

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

=====

IN THE MATTER OF THE FILING FOR  
APPROVAL OF A MASTER SERVICES  
AGREEMENT BETWEEN QWEST CORPORATION  
AND MCIMETRO ACCESS TRANSMISSION  
SERVICES, LLC

TC04-144

=====

Transcript of Proceedings  
October 26, 2004

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
ROBERT SAHR, CHAIRMAN  
GARY HANSON, VICE CHAIRMAN  
JIM BURG, COMMISSIONER

**ORIGINAL**

COMMISSION STAFF

- John Smith
- Rolayne Ailts Wiest
- Karen Cremer
- Sara Harens
- Greg Rislov
- Harlan Best
- Keith Senger
- Dave Jacobson
- Michele Farris
- Jim Mehlhaff
- Tina Douglas
- Heather Forney
- Pam Bonrud

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SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

APPEARANCES

- Melissa Thompson
- Tom Dixon
- David Gerdes
- Letty Friesen

Reported By Cheri McComsey Wittler, RPR

**PRECISION REPORTING**  
**L I M I T E D**

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2 OF THE STATE OF SOUTH DAKOTA  
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33 APPEARANCES  
34  
35 Melissa Thompson  
36 Tom Dixon  
37 David Gerdes  
38 Letty Friesen  
39  
40 Reported By Cheri McComsey Wittler, RPR  
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3  
1 CHAIRMAN SAHR: Let's go to that.  
2 It's item No. 3 under Telecommunications, TC04-144,  
3 In the matter of the filing for approval of a  
4 master service agreement between Qwest Corporation  
5 and MCI metro Access Transmission Services, LLC.  
6 And the question today is shall the Commission  
7 grant Qwest's Motion to Dismiss? If not, shall the  
8 Commission approve the agreement?  
9 Qwest.  
10 MS. THOMPSON: Good morning,  
11 Mr. Chairman, Commissioner Burg, and Commissioner  
12 Hanson. My name is Melissa Thompson, and I am here  
13 this morning on behalf of Qwest Corporation. As  
14 you know, Qwest Corporation has submitted an  
15 agreement to you for informational purposes only,  
16 which is called the QPP Master Services Agreement  
17 between Qwest and MCI, and I'm going to refer to  
18 that this morning. It's just simply the commercial  
19 agreement.  
20 As a matter of context, both Qwest and MCI  
21 submitted an amendment to their ICATU that has to  
22 do with the batch hot cut process and under  
23 services under Section 251 contemporaneous with the  
24 commercial agreement that's submitted for  
25 informational purposes.

1 APPEARANCES BY TELEPHONE 2  
2 TOM WELK  
3 RYAN TAYLOR  
4 COLLEEN SEVOLD  
5 LETTY FRIESEN  
6 LAUREL BURKE  
7 =====  
8 TRANSCRIPT OF PROCEEDINGS, held in the  
9 above-entitled matter, at the South Dakota State  
10 Capitol, Room 412, 500 East Capitol Avenue, Pierre,  
11 South Dakota, on the 26th day of October 2004,  
12 commencing at 9:30 a.m.  
13  
14  
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4  
1 On or about August 2, MCI submitted the  
2 commercial agreement to you for review and  
3 approval. Qwest has filed its Motion to Dismiss in  
4 this matter because it does not believe State  
5 Commissions have the authority to review and  
6 approve the commercial agreement. Qwest's motion  
7 rests upon a plain and straight forward reading of  
8 the federal statutes and of two federal cases.  
9 The federal statutes at issue are 251, 252,  
10 and 271. One of the two federal court decisions  
11 squarely addresses the issue of which negotiated  
12 agreements must be filed with State Commissions for  
13 review and approval. The commercial agreement  
14 that's been filed with you for informational  
15 purposes concerns mass market switching and shared  
16 transport. In the interim order that is part of  
17 the FCC's triennial review order proceedings, which  
18 is referred to as USTA II in the proceeding, the  
19 D.C. Circuit Court vacated the unbundling  
20 requirements -- I should say the FCC's impairment  
21 determination for mass market switching.  
22 Previously in the triennial review order the FCC  
23 determined unbundled share transport is not  
24 required where unbundled switching is not required.  
25 The Qwest MCI agreement, the commercial

5

1 agreement, is the direct result of the FCC's call  
 2 for carriers to negotiate agreements in the wake of  
 3 the uncertainty created by the ruling in USTA II.  
 4 Perhaps more than any other ILEC in the country  
 5 Qwest has led the way on these negotiations. These  
 6 agreements are negotiated and entered into outside  
 7 the framework of Sections 251 and 252.  
 8 In April 2002 Qwest filed a petition for  
 9 declaratory ruling asking the FCC to tell us what  
 10 kinds of negotiated agreements must be filed for  
 11 State Commissions for review. The FCC issued an  
 12 order in that -- in October 2002 that said, "Based  
 13 on these statutory provisions, we find that an  
 14 agreement that creates an ongoing obligation  
 15 pertaining to resale, number portability, dialing  
 16 parity, access to rights-of-way, reciprocal  
 17 compensation, interconnection, unbundled network  
 18 elements, or collocation, is an Interconnection  
 19 Agreement that must be filed pursuant to  
 20 Section 252(a)(1)."  
 21 Immediately following that sentence in this  
 22 order the FCC said unequivocally, "We therefore  
 23 disagree with the parties that advocate the filing  
 24 of all agreements between an incumbent LEC and a  
 25 requesting carrier. Instead we find that only

6

1 those agreements that contain an ongoing obligation  
 2 relating to Section 251(b) or (c) must be filed  
 3 under 251(a)(1). There is no ambiguity in the  
 4 FCC's filing requirements. The language I just  
 5 quoted is crystal clear.  
 6 So what are the obligations under 251(b) and  
 7 (c)? Under 251(b) they are resale number  
 8 portability, dialing parity, access to  
 9 rights-of-way and reciprocal compensation. Under  
 10 (c) they are a duty to negotiate interconnection,  
 11 which is defined specifically in the statute in  
 12 Subsections A through D, unbundled access, resale,  
 13 notice of changes, and collocation. The commercial  
 14 agreement does not concern any of these services.  
 15 Qwest has entered into this agreement with MCI  
 16 under Section 271 of the Telecom Act. Section 271  
 17 confers expressly on the FCC and not State  
 18 Commissions the authority to review these  
 19 negotiated agreements, including the checklist  
 20 provisions of 271. One state court has explained  
 21 that, "Sections 251 and 252 contemplate State  
 22 Commissions may take affirmative action toward the  
 23 goals of those sections. While Section 271 does  
 24 not contemplate substantive conduct on the part of  
 25 State Commissions, the State Commission's role is

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1 investigatory and consulting in nature, not  
 2 substantive."  
 3 Under the FCC's declaratory order, which is  
 4 the defining ruling in this matter, because it  
 5 squarely addresses the question of which negotiated  
 6 agreements must be filed, Qwest agrees that this  
 7 Commission has the authority to review agreements  
 8 and decide which ones are subject to its filing and  
 9 approval requirements.  
 10 To make that determination, however, this  
 11 Commission must apply the test that's set forth in  
 12 the declaratory order. That test is whether a  
 13 particular agreement, regardless of what it is  
 14 called, whether it's called an interconnection  
 15 agreement, a settlement agreement, a commercial  
 16 agreement, whatever concerns obligations under  
 17 251(b) and (c). If it does concern obligations  
 18 under 251(b) and (c), then this Commission must  
 19 review and approve or reject it. If it does not,  
 20 this Commission does not have authority to do so.  
 21 MCI or AT&T may argue that 252 of the Act  
 22 interpreted in isolation creates a filing  
 23 requirement separate from the one in 252(a)(1).  
 24 However, 252(e) cannot be read in isolation.  
 25 Section A of 252 refers specifically to

8

1 "interconnection services or network elements  
 2 pursuant to Section 251." The filing requirement  
 3 of 252 applies to "any Interconnection Agreement  
 4 adopted by a negotiation or arbitration," that is  
 5 Interconnection Agreements adopted through  
 6 negotiation as required by the duty to negotiate  
 7 provision in Section 251(c)(1) and concerning  
 8 obligations under 251(b) and (c).  
 9 Under the 2000 South Dakota Supreme Court case  
 10 of Faircloth v. Raven Industries this Commission or  
 11 court must interpret a statute in a way that makes  
 12 it workable and harmonious. If the Commission  
 13 interprets Section 252(e) in isolation, not only is  
 14 such an interpretation inharmonious with the rest  
 15 of the Act but such a reading turns the FCC's 2002  
 16 declaratory order on its head. If such a separate  
 17 filing requirement existed, the FCC would have  
 18 addressed it in the very order that Qwest requested  
 19 them to issue to tell us which agreements to file.  
 20 There is no mention of a separator secondary filing  
 21 requirement under Section 252(e) in the declaratory  
 22 order.  
 23 There is no dispute in this matter that Qwest  
 24 has published this commercial agreement on its  
 25 website and made it publicly available. It is

1 available to any carrier who wants to opt into it  
 2 in its entirety. So the Commission may wonder, I  
 3 mean, it's publicly available, it's out there,  
 4 Qwest has offered it, why are we pressing so hard  
 5 on this filing issue?

6 The reason is Qwest thought it had firm,  
 7 confirmed, established, and clearly defined  
 8 standard as a result of the 2002 declaratory order.  
 9 Qwest has 9 million reasons in Arizona and  
 10 26 million reasons in Minnesota to want a clear  
 11 filing standard. That's why it filed the petition,  
 12 and that's the result it thought it earned in the  
 13 2002 declaratory order.

14 You may hear from MCI and/or AT&T that this  
 15 commercial agreement must be filed with you so that  
 16 you can determine whether Qwest is discriminating  
 17 against other carriers, whether the agreement is  
 18 discriminatory. Setting aside for a moment that  
 19 the agreement is publicly available and there's no  
 20 dispute about that, it is within the FCC's purview  
 21 to determine whether this agreement is  
 22 discriminatory under Section 202 of the  
 23 Communications Act of 1934.

24 The discrimination argument posed by MCI and  
 25 AT&T leads to the conclusion that every negotiated

1 except to the extent a local exchange carrier is  
 2 exempt from or has received a suspension or  
 3 modification pursuant to 47 U.S.C. 251 the carrier  
 4 shall provide interconnection network elements, and  
 5 other telecommunications services to any provider  
 6 of competitive telecommunications services that  
 7 requests such interconnection and services to the  
 8 extent required by 251(a) through (c), inclusive."

9 MCI also refers to South Dakota Administrative  
 10 Rule 20:10:32:21. That says, "An agreement for  
 11 interconnection network elements and other  
 12 telecommunications services negotiated pursuant to  
 13 49-31-81 must be submitted to the Commission for  
 14 approval." Well, I have just cited to you  
 15 49-31-81, which in two places limits itself to  
 16 services to the extent required by 251(a) through  
 17 (c).

18 The state's laws are consistent with the  
 19 federal statutes, and, again, a commercial  
 20 agreement is not related to services provided under  
 21 Sections 251(b) and (c).

22 Finally I want to mention for the Commission's  
 23 information some of the decisions that have come  
 24 down in other states. MCI submitted one to you as  
 25 part of the briefing round in this matter, and that

1 agreement must be filed with the State Commission.  
 2 But that flies directly in the face of the  
 3 declaratory order, and I say again the FCC said,  
 4 "We therefore disagree with the parties that  
 5 advocate the filing of all agreements between an  
 6 ILEC and a requesting carrier."

7 There are many distinctions in the law between  
 8 the role of the FCC and the role of State  
 9 Commissions with respect to determining when and  
 10 what types of agreements are discriminatory. One  
 11 example -- for example -- one instance, for  
 12 example, is that State Commissions do not have  
 13 jurisdiction over Interstate access rates. The  
 14 same is true here with respect to review and  
 15 approval of the commercial agreement.

16 MCI in its briefing has cited South Dakota  
 17 Codified Law. I want to point out the section  
 18 cited by MCI, which is 49-31-81, refers not once  
 19 but twice specifically to "interconnection and  
 20 services to the extent required by 47 U.S.C. 251(b)  
 21 and (c), conclusively."

22 Section 49-31-81 reads, "The Commission may  
 23 implement and comply with the provisions of the  
 24 Federal Telecommunications Act of 1996, including  
 25 the promulgation of rules pursuant to Chapter 126

1 was from the Utah Public Service Commission. It is  
 2 Qwest's position with respect to that decision that  
 3 the Utah Public Service Commission pulled the  
 4 sections out of 252, read them in isolation,  
 5 applied them incorrectly, and more egregiously,  
 6 completely ignored the express language of the  
 7 declaratory order.

8 There have been three other decisions that I'm  
 9 aware of that have been sort of middle ground or  
 10 adverse to Qwest in other states. One of the  
 11 arguments made in those decisions was that the  
 12 amendment filed to you -- with you for approval,  
 13 review and approval with respect to the batch hot  
 14 cut process and other services under 251 is an  
 15 integral part and the same agreement as the QPP  
 16 commercial agreement.

17 We absolutely disagree with that position.  
 18 The commercial agreement is a stand-alone agreement  
 19 that has to do with mass market switching and  
 20 shared transport. Those are two agreements and not  
 21 one. We do not believe that is a legitimate basis  
 22 for finding that the Commission has authority to  
 23 review and approve the commercial agreement.

24 At the end of what may appear to you to be a  
 25 complicated issue is the crystal clear language of

1 the FCC's declaratory order. In that case Qwest  
2 asks the FCC what agreements it should file with  
3 State Commissions for review and approval, and the  
4 FCC responded unequivocally, "Only those agreements  
5 that contain an ongoing application relating to  
6 Sections 251(b) or (c) must be filed."

7 Qwest respectfully asks the Commission to  
8 grant its Motion to Dismiss. Thank you for your  
9 time this morning.

10 CHAIRMAN SAHR: Thank you very much.  
11 And now we'll hear from the other parties.

12 Mr. Gerdes.

13 MR. GERDES: Mr. Chairman, members  
14 of the Commission, I'm Dave Gerdes. I'm a lawyer  
15 from Pierre, and I represent MCI. With me is  
16 Tom Dixon, who is also an MCI member from Denver.  
17 Since Tom has not appeared before this Commission  
18 before I suggested to him that I would introduce  
19 him. Tom has been a long time MCI lawyer and has  
20 represented MCI in other states and he is here for  
21 the first time so I would ask that you welcome Tom  
22 and he will present argument on behalf of MCI.

23 CHAIRMAN SAHR: Thank you very much.  
24 Good morning, Mr. Dixon, and welcome.

25 MR. DIXON: Good morning,

1 Mr. Chairman and Commissioners, and thank you for  
2 letting me appear today.

3 I would like to start off very likely just  
4 responding to Ms. Thompson's comments about the  
5 251 obligations and the "crystal clarity" of the  
6 declaratory ruling that was issued by the FCC in  
7 2002, and I think the most obvious response I have  
8 at the present is that the Commission -- the FCC  
9 has issued an order that has referred to the  
10 interim order or the interim rules that relate to  
11 what to do for the next year with regard to the 251  
12 network elements.

13 And in that particular ruling the Commission  
14 very clearly said we desire comments from the  
15 parties on whether commercial agreements need to be  
16 filed. Moreover, Commissioner Abernathy lamented  
17 the fact in that order that, in fact, the FCC has  
18 had not clarified whether commercial agreements  
19 need to be filed.

20 If the FCC's declaratory order was so crystal  
21 clear, it seems intuitive that it would not be  
22 asking for comments in a 2004 case as to whether  
23 such agreements should be filed. So I say that up  
24 front because that has occurred after the filing of  
25 our motion.

1 When I go back to look at when we filed the  
2 agreement and subsequently our response, we filed  
3 the agreement for several reasons. Ms. Thompson's  
4 alluded to a couple. Unfiled agreements, Dockets  
5 that were pending in other states where parties  
6 were challenged on whether certain Interconnection  
7 Agreements should have been filed. MCI took the  
8 position and, in fact, Interconnection Agreements  
9 in all 14 states and filed the entire package, both  
10 the commercial agreement, also known as QPP MSA, as  
11 well as the batch hot cut amendment.

12 So in part we were driven by the same issues  
13 because the reality is it's not abundantly clear  
14 who has the obligation to file the agreements. The  
15 federal law doesn't assign that responsibility to  
16 the incumbent local exchange carriers or to the  
17 competitive local exchange carriers. It says the  
18 parties will file the agreements. So MCI took at  
19 that point a very clear position that we would at  
20 least put the agreement before you because it  
21 doesn't specify that Qwest should do so or  
22 otherwise.

23 But more importantly we also felt under  
24 Section 251(a)(1) as well as 252(e) that it  
25 certainly was an Interconnection Agreement from our

1 perspective and, therefore, should be filed under  
2 those provisions as well.

3 In retrospect and given what's happened since  
4 our filing of both the agreements and the response  
5 to the Motion to Dismiss, in spite of Qwest's  
6 protestation everybody seems to be at this point  
7 endorsing what MCI is saying. We took the position  
8 that it was better to be safe and not have a  
9 problem. But we also felt very strongly that we  
10 had two agreements that are clearly interrelated,  
11 and that's so stated in our response. It's one of  
12 the last comments that was made in our response  
13 that the agreements were indeed interrelated.  
14 Well, how so?

15 There's no question that the batch hot cut  
16 amendment is a 251 agreement that's been filed.  
17 Qwest filed it separately on June 23. If you look  
18 at paragraph 222 of that agreement, it very clearly  
19 says if the batch hot cut -- I'm sorry. If the  
20 QPP MSA agreement goes down, so does the batch hot  
21 cut amendment. Likewise, if you go to the  
22 commercial agreement, paragraph 23 of the QPP MSA,  
23 you'll once again see provisions that say if one of  
24 the agreements or terms in one of the agreements  
25 are invalidated, either party has the right to

1 terminate the entire package.  
 2 Now at the time we knew they were  
 3 interrelated. We didn't argue heavily on that  
 4 point, but we felt it was worth noting. Since that  
 5 time the State of Washington on October 20 indeed  
 6 relied heavily on that approach, citing to a Texas  
 7 District Court case for the Western District of  
 8 Texas, and that's a case known as Sage Telecom, LP,  
 9 Plaintiff, v. Public Utility Commission of Texas.  
 10 And that's Case No. A04CA364SS, and it is, as I  
 11 said, cited in the Washington decision that came  
 12 out on October 20.  
 13 Moreover, in every case that's been decided to  
 14 date the Motion to Dismiss has been denied. It was  
 15 denied in New Mexico, it's been denied in  
 16 Minnesota, it's been denied in Utah, and it's been  
 17 denied in Washington. Staffs in Arizona and Oregon  
 18 have also filed comments recommending that those  
 19 commissions deny the Motion to Dismiss, but they  
 20 haven't been acted upon. In Colorado the case has  
 21 been argued. The Commission intends to take up the  
 22 issue tomorrow in its open meeting. So I can't  
 23 report at this time what the Colorado standard is.  
 24 But the point is, the commissions have  
 25 uniformly agreed to documents, that is both the

1 QPP MSA and the batch hot cut amendment, should  
 2 have been filed, are subject to review and approval  
 3 for the sole purpose of determining whether the  
 4 agreements are discriminatory to other carriers who  
 5 are not parties to the agreement or to determine  
 6 whether the agreements are contrary to the public  
 7 interest.  
 8 So by filing we're not suggesting the  
 9 Commission should be adjusting rates, modifying  
 10 terms, or in any way changing the agreements. It's  
 11 effectively an up or down vote on the documents as  
 12 a whole and whether those documents are  
 13 nondiscriminatory and not contrary to public  
 14 interest.  
 15 So we feel in view of what has occurred -- and  
 16 I certainly recognize what the South Dakota  
 17 statutes say. I recognize it had reference to 251.  
 18 I'm not naive. I'm not going to quote a statute  
 19 that I haven't -- I don't see what's in there.  
 20 Likewise, I know the rule refers back to the  
 21 statute, and we certainly put that in our response  
 22 so it wasn't as if we were ignoring what the law in  
 23 South Dakota says.  
 24 And I think at the time we wrote the response  
 25 it was an issue. I mean, I really looked at that

1 and I said, you know, this could go either way  
 2 given what the statute says. But as these  
 3 agreements have been interpreted after our response  
 4 was filed and particularly most recently, as I  
 5 said, by Washington citing the Texas case I advised  
 6 you of, it appears abundantly clear that even under  
 7 the South Dakota statutes it does reference  
 8 Section 251 that clearly these agreements are  
 9 interrelated and, therefore, must be considered as  
 10 a whole because you cannot opt into for all intents  
 11 and purposes one portion and not opt into the other  
 12 portion.  
 13 And while I absolutely commend Qwest for  
 14 making these public and for putting them on their  
 15 website and indeed allowing a number of carriers to  
 16 already opt into this entire package -- I don't  
 17 know if there was at least five or six that I have  
 18 seen that have opted into it, which makes me feel  
 19 good so I helped negotiate the agreement. It makes  
 20 me sense maybe we did something right, not only MCI  
 21 but the others.  
 22 The reality is the issue why do we want to  
 23 file? One, we think it's required. Two, if it  
 24 were solely filed under Section 211 of the federal  
 25 law, which is what Qwest has indeed done, while the

1 FCC has the authority to determine whether the  
 2 agreement's discriminatory, you do not have the  
 3 opt-in rights under Section 252(i) of the Federal  
 4 Act. And that's the relevant issue. Again, Qwest  
 5 from a practical perspective has made that  
 6 available in this situation.  
 7 But if, in fact, you take Qwest's approach,  
 8 effectively it would be up to Qwest whether or not  
 9 to make agreements available with opt-in purposes,  
 10 and with the recent FCC ruling that the opt-in rule  
 11 is no longer a pick-and-choose rule but is rather  
 12 an all-or-nothing rule, if you take Qwest's  
 13 approach that only the batch hot cut amendment is  
 14 the agreement that must be filed and approved, then  
 15 how would you opt in to the entire agreement?  
 16 Because clearly if you look at the batch hot  
 17 cut, it's tied directly to the commercial  
 18 agreement. So presumably "all" includes both the  
 19 batch hot cut portion as well as the commercial  
 20 agreement. And, indeed, that's what Qwest has  
 21 allowed with all the other parties. So, once  
 22 again, under the all-or-nothing interpretation it  
 23 would make little sense to allow a party to enter  
 24 only into the batch hot cut process, which, indeed,  
 25 allows you to obtain installation of the loop, the

1 unbundled loop, and yet not have the corresponding  
2 activity that's found under the Qwest master  
3 agreement, mainly increased rates which come  
4 directly out of that particular agreement.

5 So as a practical matter, I don't know how a  
6 party could opt into just one piece of the two  
7 documents. So from that perspective it seems  
8 readily apparent that the -- that the agreements,  
9 indeed, should have been filed, that they should be  
10 reviewed for discriminatory and contrary to public  
11 interest issues.

12 As I said, with the final ruling of the FCC  
13 about seeking comments on commercial agreements, it  
14 is not crystal clear. The declaratory ruling set  
15 forth a guideline. It did not set forth a specific  
16 standard. It gave examples of what not to file.  
17 And I can assure you the QPP MSA does not fall  
18 under those standards. That talked about you  
19 didn't have to file forms, you didn't have to file  
20 documents that were ordering, for example, what are  
21 known as local service requests or access service  
22 requests, LSR or ASR, as you may have heard of  
23 them, and you didn't have to file settlement  
24 agreements that were backward looking only, that  
25 resolved matters in the past with no ongoing

1 obligations.

2 So the reality is there is nothing in the FCC  
3 order that says this agreement is exempt from  
4 filing. Rather it gives guidance, and it says you,  
5 the states, will make this determination in this  
6 first instance, and we believe that's where it  
7 properly belongs today.

8 So on that basis we believe the Motion to  
9 Dismiss should be denied and that you should  
10 approve the agreements. As you'll note from our  
11 application, we set forth the reasons we do not  
12 believe it's discriminatory, the most obvious of  
13 which it's available to others and they have  
14 elected to take it. We believe it's not contrary  
15 to the public interest, it's posted, and again it's  
16 been taken by other parties which tends to show  
17 that it's indeed fulfilling the recommendations of  
18 the FCC, the parties and the commercial agreements  
19 as opposed to relying on the network elements under  
20 Section 251 for switching and shared transport.

21 So I thank you very much, and I'd be happy to  
22 answer any questions.

23 CHAIRMAN SAHR: Thank you very much.

24 Next we'll go to AT&T.

25 MS. FRIESEN: Thank you very much.

1 This is Letty Friesen filling in for Steve Weigler.  
2 And I guess the easiest way for me to do this is to  
3 first concur in most -- in all of MCI's comments,  
4 AT&T likewise believes that this agreement should  
5 be filed. There are a couple of issues that I'd  
6 like to bring up that are just slightly different  
7 than what Mr. Dixon discussed with you, and that is  
8 this.

9 Well, the first one has to do with Section 202  
10 and Section 211 of the Act. Both of those sections  
11 to the Act were in place and contemplated at a time  
12 when there was no local competition. These  
13 sections predate the 1996 Telecommunications Act  
14 and ostensibly probably apply to jurisdictional  
15 services to the FCC, that is interstate services.

16 I believe that because these two sections have  
17 yet to be applied to local competition and  
18 intrastate telecommunications services, we don't  
19 know at this juncture what the FCC will do with  
20 either of those sections. Now those are the  
21 sections that Qwest relies on to suggest to you  
22 that its nondiscrimination obligation is fully  
23 tended to at the federal level.

24 So I would say to you that AT&T believes at  
25 least at this point and until the Commission

1 determines consistent with its request for comments  
2 in the interim order -- until it determines whether  
3 or not these kind of commercial agreements should  
4 be filed and what law requires that filing, I'd  
5 suggest that Sections 202 and Section 211 requiring  
6 nondiscrimination on the federal level may or may  
7 not apply. So hanging our hats solely on that in  
8 terms of nondiscrimination is a very uneasy path to  
9 follow.

10 The other thing I'd like to point out to you  
11 is that with respect to the clarity of law today, I  
12 would say that in South Dakota, as in other states,  
13 the obligation to provide unbundled switching and  
14 common transport, which is really what this QPP  
15 contract -- or this QPP product provides, continues  
16 to go to unbundled network elements that are at  
17 least available in this state today. They may not  
18 be available once the FCC's final or permanent  
19 orders come out, but they are certainly available  
20 or should be available and are considered UNEs in  
21 the state today and here's why.

22 The USTA II decision, that is the D.C. circuit  
23 opinion, did not say that unbundled switched or  
24 unbundled common transport is no longer available.  
25 What it said is that states such as South Dakota

1 can't make that determination but rather the FCC  
 2 needs to make that determination.  
 3 What the FCC did based on that decision was  
 4 put in place an interim order that required  
 5 incumbent LECs like Qwest to continue providing  
 6 unbundled access to switching and transport, based  
 7 on existing agreements in the various states.  
 8 Today AT&T has an agreement in this state that  
 9 requires unbundling of switching. So I'd suggest  
 10 to you that at least today unbundled switching is  
 11 considered a network element until we hear  
 12 otherwise. It is considered a network element for  
 13 AT&T. It is considered a network element for many  
 14 and any other CLEC that still has a valid contract  
 15 in place today that requires unbundling of  
 16 switching.  
 17 That said, the obligation to file this  
 18 agreement not only falls under 252(e)(1), which is  
 19 what AT&T has already suggested with respect to  
 20 something called the commercial agreement as  
 21 opposed to the Interconnection Agreement, but  
 22 because those are still elements today, it still is  
 23 a requirement under 251(a)(1).  
 24 Qwest still is under the obligation to file  
 25 these kinds of contracts until we hear otherwise

1 for a number of reasons and under a number of  
 2 statutes. The clarity that Qwest will try to  
 3 present to you is about as clear as mud so AT&T  
 4 suggests to you that you go with what the law  
 5 actually is today, you look at what the FCC's  
 6 actually questioning today, and take your cues from  
 7 that.  
 8 From what Qwest's interpretation of the law is  
 9 or what it wants the law to be, I think we see in  
 10 the Texas decision where that decision and the LEC  
 11 in that decision, the incumbent, FCC tried to  
 12 enforce this sort of notion that this thing didn't  
 13 need to be filed, that there were no filing  
 14 obligations. And there you see the District Court  
 15 in Texas telling the parties to those agreements  
 16 that that needs to be filed. I suggest that  
 17 probably the same thing will happen in the Qwest  
 18 territories if this goes to District Court.  
 19 There again, because of the current  
 20 uncertainty at the federal level and the state  
 21 level, the best way is to make these contracts part  
 22 of the filing obligation that currently exist.  
 23 That's all I have for now. Thank you very  
 24 much for your time.  
 25 CHAIRMAN SAHR: Thank you very much.

1 Ms. Wiest.  
 2 MS. WIEST: Yes. And I'm appearing  
 3 on behalf of staff. First of all, staff's position  
 4 is that the Commission should deny Qwest's Motion  
 5 to Dismiss and the Commission should approve the  
 6 agreement. I would agree with MCI that the FCC has  
 7 not decided this issue. In fact, I looked up the  
 8 recent interim TRO order and the notice of proposed  
 9 rule making, and what the FCC stated in there  
 10 specifically was that it was, Incorporating three  
 11 petitions regarding incumbent LEC's obligations to  
 12 file commercial agreements under Section 252 of the  
 13 Act, governing acts as to network elements for  
 14 which there is no Section 251(c)(3) unbundling  
 15 obligation, to that end the FCC said, should we  
 16 treat, properly treat, commercially negotiated  
 17 agreements for access to network elements that are  
 18 not required to be unbundled pursuant to Section  
 19 251(c)(3) under Section 251, 211, or other  
 20 provisions of law.  
 21 So to the extent where they were arguing about  
 22 what the Qwest declaratory rulings did or did not  
 23 say, it appears that the FCC's position is that  
 24 they haven't decided the issue yet.  
 25 But what the FCC did say in the Qwest

1 declaratory ruling is that the State Commissions  
 2 are well positioned to decide on a case-by-case  
 3 basis whether a particular agreement is required to  
 4 be filed. So looking at this particular agreement,  
 5 I think it is very relevant to note as MCI pointed  
 6 out that it is interrelated with Qwest's existing  
 7 Interconnection Agreement with MCI.  
 8 And I was going to point out through examples  
 9 how the agreements are interrelated. I know MCI  
 10 specifically mentioned the part about how the party  
 11 can terminate the agreement along with the  
 12 Interconnection Agreement amendment executed  
 13 concurrently with the agreement. And I would point  
 14 out that this concurrent amendment, as I mentioned,  
 15 that has already been approved by the Commission  
 16 previously.  
 17 Second, I would point out under the QPP the  
 18 recurring charge for the port element is to  
 19 increase each year but only if Qwest meets its  
 20 obligation related to the implementation of the  
 21 batch hot cut process under that already approved  
 22 amendment. Third, a change in the loop rate or the  
 23 pricing zone designations will be offset by  
 24 increase or decrease in the charges that would  
 25 apply under the QPP.

1 Now the Washington Commission pointed out all  
 2 of those examples, and they did cite to the Sage  
 3 case, and I would just like to quote from that  
 4 case. In that case the court stated that, "If the  
 5 parties were permitted to file for approval on only  
 6 those portions of the integrated agreement that  
 7 they deem relevant to Section 251 obligations, the  
 8 disclosed terms of the filed subagreements might  
 9 fundamentally misrepresent the negotiated  
 10 understanding of what the parties agreed to." The  
 11 court also said that, "Without access to all terms  
 12 and conditions, the PUC could make no adequate  
 13 determination of whether the provisions fulfilling  
 14 251 duties are discriminatory or otherwise not in  
 15 the public interest."

16 And staff believes that preventing  
 17 discrimination is a very important goal of the Act.  
 18 When a Commission decides whether to approve a  
 19 negotiated agreement one of the standards the  
 20 Commission needs to apply is whether the agreement  
 21 discriminates against any nonparty. Only by  
 22 requiring these agreements to be filed for approval  
 23 will the Commission be able to determine whether  
 24 Qwest is favoring one CLEC over another.

25 Thanks.

1 that stands as good and clear law. What Qwest  
 2 anticipates is that the FCC will clarify its ruling  
 3 in 202 and 211 which do provide for the FCC purview  
 4 with respect to whether or not agreements like this  
 5 one are discriminatory.

6 It is within the FCC's purview, not State  
 7 Commissions, to review and approve commercial  
 8 agreements like this one. Thank you.

9 CHAIRMAN SAHR: Thank you very much.  
 10 Any questions or comments from Commissioners?

11 Commissioner Burg.

12 COMMISSIONER BURG: I just have a  
 13 couple short ones. First of all, do you agree  
 14 with -- Ms. Thompson, do you agree with Mr. Dixon  
 15 that you have been denied -- in every state that's  
 16 decided this you've been denied dismissal?

17 MS. THOMPSON: There have only been  
 18 a few states, but, yes, the decisions have been  
 19 adverse with respect Qwest's motion to dismiss.

20 COMMISSIONER BURG: If that's the  
 21 case, what is the harm you see with having the same  
 22 application here in South Dakota?

23 MS. THOMPSON: Really we're fighting  
 24 this because it's a slippery slope because we  
 25 thought we had a filing standard in 2002. It's

1 CHAIRMAN SAHR: Thank you. Do we  
 2 have anyone else who wants to appear in this  
 3 matter?

4 Seeing none, Ms. Thompson, I would give you a  
 5 very short amount of time, if you wanted it, to do  
 6 rebuttal, but I would encourage you to stick  
 7 strictly to rebuttal type issues.

8 MS. THOMPSON: Thank you,  
 9 Mr. Chairman. It is my understanding that the  
 10 batch hot cut amendment filed for your review and  
 11 approval is a separate agreement from the shared  
 12 transport and mass market switching agreement which  
 13 we've been referring to as the commercial  
 14 agreement.

15 The declaratory order is the law, period, and  
 16 it's very clear, but the only negotiated agreements  
 17 that must be filed for State Commission review and  
 18 approval are those that concern services provided  
 19 under 251(b) and (c).

20 The notice of proposed rule making that  
 21 discusses the issue of commercial agreements is not --  
 22 is an issue that Qwest expects the FCC to  
 23 address specifically with respect to Sections 202  
 24 and 211. Qwest does not anticipate that the FCC's  
 25 going to rewrite the very law at issue in 2002 and

1 been upended. Qwest anticipates appealing the  
 2 decisions that are adverse to it. We believe our  
 3 interpretation of the federal statutes out of the  
 4 FCC's order is a plain and straight-forward  
 5 interpretation, and the harm is that in Qwest's  
 6 opinion it foresees a time when two parties spend  
 7 hundreds of thousands of dollars and months  
 8 negotiating a agreement, submit it to a State  
 9 Commission, and I'm not saying to this Commission  
 10 but as a principle to a State Commission in Qwest's  
 11 14-state region, and that Commission sees fit to  
 12 change the very terms and rates that the parties  
 13 have spent months and hundreds of thousands of  
 14 dollars to negotiate.

15 That is the danger. That is the harm that  
 16 Qwest sees with respect to the filing of these  
 17 agreements.

18 COMMISSIONER BURG: But the other  
 19 half of the parties, in this case MCI, has the same  
 20 risk as you just mentioned, but they see a value to  
 21 it. Because they put as much time negotiating as  
 22 you did; is that right?

23 MS. THOMPSON: Yes. And  
 24 certainly --

25 COMMISSIONER BURG: And they want to

1 file because they see a value, there's a difference  
2 here.

3 MS. THOMPSON: There is a  
4 difference, and you'll note Mr. Dixon was very  
5 careful to say it was submitting the agreement to  
6 you for approval and not for a State Commission to  
7 change the rates and terms. But I would suggest  
8 that he made that comment because the risk is the  
9 same for both parties, absolutely.

10 COMMISSIONER BURG: Okay. That's  
11 all I have.

12 CHAIRMAN SAHR: Commissioner Hanson,  
13 do you have any questions?

14 VICE CHAIR HANSON: I was a little  
15 curious. Looking at precedents I look for our  
16 counsel to give me some direction on this. When  
17 they are appealing rulings how much can we rely  
18 upon that as a foundation for making our decision?

19 MR. SMITH: The opinions of the  
20 other commissions?

21 VICE CHAIR HANSON: Well --

22 MR. SMITH: The decisions of the  
23 other commissions?

24 VICE CHAIR HANSON: Correct.

25 MR. SMITH: Well, it's not binding

1 authority on any court to which this would be  
2 appealed.

3 VICE CHAIR HANSON: That's true.

4 MR. SMITH: But on the other hand,  
5 it's authority, and particularly I would say the  
6 Sage opinion, which is a Federal District Court  
7 that's ruled on that. So I would assume that the  
8 Federal District Court here in South Dakota might  
9 be at least influenced by the thinking of the Texas  
10 District Court.

11 VICE CHAIR HANSON: Question for  
12 Rolayne then. As Ms. Thompson was discussing, she  
13 said that we do not have certain authorities such  
14 as approving commercial agreements such as this  
15 particular one.

16 What are your thoughts on that? I didn't  
17 catch what you might have said.

18 MS. WIEST: My position is that what  
19 has happened here with the batch cut, which they  
20 did put in for approval, Qwest did put in for  
21 approval, it is integrally related with this  
22 agreement and that the two amendments actually are  
23 agreements -- agreements reference each other and  
24 they're affected by each other.

25 And so the point is if they only have to file

1 the one agreement for approval and then there's  
2 another agreement that affects that one, then what  
3 happens to the CLEC that only is aware of the one  
4 that has been approved by the Commission. And I  
5 realize that Qwest has made this agreement publicly  
6 available, but, again, I'm looking further down the  
7 road to see what happens if the next agreement that  
8 also affects the agreement that has been approved  
9 by the Commission, that another CLEC doesn't know  
10 about, if that discriminates against another CLEC,  
11 then what happens if those aren't actually put out  
12 there by Qwest.

13 VICE CHAIR HANSON: Is this a  
14 Catch-22 then, considering your remarks there and  
15 the potential that we may not have -- or we don't  
16 have the right to approve certain issues? Let me  
17 jump to, do you recall or do you have it written  
18 down the very last statement you made in your  
19 presentation?

20 MS. WIEST: That was on  
21 discrimination and that only by requiring the  
22 agreements to be filed for approval will the  
23 Commission be able to determine whether Qwest is  
24 favoring one CLEC or another.

25 VICE CHAIR HANSON: Okay. That

1 seems to be a rather compelling argument.  
2 Ms. Thompson, do you have -- I'd be interested in  
3 hearing what you have to say on that. Seems to be  
4 a number of Catch-22s here.

5 MS. THOMPSON: Yes, there are, and I  
6 think the way the Telecom Act has been drafted it  
7 really put us in that position. But I would point  
8 out to you that very early in my opening statement  
9 I said that, you know, MCI and Qwest have submitted  
10 the commercial agreement and entered into it under  
11 Section 271 of the Act. Section 271 of the Act  
12 confers on the FCC and not State Commissions the  
13 authority to review and approve.

14 Section 202 of the Telecommunications Act  
15 says, "It shall be unlawful for any common carrier  
16 to make any unjust or unreasonable discrimination  
17 in charges, practices, classifications,  
18 regulations, et cetera, in connection with like  
19 communication service, directly or incorrectly, by  
20 any means or device."

21 That is the provision under which the FCC can  
22 and does and would review and be -- and have the  
23 authority to determine whether an agreement like  
24 this one is discriminatory. It is the FCC's  
25 purview and not the State Commission's in this

1 instance. Public interest is still protected.  
2 It's just the FCC's job and not the State  
3 Commission's.

4 VICE CHAIR HANSON: I don't know  
5 whether I want to pursue this further in trying to  
6 untie the knot, but, Mr. Dixon, would you have a  
7 comment on that?

8 MR. DIXON: Commissioner Hanson,  
9 yes. As we've indicated, we believe exactly what  
10 you're saying. It is a Catch-22. We believe the  
11 law requires you to at least look at the  
12 agreements, make a determination whether they're an  
13 Interconnection Agreement, and then determine  
14 whether or not they're discriminatory or contrary  
15 to public interest.

16 If you don't have the opportunity to see  
17 them -- and although this one has been made  
18 available, that's not the requirement. If you  
19 accept Qwest's position, then you would not have  
20 the ability to factually make that determination,  
21 and that is indeed a factual determination. It is  
22 not a matter of law. You have to look at the  
23 document, see the facts, see what it provides, and  
24 then find out how it is or is not discriminatory  
25 and whether it is or is not contrary to public

1 interest.

2 So I absolutely agree. I don't know how else  
3 you could do it other than to define that  
4 information without ever seeing it. I don't think  
5 that's going to work.

6 VICE CHAIR HANSON: Thank you.

7 MR. SMITH: May I ask a couple of  
8 questions?

9 CHAIRMAN SAHR: Absolutely. Please  
10 proceed.

11 MR. SMITH: Mr. Dixon, would the  
12 position of MCI be different if the linkages were  
13 not contained in the batch hot cut amendment?

14 MR. DIXON: I would say that at the  
15 time we filed it, of course, we did not have the  
16 linkages clearly defined by the State of Washington  
17 and the Texas District Court, and it was our  
18 opinion and continues to be our opinion that 252(e)  
19 is broad enough to require the voluntary -- or the  
20 filing of voluntarily negotiated Interconnection  
21 Agreements.

22 We believe that is what this is. It's network  
23 elements. We're not arguing and have never argued  
24 that the unbundled switching or the shared  
25 transport issues are now 251 by virtue of what

1 we're doing. The whole purpose of this was indeed  
2 to come up with an alternative to the fact that MCI  
3 in June when it signed this and throughout its  
4 negotiating section said we're in a position where  
5 we see the handwriting on the wall, we need  
6 certainty. We're willing to forego the 251 UNEs to  
7 get this other arrangement.

8 And so we felt strongly then -- and, in fact,  
9 it's evident in the agreement. I'm not going to  
10 talk about the negotiations, but the agreement  
11 preserved the parties' positions on the obligations  
12 to file all of these documents. That's why it's  
13 written in there, because it becomes apparent now  
14 we had a disagreement on what to do with whatever  
15 we were about to participate in and what we were  
16 going to put together.

17 And so we agreed to put that aside and deal  
18 with it later, and that's exactly where we're at.  
19 But our decision has been prior to the Texas  
20 decision, prior to the Washington decision these  
21 documents needed to be filed. Whether or not they  
22 were interrelated, that was our position.

23 Now they are interrelated, in fact, we've  
24 since heard after the fact. That's a significant  
25 issue in the State of Texas and now in the State of

1 Washington, and while they're not binding  
2 precedent, they're persuasive. They're something  
3 you can rely on. And I think those two which focus  
4 on that issue are well written. So they give you  
5 not only a standard and in some respects eliminate  
6 the "slippery slope" that Qwest is discussing and,  
7 in fact, establish standards that give some  
8 direction on how to deal with this going forward.

9 MR. SMITH: Thank you. And maybe  
10 let me -- in the absence of any linkage to a  
11 current 251 service, I mean, might not the whole  
12 purpose of removing those elements from 251 and  
13 putting them back into the strictly commercial  
14 context be to permit a wider range of business to  
15 business negotiation and to actually -- if not -- I  
16 mean, they would still be subject to the federal  
17 nondiscrimination and fairness standards, but they  
18 would not be subject to the rigid term-for-term  
19 opt-in standards that apply once you have a filing  
20 requirement under 252(e)?

21 MR. DIXON: Yes. I agree. I think  
22 that is certainly a possibility. But literally  
23 that's exactly what the FCC is going to be  
24 addressing. So we're talking possibilities. I'm  
25 not going to predict the FCC's activity. Nor do I

1 predict how they'll come out on this. But the  
2 point is a standard will be set. Whether it is the  
3 "crystal clear" standard in the declaratory order,  
4 that doesn't seem quite as crystal clear to me at  
5 the moment. Perhaps they will make that abundantly  
6 clear.

7 I still think if that was the crystal clear  
8 standard, they had no reason to seek comments, and  
9 they could have so stated that we've already  
10 previously determined that only agreements that  
11 address Sections 251(b) and (c) must be filed.  
12 That would have been a very easy sentence to put in  
13 decision 04-179, which is the decision Ms. Wiest  
14 has cited. They didn't to that.

15 And, in fact, that's the point. Commissioner  
16 Abernathy very clearly said, you know, I'm  
17 disappointed we did not clarify the filing  
18 requirements. And while Ms. Thompson asserts it's  
19 202 and 211 at issue, that decision also does refer  
20 to the filing options under 252. And so while I  
21 appreciate her prediction, and it will give clarity  
22 and we'll know what to do going forward, it's  
23 missing today and it's in your hands and you have  
24 the authority to deal with it.

25 And from the standpoint of what harm, if in

1 the end the Commission is wrong and the FCC says,  
2 no, that didn't need to be filed, what happened,  
3 nothing. If on the other hand, the Commission had  
4 ruled it had to be filed, you have already reviewed  
5 it, it didn't happen by operation of law. It  
6 didn't happen because you just said, well, we don't  
7 have to mess with this for now, we'll wait for  
8 them. You made a concrete decision and said, no,  
9 this is not discriminatory against other carriers  
10 and it's not contrary to the public interest. I  
11 see no harm.

12 You could argue it's against the law. I'm not  
13 trying to play games, but the reality is those  
14 issues from a practical perspective are not going  
15 to harm anybody. Both of us want this agreement  
16 approved. Both of us believe it's not  
17 discriminatory and not contrary to the public  
18 interest. Both of us intend to operate, and we do  
19 not intend for any Commission to be modifying any  
20 terms or conditions. It's up or down on the whole  
21 document. You can't go in and say, well, we'll  
22 agree with it if you change this rate to this or  
23 that. It's up or down. And the standards don't  
24 allow you to do that under the federal law.

25 MR. SMITH: Well, I think maybe,

1 Mr. Dixon -- this was for Ms. Thompson, and it's  
2 really a question I had for you on the slippery  
3 slope issue. If as all the other states really  
4 have done, New Mexico not so clearly but all the  
5 other states I have seen and in Michigan I'm not so  
6 sure how they viewed the problem, but Texas, Utah,  
7 and Washington have all basically grounded their  
8 decisions in the fact that there were, in fact,  
9 clearly 251 obligatory services included as part of  
10 the agreement package.

11 Now I know you're disputing it in this case,  
12 but when I look at the filed agreement that we've  
13 already approved and the other agreement, there are  
14 absolutely interconnection -- you know, there are  
15 absolutely relationships between those two that are  
16 I guess sine qua non basically. I mean, if the one  
17 disappears the other one goes away too.

18 MR. DIXON: I agree.

19 MR. SMITH: You know, they're  
20 absolutely -- they are absolutely in this case a  
21 package agreement. And so I think from Qwest's  
22 point of view to me what that says is at least as  
23 far as -- I don't know that the Commission might  
24 not necessarily reach the issue of whether the MSA  
25 agreements standing alone would have to be filed

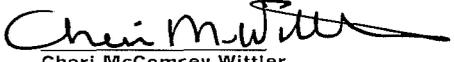
1 necessarily, but at least it could be that there is  
2 another way for Qwest to achieve a set of  
3 commercially agreements that would not be subject  
4 to filing and that would be don't link them with  
5 the ICAs.

6 MR. DIXON: And that's precisely  
7 what the District Court in Texas stated in the  
8 decision Ms. Wiest referred to. It isn't a  
9 Catch-22 for Qwest. It isn't a slippery slope in  
10 that respect. There's a way that is clear and  
11 you've just identified it and it's found in the  
12 Texas decision and it very clearly draws a  
13 potential standard, and perhaps you will use that  
14 standard and the FCC will agree later. I don't  
15 know.

16 But the point is what you've said is what is  
17 clear. It's not all negotiated agreements. And  
18 that's a misstatement. It would best be all  
19 negotiated Interconnection Agreements as opposed to  
20 all negotiated agreements. Under no circumstances  
21 is MCI arguing that switched access or special  
22 access or agreements we entered into that deal with  
23 long distance or other nonlocal services are  
24 supposed to be filed under 252(e). It's  
25 negotiated, voluntary, Interconnection Agreements.

1 That's what we're talking about under 252(e) and  
 2 under this one.  
 3 And as you point out, I'm looking at one  
 4 agreement. I'm not smart enough to predict what  
 5 will be done in the future by other companies and  
 6 how they may do this or how Qwest may do it going  
 7 forward, but this agreement and this package we  
 8 believe should be filed, should be approved, is not  
 9 discriminatory and not contrary to public interest.  
 10 MR. SMITH: Thank you.  
 11 MR. DIXON: Thank you.  
 12 CHAIRMAN SAHR: Any other questions  
 13 from Commissioners? I would just like to thank MCI  
 14 and Qwest, and I know this process was one that  
 15 took a lot of time and effort and we're happy they  
 16 came up with this on their own and that's posted,  
 17 that's available to people. In my mind they're  
 18 definitely seems to be -- there definitely seems to  
 19 be a relationship between these two agreements, and  
 20 when you couple that with the uncertainty right now  
 21 that we have with some of the FCC guidance, that  
 22 may be clarified in a little while, you look at  
 23 what other states are doing, in my mind the most  
 24 prudent route to take is to require the filing and  
 25 if the court cases go the other way, if we get some

1 stronger guidance from the FCC, then we could  
 2 always revisit that issue.  
 3 But right now especially with the connection  
 4 between the agreements I think it's the appropriate  
 5 thing to do to move that we deny Qwest's Motion to  
 6 Dismiss and that we do approve the agreement.  
 7 VICE CHAIR HANSON: Second.  
 8 COMMISSIONER BURG: I'll concur.  
 9 CHAIRMAN SAHR: Thank you.  
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1 STATE OF SOUTH DAKOTA )  
 2 :SS CERTIFICATE  
 3 COUNTY OF HUGHES )  
 4  
 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 26th day of  
 11 October 2004, and that the attached is a true and  
 12 correct transcription of the proceedings so taken.  
 13 Dated at Pierre, South Dakota this 16th day  
 14 of November 2004.  
 15  
 16  
 17   
 18 Cheri McComsey Wittler,  
 19 Notary Public and  
 20 Registered Professional Reporter  
 21  
 22  
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