are where we are today
17 is because this was a lazy filing on behalf of
18 Qwest. The Commission purposefully consciously
19 made a decision not to be a part of the multi-state
20 way back when because we wanted a case filed in
21 front of us that addressed South Dakota and its
22 issues allowing the South Dakota providers to come
23 forward.

24 That's not what happened here. Qwest simply
25 took the multi-state filing and filed it here and

		53	
1	drug us into it, whether we wanted to or not, and 2 they're trying to make it work, and I don't think 3 it's appropriate. Qwest, I believe, needs to show 4 with its filing that the facility-based providers 5 are getting access to the market in a 6 nondiscriminatory manner.		1 and I would think that the way I would be looking 2 at it is I would be looking at Qwest does need to 3 come in and prove its case. 4 I don't think you have to prove a negative. I 5 think they have to come in and show here's what we 6 have, here's our evidence. If they fail to do that 7 or the other sides can disprove that evidence, then 8 we make the decision. 9 I don't think it's any sort of burden has 10 changed. Nor should it. I mean, I don't think 11 they have to disprove it, and I don't think we're 12 saying in this case that we agree with what Qwest 13 has filed. 14 What we're saying is at their point in time at 15 their day in court Qwest needs to come in and prove 16 their case. And perhaps we should, you know, see 17 what evidence that they file at that point in time. 18 The interveners can make their arguments for and 19 against it. 20 And I don't think anyone's jumping the gun on 21 saying just because they intend to file something 22 that we're going to give it anymore weight than it 23 should be given. I did want to clarify that point 24 because I think it's important, you know, at least 25 for me to clearly state I think they'll bear their
1	I'm trying to figure out what the difference is. 2 Anyway, well taken. 3 COMMISSIONER NELSON: Well, I guess 4 I kind of agree with the staff a little bit on 5 this. I really agree they still have the burden 6 here. And I don't want to end up like we have in 7 several other cases lately with an inadequate 8 record to support the decisions we made. 9 And when you say I want to do what I want to 10 do and you say, well, the record doesn't allow you 11 to make that decision because you don't have any 12 evidence. So I guess for myself, and I don't think 13 the majority of the Commission agrees with me ..	54	1 burden. And regardless of my opinion on these two 2 motions, it's certainly no tip of my hand as to 3 whether or not they're going to be able to do that 4 eventually. 5 CHAIRMAN BURG: I'm going to second 6 the Motion of Commissioner Nelson, partly because I 7 think it helps us get to where we want to go. I 8 think if Qwest does not use the SGATs, if they do 9 not use the Interconnection Agreements, if they do 10 not use proof of the 14 point checklist, they 11 reflect adequately either one of those, that 12 they're doing it at their peril. 13 I think all of those should be used to show us 14 we're going to truly have a competitive open 15 opportunity here that to us beyond a doubt all 16 14 points have been met. And if any of those are 17 weak, I'll be reluctant to say they've met that 18 checklist. 19 And I think it just behooves the parties to 20 use every means available, and I would think all 21 three of those would be to make that proof. And so 22 for that reason I think it just clarifies where we 23 want to go, and I'm going to second that Motion. 24 COMMISSIONER SAHR: Could we read 25 back the Motion?

1 COMMISSIONER NELSON: I would grant
 2 Midco's Motion that Qwest should rely on the
 3 Interconnection Agreements, SGATs, and other
 4 evidence to demonstrate to this Commission that
 5 they are in compliance with the 14 point checklist.

6 COMMISSIONER SAHR: Mr. Gerdes, was
 7 that Midco's Motion? That's what I'm trying to
 8 recall. Because I want to make sure we're not
 9 mixing apples and oranges here.

10 COMMISSIONER NELSON: Well, as I
 11 understood it, if I granted Black Hills's Motion, I
 12 was tossing the whole petition out, and I didn't
 13 want to go in that direction. So I guess I thought
 14 this accomplished what I heard people say they were
 15 interested in.

16 MR. GERDES: I believe that that
 17 does.

18 COMMISSIONER NELSON: What Motion
 19 did you really want?

20 MR. GERDES: I was waiting for
 21 Commissioner Sahr.

22 MS. CREMER: Would it help if they
 23 named the Interconnection Agreement they were
 24 relying on?

25 COMMISSIONER NELSON: Well, I assum

1 MR. GERDES: That's correct.
 2 COMMISSIONER NELSON: Because you
 3 said .. I thought the Motion encompassed what you
 4 intended when you delineated your explanation of
 5 specifying between Track A and Track B Analysis,
 6 which required interconnections, SGATs, and
 7 other ..

8 MR. GERDES: I agree. You just used
 9 different words than I did.

10 COMMISSIONER NELSON: I want to mak
 11 it pretty clear everybody understands what I want
 12 to see when you show up with your evidence.

13 COMMISSIONER SAHR: I do have a
 14 question for the Qwest attorney. I think he wants
 15 to make a statement first.

16 MR. MUNN: I can go ahead and answer
 17 your question. I just had a question to try to
 18 clarify what my company was to do with this. But
 19 if you can ..

20 COMMISSIONER SAHR: My question was
 21 with what Mr. Gerdes just described as part of
 22 their Motion, is that any different than what you
 23 had said earlier that you were going to put on as
 24 your case?

25 MR. MUNN: I don't think so. I'm

58 they have more than one.

1 CHAIRMAN BURG: So do I.

2 COMMISSIONER NELSON: They may hav
 3 a different one with Black Hills than they have
 4 with .. I think we ought to look at all of them and
 5 see that they're complying.

6 MR. GERDES: If I may, Mr. Chairman,
 7 in answer to Commissioner Sahr's question I believe
 8 that the Motion responds to our Motion. Our Motion
 9 specifically said that we asked that the Commission
 10 define the Track A proof required of
 11 Qwest Corporation to satisfy its burden of proof.

12 And so then our view of it is that they have
 13 to use a Track A Analysis along with the 14 point
 14 checklist and not, you know, rely only on the SGAT.
 15 So I believe what was said is -- grants our Motion.
 16 I'm having a little trouble with words.

17 COMMISSIONER NELSON: Well, I think
 18 you wanted me to buy that they should have to rely
 19 on something other than their ..

20 MR. GERDES: That's correct.

21 COMMISSIONER NELSON: What they
 22 propose to do. You wanted to rely on the
 23 demonstration and that he actually has been doing
 24 so based on experience.

59 telling you in the rebuttal affidavits that we file
 1 next week we'll refer to not only SGAT provisions
 2 but also to the KMC Interconnection Agreement,
 3 which is an Interconnection Agreement with a CLEC
 4 in this state that has been filed with this
 5 Commission. It is exactly the same, word for word,
 6 with the SGAT. So there's no surprise, for
 7 example, to anyone, oh, wait a minute, now they're
 8 pulling in this provision.

8 MR. GERDES: We've actually done the compare before I came
 9 here today with the version of the SGAT we filed
 10 with our petition in November and the
 11 KMC Agreement, and in every material respect it's
 12 the same.

13 I'm telling you there is a signatures line ..
 14 it actually has a signature KMC, but when I say
 15 material respect that's not Lawyer Notoriani,
 16 except for -- all of the words are the same. All
 17 the numbering is the same. So there's no surprise
 18 to any party. And it's an Interconnection
 19 Agreement with a CLEC just like what I'm hearing
 20 people are asking for.

21 But the pieces of paper themselves don't show
 22 performance. I just wanted to be clear that you
 23 want Qwest to present its case to show you can do

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what you're claiming you can do based on the experience with working .. you know, our actual performance data. We've already presented our actual performance data in the filing in November, and I think that's certainly an important piece for this Commission to look at is the performance data.

But that's independent of whether you're looking at pieces of paper called Interconnection Agreements with CLEC A or an SGAT. Either one of those pieces of paper is going to tell you the performance on a monthly basis. Qwest has filed that as well.

COMMISSIONER NELSON: But OSS will.

MR. MUNN: Right. But that won't change with Interconnection Agreements.

COMMISSIONER NELSON: No. I didn't say I was leaving out OSS. I just said that's another piece of evidence.

MR. MUNN: That's exactly right, Commissioner Nelson. And our OSS, the evidence we've presented with the Notoriani affidavit and her attachments and Mr. Williams's actual performance data results, I think that's something certainly you're going to look at, you should look at.

I just wanted to make sure that's independent of this issue you have to use a piece of paper that says this is an Interconnection Agreement with KMC or another piece of paper that says this is an SGAT. That's not going to tell you the story.

What I think I'm hearing you want to see, which you should see, which is performance, we've already presented that. That's not being addressed today.

COMMISSIONER NELSON: Not only that, I want to see you have an agreement with somebody. You can have an SGAT that says what you think you should have in agreements or you can have an Interconnection Agreement that says I'm really going to do this and by contract you're obligated to do so.

You might have one in some other state. You might want to have one in Colorado. In theory you might want to do that and you might not be able to do that in South Dakota, but I would want to see ..

MR. MUNN: That's a very good point. I think one of the reasons you would want to see something that's actually binding on Qwest is, for example, if another carrier, if they like that provision, could pick and choose out of it and

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Qwest wouldn't have the ability to say, oh, no, you can't do that.

And I think the FCC has actually specifically addressed that issue as it relates to SGATs in its line sharing order where it actually notes that the box SGATs are subject to 252. The FCC might have a slight typo there, but 252(l), which is pick and choose. The SGAT itself is subject to that. It is a binding obligation on Qwest. We can't withdraw that because it's gone under effect under 252(F), and that is a binding legal obligation on Qwest's behalf.

And the reason that we have used the SGAT is not to preclude any CLEC from negotiating any other term they want to but that is a document that's gone through .. it doesn't reflect just the negotiations and interest of one CLEC in one state. It's a document that's gone through a collaborative process with many CLECs in many states.

And not just CLECs but Commission staffs. Antonuek Commissions have ordered modifications to that to be fair to CLECs and Qwest alike, and that's why we've brought that document forward as an example of showing our legal obligation. It's by no means the end of the story for CLEC. If they

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don't like those terms, they can negotiate any other terms, you know, that they want to with Qwest and through regular 252 negotiations.

And so but the bottom line is, to sum up, we are going to submit the KMC Interconnection Agreement. We will be relying on that Interconnection Agreement as evidence of checklist compliance as well.

COMMISSIONER SAHR: So based on what I've heard this afternoon, do you have any objections to Midco's Motion still standing?

MR. MUNN: I guess I would need to hear exactly what it is because I'm not sure .. Mr. Gerdes wanted to make sure what his Motion was. I want to make sure I know what I'm agreeing to. But I'm agreeing to file an Interconnection Agreement for the testimony next week that will be the KMC Agreement that's been filed with this Commission with a live CLEC here in this state.

MS. AILTS WIEST: But it's not a state-approved Interconnection Agreement.

MR. MUNN: Right. I would think certainly it will be by the time it has to be, which is by the time ..

COMMISSIONER NELSON: Are you saying

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1 I'm not going to be able to look at the
 2 Interconnection Agreement you have with Black Hills
 3 and Midco and the other people that are intervening
 4 with this case? Because to me that's more
 5 relevant.

6 MR. MUNN: I feel pretty confident,
 7 although I'm not -- I know I can say this, even
 8 though I'm not up to speed in South Dakota
 9 procedure, those Interconnection Agreements are
 10 filed with this Commission, and certainly you can
 11 evaluate those in any way that you would like to.
 12 And I think our -- we would respond to any
 13 questions that you have on that.

14 MR. WEIGLER: This is Steve Weigler,
 15 and if I could be heard.

16 CHAIRMAN BURG: Okay.

17 MR. WEIGLER: From what I see from
 18 what the Commission's ruled is that Qwest has to
 19 rely on Interconnection Agreements and right now
 20 Qwest's testimony relies on SGATs and
 21 Interconnection Agreements. And from what Mr. Munn
 22 said, he was going to in rebuttal testimony put in
 23 the SGATs and Interconnection Agreement too.

24 The problem is that Qwest's case in chief
 25 right now relies on SGATs and Interconnection

1 But then the next thing -- and this is my last
 2 point here -- Mr. Weigler had mentioned he's
 3 concerned that they would need to respond to this
 4 after they see the Interconnection Agreement. The
 5 Interconnection Agreement is exactly the same thing
 6 as the SGAT. I don't know if I can say that any
 7 other way. But there's nothing new to respond to.
 8 It will be the same section, same document.

9 CHAIRMAN BURG: If I've gathered one
 10 thing from here today, you filed based on the SGAT,
 11 we've gotten an indication that you're also going
 12 to back up some of the things that are in SGAT with
 13 actual Interconnection Agreements, and my
 14 presumption is there may be some of those things
 15 that don't touch on all 14 point checklists in
 16 there and I'm going to be looking for a way that
 17 you're going to meet every one of the 14 point
 18 checklists, whether they are in an Interconnection
 19 Agreement or not.

20 Those that are in the SGAT but do not have an
 21 Interconnection Agreement to prove it, I want to
 22 see some evidence that that one is also going to be
 23 able to be met. Because in the end I will make my
 24 decision on whether I support the positive
 25 recommendation to the FCC on whether or not I think

1 Agreements, and the Commission's ruling is contrary
 2 to that. I think what needs to happen is Qwest
 3 needs to refile its testimony case in chief with
 4 just Interconnection Agreements pursuant to the
 5 Commission's ruling. We'll file a response to
 6 that.

7 I mean, what Mr. Munn's trying to do is back
 8 door it into rebuttal testimony. That to me is
 9 beyond what you would do in civil procedures,
 10 beyond Commission procedures, and I feel it's
 11 inappropriate.

12 MR. MUNN: May I respond to that?

13 CHAIRMAN BURG: Very quickly.

14 MR. MUNN: Two things there. I have
 15 not heard today that Qwest is prohibited from
 16 relying on the SGAT. I think the FCC has been
 17 clear you can rely on the SGATs, some of them just
 18 SGATs, but what I'm hearing is you would like for
 19 Qwest to present Interconnection Agreements,
 20 present that alongside with the SGATs.

21 You don't just have the SGAT reference there.
 22 It would be the SGAT and an Interconnection
 23 Agreement. Qwest has already agreed to do that.
 24 So we'll be filing that Interconnection Agreement
 25 that I've discussed.

1 every single 14 point checklist item will be able
 2 to be met in South Dakota.

3 And I don't care how you get there personally.
 4 I think all of this how are we going to do it is
 5 confusing at this point, to say the least. I am
 6 supporting the Motion only because I think it
 7 clarifies to where we want to get to.

8 COMMISSIONER SAHR: And I agree with
 9 Chairman Burg without any other statements, and
 10 I'll just say that I concur in the Motion as well.

11 CHAIRMAN BURG: Okay. So that
 12 part's clear.

13 We've got two other ones I want to quickly
 14 cover. Shall the Commission schedule additional
 15 time for the hearing? Any quick comments?

16 Mr. Gerdes.

17 MS. AILTS WIEST: Let me just point
 18 out what we were thinking of, and then you can
 19 respond to that. We think that we need more than a
 20 week. We were looking at going to two and a half,
 21 almost three weeks up through the morning of May 9.
 22 Any response to that?

23 MS. HOBSON: This is on behalf of
 24 Qwest. That is satisfactory to Qwest. We suspect
 25 that we will be able to work out things that will

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1 prevent us from needing all of that time, but we
 2 would like to thank the Commission for thinking
 3 ahead to giving us certainly adequate time.

4 MR. GERDES: It so happens my
 5 calendar's open. I don't know about my clients,
 6 but I'm amazed. I looked at my calendar, and it's
 7 open. I don't know about my clients ..

8 MR. THOMAS: No problems.

9 MS. AILTS WIEST: AT&T?

10 CHAIRMAN BURG: I think we'll be
 11 fairly rigid because we've got too many people it's
 12 too hard. If we're not going to be done in one
 13 week or two weeks, we're going to keep plowing
 14 ahead. And there will have to be adjustments made
 15 because we can't make accommodations for as many as
 16 we have beyond that, and we want to try to let you
 17 know this far out.

18 So that will be the way we will be planning.
 19 Hopefully, we don't get there. There's none of us
 20 want to be here longer than that.

21 The last question is how shall the Commission
 22 schedule issues and/or witnesses for the hearing?

23 Rolayne.

24 MS. AILTS WIEST: The question is
 25 whether the Commission, if you would like -- do you

1 Anybody have a comment on that? Do I need to
 2 put out a procedural schedule just with the
 3 opportunity for interveners and staff to file
 4 supplemental testimony based on Qwest's rebuttal
 5 testimony?

6 MR. GERDES: My understanding was
 7 that the Motion for Supplemental Testimony was
 8 granted back two weeks ago. Are you changing .. I
 9 mean, are you talking about doing something
 10 different ..

11 MS. AILTS WIEST: Well, I think
 12 things are changed to a certain extent because at
 13 that point I think it may have been that people
 14 were expecting Qwest to refile their initial
 15 testimony. And so my .. if that's the way .. if we
 16 still want an opportunity for supplemental
 17 testimony, that's fine.

18 Does anything change that, and can I just put
 19 out a procedural schedule that has a new date for
 20 the supplemental?

21 MR. MUNN: If I could comment on
 22 that, I guess since Qwest has the burden of proof
 23 in this case, I am concerned that Qwest doesn't get
 24 the last word, which is our rebuttal round that
 25 will be filed next week.

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1 want .. I think it's easier to stay to issues than
 2 witnesses. Do you want to go 1 through 14, and
 3 then take Section 271, public interest? Do you
 4 want to go by the groupings?

5 And what we were anticipating is that whether
 6 we do it in small groupings or issues, one by one
 7 that we would like Qwest to put on their evidence
 8 as to that issue and then we would like the
 9 response as opposed to Qwest putting on their
 10 entire case at the beginning and then having the
 11 response to that.

12 MS. CREMER: Let me shorten this up
 13 for you. Mary Hobson and I were talking and how
 14 about if we get together with the interveners and
 15 get back to you by the middle of next week with how
 16 we want to do it?

17 MS. AILTS WIEST: Okay. And the
 18 other point is I believe that after the Commission
 19 denied the motions a couple of weeks ago about
 20 suspending the procedural schedule there was talk
 21 that if the Commission were to grant, for example,
 22 Midcontinent's Motion, that it may be likely that
 23 the interveners and staff would want time to file
 24 supplemental testimony after Qwest's rebuttal
 25 testimony.

1 And I haven't heard anybody contradict this.
 2 You can certainly test it when we file. The only
 3 thing that is going to be coming in that's new,
 4 other than just rebutting what the other parties
 5 have said, is attaching the exact same wording.
 6 It's called the KMC Agreement instead of the SGAT.
 7 There's no reason for any additional round of
 8 testimony that comes after Qwest because of
 9 anything that occurred here today.

10 So I'm just concerned that the general concept
 11 of Qwest not having the rebuttal and the last words
 12 so we do have the burden as a general rule on this
 13 case.

14 MS. CREMER: I guess I would just
 15 comment that they will have the last word at the
 16 hearing. I mean, that's ultimately where they will
 17 have their last word. And this will shorten the
 18 hearing up.

19 I think if people can reply to it now as
 20 opposed to waiting until the hearing for bringing
 21 up these issues and Qwest's response, I think it
 22 will shorten things up. And, ultimately, they do
 23 have the last word.

24 MR. WEIGLER: I think what Mr. Munn
 25 said is contrary to the agreement Midcontinent

1 reached with Ms. Hobson, which is that if this
2 Motion is granted, then we would have the
3 opportunity to supplement our testimony if need be.

4 I haven't seen the rebuttal testimony. I
5 don't know if we need to supplement or not. But
6 Qwest is making a contrary position.

7 MS. AILTS WIEST: I think we'll
8 allow the supplemental testimony. After that comes
9 in if Qwest wants another opportunity to file
10 rebuttal, we'll entertain that, if there's any time
11 before that hearing.

12 Anything else?

13 (The hearing concluded at 3:45 p.m.)

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF HUGHES)

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 28th day of
11 March 2002, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 2nd day
14 of April 2002.

18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

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15

16

17 Cheri M. Wittler
18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter

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