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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED BY
MIDCONTINENT COMMUNICATIONS, KNOLOGY
OF THE PLAINS, INC., AND KNOLOGY OF THE
BLACK HILLS, LLC, AGAINST MCI
COMMUNICATIONS SERVICES, INC. D/B/A
VERIZON BUSINESS SERVICES FOR UNPAID
ACCESS CHARGES

TC10-096

=====

Transcript of Proceedings
March 30, 2011

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION,
STEVE KOLBECK, CHAIRMAN
GARY HANSON, VICE CHAIRMAN
CHRIS NELSON, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Kara Semmler
Ryan Soye
Greg Rislov
Brian Rounds
Bobbi Bourk
Demaris Axthelm

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APR 14 2011

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

APPEARANCES

Kathryn Ford, Midcontinent Communications
Brett Koenecke, Verizon
Lindsey Riter-Rapp, Intervenors

Reported By Cheri McComsey Wittler, RPR, CRR

1 APPEARANCES BY TELEPHONE

2 Christopher Oatway, Verizon
3 Tom Simmons

4 = = = = =

5 TRANSCRIPT OF PROCEEDINGS, held in the
6 above-entitled matter, at the South Dakota State Capitol
7 Building, 500 East Capitol Avenue, Room 412, Pierre,
8 South Dakota, on the 30th day of March 2011, commencing
9 at 1:25 p.m.

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1 CHAIRMAN KOLBECK: It's my understanding that
2 Interrogatory No. 7, 8, and 17 are now settled. Please,
3 someone correct me if I am wrong.

4 Okay. So that means we'll have to deal with
5 Verizon -- and this is kind of the way I'd like it to go
6 here. First we'll do Verizon Interrogatory No. 4. And
7 then next we'll deal with Verizon Document Request No. 2.
8 After that how about Verizon Interrogatory No. 15. And
9 then the last one would be Verizon Document Request
10 No. 1.

11 Okay. Have I missed anything? Those are the
12 four we need to discuss.

13 Okay. So how do we start this? I think we'll
14 just start with Verizon Interrogatory No. 4. The
15 question -- the moving party will be Verizon so we'll let
16 you go first, Mr. Koenecke.

17 Cheri, should I mention that we are actually now
18 discussing Docket TC10-096, In the matter of the
19 Complaint filed by Midcontinent Communications, Knology
20 of the Plains, and Knology of the Black Hills against
21 MCI Communications doing business as Verizon Business
22 Services for unpaid access charges.

23 All right.

24 MR. KOENECKE: Thank you, Mr. Chairman,
25 Commissioners and Staff. Brett Koenecke appearing for

1 Verizon.

2 Thank you, Commissioner, for detailing for us
3 which questions and in which order you want to take them.
4 We attempted to file an Amended Motion last week, and it
5 appears that we didn't quite get the job done there.

6 Mr. Oatway, however, will be handling the
7 argument this afternoon for Verizon, and I'll be here to
8 assist and answer any questions. That's better.

9 CHAIRMAN KOLBECK: I appreciate that. This
10 microphone is maxed out now so that's as loud as it goes.

11 MR. OATWAY: I can hear fine. Can others hear
12 me, Your Honor?

13 CHAIRMAN KOLBECK: You're coming through rather
14 well.

15 MR. OATWAY: Just to pick up on what
16 Mr. Koenecke was saying, I'd be happy to walk through the
17 four remaining Interrogatories. We're happy to report
18 I'm sure we can do this well in advance of 5:30, and we
19 appreciate Midcontinent's working with us to narrow the
20 disputes that are still in front of the Commission.

21 With respect to No. 4, Interrogatory No. 4,
22 which I guess is on page 5 of the initial Motion to
23 Compel that we filed, what Verizon is seeking here is
24 information relating to the economic relationships
25 between Midcontinent and Midcontinent's customers and the

1 interexchange carriers that carry Midcontinent's
2 traffic.

3 And one of the defenses that we put forth in our
4 Answer to Midcontinent's Complaint is that, you know, we
5 think it matters that Verizon is subject to interexchange
6 carriers when delivering traffic to Verizon withholding
7 switched access charges from Verizon on our end. And
8 that has a lot to do with Verizon's decision to start
9 sort of doing the same thing that other interexchange
10 carriers have been doing.

11 And what Verizon has been able to ascertain
12 through its systems and through information in its
13 possession is that there are several interexchange
14 carriers that are delivering traffic from Midcontinent to
15 Verizon and that these -- these interexchange carriers
16 are known to and have in the past disputed the
17 applicability of switched access charges on VoIP traffic.

18 And what we're looking for in these -- this
19 Interrogatory, and it's specifically just Subparts C
20 and E that there continues to be a dispute over, is
21 information relating to that set of economic issues
22 associated with the extent to which Midcontinent does or
23 maybe does not derive an economic benefit from the fact
24 that some of those IXCs are withholding and to the extent
25 to which some of its own customers may directly contract

1 with some of those withholding IXCs, which would also
2 be -- I'm not, frankly, sure how it would play out in
3 terms of litigation, but it would be relevant to the
4 litigation or relevant to the testimony that our economic
5 and policy witness would be putting forth.

6 So that's the purpose for that Interrogatory,
7 asking for information about customers that have -- that
8 have selected particular IXCs as their carriers -- that's
9 Subpart C, and then Subpart C is agreements and
10 arrangements that Midcontinent has made with third
11 parties to deliver interexchange traffic.

12 And what they've told us so far is that they
13 have three relationships with three wholesale carriers.
14 They've given us the contracts with one of those three
15 wholesale carriers. They haven't given us the contracts
16 with the other wholesale carriers, and they haven't
17 described the nature of the relationship and the pricing
18 and other arrangements and agreements.

19 And we were simply asking for that information
20 because it's -- you know, and, again, this is just
21 discovery. We're not quite sure exactly how it plays
22 into our case and our defense, but obviously the idea
23 behind discovery is that it's, you know, intended to be
24 broad so that we can get the, you know, relevant
25 information that is in the hands of the other party.

1 So that's Interrogatory No. 4, Subparts C and E.
2 CHAIRMAN KOLBECK: Did you say C and D or D and
3 E?

4 MR. OATWAY: I'm sorry. C and E.

5 CHAIRMAN KOLBECK: Okay. And the other ones are
6 resolved?

7 MR. OATWAY: The other ones are resolved.

8 CHAIRMAN KOLBECK: Okay.

9 Midcontinent.

10 MS. FORD: Thank you, Mr. Chairman. That's
11 loud.

12 Commissioners, Kathy Ford appearing on behalf of
13 Midcontinent. I'll take the two subparts to
14 Interrogatory No. 4 separately.

15 First, Subpart C is asking for the identity of
16 carriers other than Verizon and Midcontinent that
17 Midcontinent customers might subscribe to as their
18 interexchange carrier.

19 We've provided information in response to this
20 question. We provided Verizon with the number of
21 Midcontinent customers that are PIC'd, being the term of
22 art, who have chosen Midcontinent as their interexchange
23 carrier. We've given them the numbers of customers who
24 have chosen Verizon as their interexchange carrier, and
25 then we gave them the number of customers that are PIC'd

1 to all other carriers.

2 Verizon wants Midcontinent to identify those
3 other carriers and provide the individual numbers of
4 customers that are subscribed to those other carriers.

5 Frankly, the information is just not relevant to
6 this dispute. Midcontinent is an equal access provider.
7 Midcontinent has no choice but to allow its customers to
8 choose the interexchange carrier of their choice.

9 So if a customer chooses AT&T, for instance, as
10 their long distance carrier, Midcontinent can't control
11 that. Midcontinent -- it has nothing to do with
12 Midcontinent's relationship with Verizon. If that
13 customer who has chosen AT&T for -- as an example, picks
14 up the phone and makes a long distance call, Midcontinent
15 delivers that call to AT&T at a tandem access point, and
16 that call is taken by AT&T wherever it's going.

17 If AT&T happens to deliver that call to Verizon
18 and refuses to pay switched access charges to Verizon on
19 that call, that has nothing to do with Midcontinent.

20 There's no economic relationship involved in
21 that situation. And the information, while they may
22 think, you know, they need to see and know who these
23 other carriers are, frankly, isn't relevant to this
24 dispute.

25 This dispute involves traffic that Midcontinent

1 is either sending directly to Verizon or that Verizon is
2 sending to Midcontinent. And that's simply not the case
3 when you're talking about customers who are PIC'd to
4 other carriers.

5 There's no wholesale relationship involved
6 between Midcontinent and those carriers. Those calls are
7 delivered to the carriers because the customer has PIC'd
8 that carrier as an interexchange carrier, and
9 Midcontinent has no control over that. So we don't
10 believe we should be obligated to provide the
11 information.

12 Yes, discovery is designed to be broad, but it's
13 not open-ended. And just because a Complaint has been
14 filed relating to this dispute does not mean that
15 everything related to Midcontinent's business is suddenly
16 up for grabs. So as to Subpart C, we don't believe the
17 information is relevant.

18 Subpart E asks for the wholesale arrangements
19 between Midcontinent and its wholesale interexchange
20 carriers. This involves traffic that if a customer of
21 Midcontinent is PIC'd to Midcontinent as their long
22 distance carrier, how does Midcontinent get that traffic
23 to where it needs to go? What companies does it have
24 arrangements with to do that?

25 Midcontinent has informed Verizon that it has

1 four wholesale interexchange carriers that it uses. One
2 of them is Verizon. The other three have been identified
3 to Verizon. And only one of the other three -- and I
4 could go into more detail if we can go into a
5 confidential portion of the record, but these are part of
6 the confidential responses so if the phone is cleared, it
7 would be easier to talk about if we were on a
8 confidential portion of the record.

9 CHAIRMAN KOLBECK: First of all, is MidAmerican
10 still on the line?

11 Okay. Because I believe the only two people on
12 the line should be Mr. Oatway and Mr. Tom (sic).

13 MS. FORD: Mr. Simmons?

14 CHAIRMAN KOLBECK: Mr. Simmons. Is that
15 correct?

16 Mr. Simmons, are you still with us?

17 MR. SIMMONS: I am.

18 CHAIRMAN KOLBECK: Mr. Oatway?

19 MR. OATWAY: Yes, I am.

20 CHAIRMAN KOLBECK: Is there anyone else on the
21 phone line?

22 Demaris.

23 MS. AXTHELM: I'm going to check here real
24 quick.

25 CHAIRMAN KOLBECK: Once we know there's only

1 two -- is there anyone in the room you have -- other than
2 Staff?

3 MS. FORD: Is the internet on?

4 MS. AXTHELM: We'll go off the web if you're
5 going confidential.

6 (The following portion of the transcript is confidential)

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1 (End of confidential portion of transcript)

2 CHAIRMAN KOLBECK: Okay. We've heard from both
3 Verizon and Midcontinent.

4 Interveners?

5 MS. RITER-RAPP: Lindsey Riter-Rapp. And I'm
6 appearing for Darla Rogers here this afternoon. But the
7 Interveners do not take a position on this particular
8 Interrogatory.

9 CHAIRMAN KOLBECK: Thank you.

10 All right. Staff, would you like to comment on
11 this one?

12 MS. SEMMLER: You know, I -- Staff just doesn't
13 have anything I think it can add that's very meaningful
14 to this argument. I think the parties have both fully
15 explained their positions, and Staff has nothing further
16 that we can add.

17 CHAIRMAN KOLBECK: All right. Thank you.
18 Verizon.

19 MR. OATWAY: Yes. I just -- you know, I would
20 note that her argument rests exclusively on relevancy.
21 And the fact is that in a discovery dispute it's not
22 appropriate for one party to describe what that party
23 sees as the relevant issues and to frame the scope of the
24 litigation in a way such that they conclude based on some
25 facts that have come out in discovery but not based on an

1 entire record that, you know, the facts that the other
2 party is seeking are simply irrelevant.

3 And to be clear, I'm not saying that we
4 necessarily will say, oh, we got the -- you know, the
5 information about the following two wholesalers and
6 that's crucial to, you know, the outcome of the case or,
7 you know, that's a key piece of evidence.

8 What I'm saying is that we think and our
9 witnesses think that it's important to understand the
10 economics of the relationships between Midcontinent's end
11 users, Midcontinent, Midcontinent's wholesale providers,
12 and the other IXCs those wholesale providers may use to
13 terminate traffic to Verizon at Verizon's exchanges.

14 What she's done is she's given us a little bit
15 of information in discovery, and she's said that because
16 that information in her opinion supports her view of how
17 this case should play out, that the rest of the
18 information in her client's position is irrelevant.

19 And I suppose it's possible that it turns out to
20 be irrelevant, but there's several areas where we think
21 it's actually likely to be something that our experts
22 will want to analyze and very possibly include in their
23 testimony.

24 For example, the reality is that in the industry
25 wholesale providers that are contracted to local exchange

1 carriers such as Midcontinent, in other words, the two
2 that she mentioned a moment ago, typically use
3 third-party IXCs to terminate their traffic.

4 We have identified a substantial amount of
5 traffic coming from Midcontinent's network to Verizon's
6 network being delivered by companies that Verizon knows
7 to be disputers of VoIP traffic. And we're actually, you
8 know, not sure that the specific traffic coming from
9 Midcontinent is being disputed by those carriers but we
10 have our thoughts and our suspicions and we may actually
11 have to pursue discovery or subpoena information from
12 these third parties.

13 But the reality is that we're talking about
14 economic arguments and economic relationships and
15 economic benefits that may be incorrect. And the
16 asymmetrical nature of the lows of switched access
17 revenue can affect the policy issues in ways that we
18 believe are relevant to the litigation.

19 And given that her only argument is essentially
20 relevancy based on her idea of the proper scope of the
21 proceeding, we would just point out that, you know, this
22 is not a -- you know, this is not, you know, clearly
23 irrelevant information.

24 A lot of this, for example, if there's any
25 discussion in the contracts or in the arrangements

1 between Midcontinent and any of their wholesale providers
2 relating to VoIP or relating to pricing for VoIP being
3 different than pricing for nonVoIP traffic, that would be
4 highly relevant. So we just don't know whether this is
5 going to turn out to be relevant until we see the
6 information.

7 CHAIRMAN KOLBECK: Thank you.

8 Ms. Wiest, any questions?

9 MS. AILTS WIEST: A question for Verizon.

10 I can see your argument with respect to 4E. And
11 just to clarify, is it your point that you want the other
12 two carrier agreements to see if there's another third
13 party carrier involved in that?

14 MR. OATWAY: Well, that would be the next step
15 is to look at what extent -- first of all, by having C we
16 would be able to figure out better what percentage of the
17 traffic being delivered by disputers seems to be coming
18 from potentially customers that are PIC'd over to those
19 disputers, versus customers that are -- have designated
20 Midcontinent as their long distance provider and then,
21 therefore, are getting their -- are sending their traffic
22 via these wholesale providers and then possibly via
23 third-party providers.

24 I don't know that the arrangement between
25 Midcontinent and those two wholesale providers will

1 necessarily say anything about VoIP or will necessarily
2 say anything about third-party providers that they're
3 sort of direct partner may contract with. But it's a
4 start towards understanding the relationship. And the
5 whole point, of course, is that, you know, the standard
6 is whether or not the discovery sought is reasonably
7 calculated to lead to admissible evidence.

8 So even if it's just the first step, and it may
9 be in and of itself, that the information is crucial, for
10 example, if it discusses VoIP directly, but even if it's
11 not, it helps complete the record and helps us start
12 developing the full record that we think the Commission
13 should have when making its decision.

14 MS. AILTS WIEST: I think I have a little bit
15 more problem with the 4C. And so my question would be
16 so, you know, if you received IXCs that Midco customers
17 have directly PIC'd, I mean, you still aren't going to
18 know if some of those customers are -- I think you argued
19 that some of their own customers might be directly
20 contracting with IXCs for lower rates. That's not going
21 to give you any of that information.

22 MR. OATWAY: I can give you a concrete example
23 of the kind of thing that may very well flow from that
24 information.

25 One would be, for example, we know there's one

1 particular disputer that disputes pretty much across the
2 board. Some disputers only dispute on traffic that they
3 know is VoIP. Others dispute more broadly.

4 And so for one particular disputer we would be
5 interested in looking at the traffic volumes associated
6 with that disputing IXC. And if the traffic volumes
7 associated with that disputing IXC are greater than the
8 volumes associated with the customers that have directly
9 chosen that IXC as their IXC as opposed to the customers
10 that are going through Midcontinent for their long
11 distance service, then we would know something about the
12 indirect benefit that Midcontinent is receiving from
13 routing traffic through a disputer.

14 I mean, those are the kinds of things that would
15 be relevant with respect to that data. But I'll grant
16 you that by far -- by far the most important piece of
17 this is 4E.

18 I mean, 4C is sort of checking off, you know,
19 dotting the I and crossing the T. 4E and the next data
20 request that we'll be getting to is getting much more
21 directly at the core issues.

22 MS. AILTS WIEST: And then you requested this
23 information at least with respect to 4C every month since
24 January of 2006. I think you indicated in your response
25 you might be willing to narrow that?

1 MR. OATWAY: Yes. That's right. We would be
2 willing to do a snapshot, whatever is least -- whatever
3 snapshot is least burdensome to Midcontinent.

4 MS. AILTS WIEST: Could you describe what you
5 mean by a snapshot? Is that a month or a couple of
6 months?

7 MR. OATWAY: Well, I guess it would actually
8 be -- given we're talking about the number of customers,
9 it would be on any particular day. You know,
10 December 31, 2010 or, you know, end of quarter 2011 or
11 whatever, you know, is least burdensome for Midcontinent.

12 MS. AILTS WIEST: So you're just looking at
13 maybe one number?

14 MR. OATWAY: Yes. I think that's right. We're
15 looking at the number of voice customers that are PIC'd,
16 to use the term of art that Kathy introduced, to each of
17 the different interexchange carriers.

18 MS. AILTS WIEST: On a certain date?

19 MR. OATWAY: On a particular date.

20 MS. AILTS WIEST: Okay. Thank you.

21 CHAIRMAN KOLBECK: Commissioner questions? I
22 just have a couple here.

23 I am -- I guess on the number -- on C, on 4C, I
24 can understand where that should be just a day. I mean,
25 people change their PIC every day. So, I mean, even if

1 you had it for every month for five years, it's still not
2 right. So I understand that.

3 Midcontinent, do you have a day in mind that
4 would be -- do you have quarterly reports that are run
5 normally or anything like that?

6 MS. FORD: I think the data that we've given
7 them to date on the number of PICs for Midcontinent and
8 Verizon and other, I believe, was end of year 2010. If
9 I recall correctly, it was December 31 -- as of
10 December 31, 2010.

11 CHAIRMAN KOLBECK: And if I understand
12 correctly, Verizon is interested in what the other are,
13 or is that not correct?

14 MS. FORD: Yes. They want the -- what does the
15 other consist of. They want us to break that out.

16 MR. OATWAY: Yes, sir. That's correct. And the
17 numbers associated with each of the --

18 CHAIRMAN KOLBECK: Because they've given one
19 number, and then they've given you another number, which
20 is confidential, and then there's a number for all of the
21 other.

22 I would think that -- I don't think that would
23 be overly burdensome to tell them what the other is.

24 MS. FORD: No. And I don't think it's a
25 burdensome argument. I think it's a relevance argument.

1 CHAIRMAN KOLBECK: Okay. Okay. But only on one
2 day.

3 MS. FORD: Right.

4 CHAIRMAN KOLBECK: Just a one-day deal.

5 MS. FORD: Right.

6 CHAIRMAN KOLBECK: On the agreements I still
7 find myself stretching to understand why two carriers
8 that really aren't in play here need to be forced into
9 play on that agreement. I really don't have a -- I'm not
10 sure how to ask a question to resolve my concerns, but I
11 do understand that it may at some point come into it.
12 But I'm -- I'm just not understanding that argument.

13 Any other Commissioner questions?

14 COMMISSIONER NELSON: Well, if I can maybe just
15 ask a question to follow that vein, Mr. Oatway, if I
16 understood correctly, you indicated that the two carriers
17 in question that it's common practice in the industry for
18 them to contract with third parties.

19 And so my question for Ms. Ford is, is that is
20 correct? Is that a common practice in the industry for
21 those types of carriers to do additional third-party
22 contracting?

23 MS. FORD: I can't say from Midcontinent's
24 perspective. If they did, it isn't something that's
25 under Midcontinent's control.

1 I assume that's the case since most carriers
2 don't have a network that spans the entire country. So I
3 would guess from a practical point every carrier
4 contracts with other carriers to get from point A to
5 point B at some point.

6 CHAIRMAN KOLBECK: Any other Commissioner
7 questions?

8 I've got kind of a -- I have an idea of what I
9 would make a motion here. It's probably not going to be
10 a very fluent one so bear with me.

11 On Verizon Interrogatory No. 4, item number C, I
12 would grant that but only to be a snapshot of one day of
13 who's -- of the Midcontinent customers telling of all
14 customers are PIC'd to which IXC.

15 So, in other words, we'll grant that the others
16 would be identified but only on one day. Not every month
17 for the last five years. I'll probably stop on that
18 Motion. And we'll discuss that. And we can discuss item
19 E.

20 COMMISSIONER NELSON: Would it make any sense to
21 specifically designate December 31 of 2010 so the numbers
22 are consistent with what we've already got?

23 CHAIRMAN KOLBECK: I think that would make a lot
24 of sense.

25 COMMISSIONER NELSON: Or is that -- is that

1 burdensome?

2 MS. FORD: Well, we'd like to use the same day
3 that we used. I think it was same December 31. I wanted
4 to clarify that. I believe we still have that data as
5 well.

6 CHAIRMAN KOLBECK: And I'm okay with that. So
7 to clarify my Motion, yes -- and actually I'm reading it
8 right here. As of December 31, 2010 Midcontinent will
9 identify on that day their customers that were PIC'd.

10 Two of the numbers have been identified. They
11 would need to clarify just that third number that's given
12 in the confidential information.

13 Any other discussion on that?

14 COMMISSIONER HANSON: Mr. Chairman.

15 CHAIRMAN KOLBECK: Oh, I'm sorry.

16 COMMISSIONER HANSON: That's fine. I -- I've
17 wrestled a great deal with this. And I very much
18 appreciate the Motion that you made. I had actually
19 written down, you can see, December 31, 2009 in my notes
20 before our meeting here. So I missed it by one year on
21 what your Motion was going to be.

22 But I continue to wrestle with this. I had some
23 questions. I believe Ms. Ford answered those questions
24 sufficiently. Unfortunately it was during the period of
25 time that there was confidential information that was

1 presented. And I'm going to vote no on the Motion simply
2 because I just don't feel that it's necessary to -- the
3 argument of relevancy is one thing, but I don't think the
4 argument was based solely on relevancy by any means. And
5 I think that was answered quite well by Ms. Ford. So
6 I'll be voting no.

7 Thank you.

8 CHAIRMAN KOLBECK: Any other discussion?
9 Hearing none, we'll vote on this Motion.
10 Commissioner Nelson.

11 COMMISSIONER NELSON: Aye.

12 CHAIRMAN KOLBECK: Commissioner Hanson.

13 COMMISSIONER HANSON: No.

14 CHAIRMAN KOLBECK: Kolbeck votes aye.

15 So now we still have to discuss item E. I'm
16 going to very simply Motion that we deny that request. I
17 just -- I understand that we need to be broad. However,
18 I think we're talking two tiers down here when we're
19 talking about carriers. And I believe that Midcontinent
20 has actually been very forthcoming in the confidential
21 part of our hearing today. I believe it was all laid out
22 there.

23 Two are in dispute. I understand that.
24 However, that's something that isn't under Midcontinent's
25 control what Verizon is looking for, I think. That's

1 just my opinion.

2 Any other discussion on that Motion?

3 Hearing none, we'll continue to vote.

4 Commissioner Nelson.

5 COMMISSIONER NELSON: Aye.

6 CHAIRMAN KOLBECK: Commissioner Hanson.

7 COMMISSIONER HANSON: Aye.

8 CHAIRMAN KOLBECK: Commissioner Kolbeck votes
9 aye also.

10 All right. We've got Verizon Docket Request
11 No. 2. So we'll do a little musical chairs here, and
12 then -- well, actually we probably don't, Ms. Ford.

13 Verizon, would you like to can kick it off,
14 Verizon Docket Request No. 2?

15 MR. OATWAY: Sure. I guess the first piece of
16 the request is probably up to what you just voted on.

17 In response to No. 2 we are seeking -- and this
18 is page 8 of the initial Motion to Compel. Verizon is
19 seeking copies of all documents including contracts and
20 communications relating to any entity that provides
21 wholesale interexchange services to Midcontinent. So you
22 just, I think, indicated that the wholesalers other than
23 the single wholesaler which they admit is relevant is
24 sort of beyond the scope.

25 And I guess then that we -- so I would, you

1 know, not waste the Commission's time asking for the
2 contracts with the two wholesalers that you just denied
3 in the previous discussion.

4 But I would note that, you know, Ms. Ford
5 indicated that they went through great lengths to produce
6 the contract with their single wholesale provider that
7 they agree is relevant here.

8 We didn't just ask for the contract. We asked
9 for internal and external communications relating to the
10 entity. We found through other discovery responses by
11 Midcontinent that Midcontinent does tend to keep e-mail
12 negotiation history, you know, e-mail threads, and other
13 information associated with their discussions with their
14 wholesale providers.

15 And we think that those kinds of discussions are
16 important to understanding the nature of their contract,
17 the extent to which VoIP was or was not an issue when
18 they entered into the contract, the extent to which it's
19 been discussed, the VoIP or nonVoIP nature of their
20 traffic, and any benefits that they do or do not get
21 associated with VoIP traffic.

22 And, again, we're simply asking for, you know,
23 whatever e-mails or other communications they have on
24 hand relating to the contract with that single wholesale
25 provider, the one that they admit is relevant here.

1 We're not asking them to do a burdensome, you
2 know, search of their e-mail server or anything along
3 those lines. It would just be, you know, go to the
4 custodian who deals with that wholesale carrier and, you
5 know, turn over any documents that that person might
6 have.

7 And we would suggest that that's a reasonable
8 issue associated with our need and our interest in
9 developing the full record on the economic relationship
10 with that wholesale provider.

11 CHAIRMAN KOLBECK: Thank you.

12 Ms. Ford.

13 MS. FORD: Thank you.

14 Again, I think our response is fairly clear on
15 this. The agreement with the one provider in question
16 has been provided. In fact, there's multiple sections to
17 that agreement. I think there's seven different
18 amendments. They've all been provided.

19 Paragraph 16.12 of the master agreement with
20 that provider is an integration clause which says, "This
21 agreement, including all referenced documents,
22 constitutes the entire agreement and understanding
23 between the parties. It supersedes all prior or
24 contemporaneous negotiations or agreements, whether oral
25 or written, relating to the subject matter."

1 In South Dakota under Code Section 53-8-5 parole
2 evidence is not admissible in any proceeding in this
3 state where the agreement to be interpreted is
4 integrated, unambiguous, and where the party's intent is
5 clear.

6 Now this is a rule of law. Parole evidence, the
7 negotiations between the parties leading up to the
8 written agreement are not relevant, and they aren't
9 admissible in any proceeding. And we should not be
10 required to provide e-mail history on an agreement that's
11 been signed and is integrated by itself.

12 The terms of the agreement are clear. They're
13 not ambiguous. They are between the party and
14 Midcontinent. They aren't between Verizon and
15 Midcontinent or Verizon and the other party. And there's
16 simply no basis to contend that it's unclear what the
17 agreement means or what the party's intent was.

18 And I find it ironic that we're having this
19 argument. Because, frankly, in response to Verizon's
20 second set of Interrogatories, we have provided an e-mail
21 from counsel for this third-party interexchange provider
22 who has specifically said they are not disputing the
23 payment of Midcontinent traffic to Verizon.

24 They've confirmed it. The agreement spells it
25 out. And yet we're here now having to back up the

1 agreement which speaks for itself. It seems no matter
2 what we provide it's not enough to convince Verizon that
3 we're not engaged in this asymmetrical arbitrage.

4 But getting back to the argument, under
5 South Dakota Law, even if there did exist e-mail
6 correspondence between Midcontinent and this other party,
7 it is not relevant and it's not admissible in these
8 proceedings and we should not have to dig it up and
9 provide it to them.

10 CHAIRMAN KOLBECK: Staff.

11 MS. SEMMLER: Just again, there's that
12 distinction between what's relevant and what's
13 admissible, and the relevancy would be determined at
14 trial, at the hearing.

15 So with that in mind, Staff would recommend that
16 the information as it relates to [REDACTED] only -- the one
17 carrier only, be provided.

18 CHAIRMAN KOLBECK: All right. Verizon,
19 response?

20 MR. OATWAY: Sure. Ms. Ford mischaracterizes
21 our argument. We're not engaged in some contract
22 interpretation proceeding here relating to their contract
23 with [REDACTED]. We're trying to understand their economic
24 relationship with [REDACTED]. The contract's part of it.
25 There's a broader set of discussions that presumably have

1 gone on with respect to current and potentially future
2 economic relationships.

3 Parole evidence I think is relevant to the
4 extent that there is an ambiguity in the contract.
5 Ms. Ford simply asserts that it's unambiguous. Frankly,
6 I haven't done enough analysis to necessarily agree or
7 disagree with her on that. But I think it's appropriate
8 for us to get broad discovery about a wholesale
9 relationship that is undisputedly relevant to this.

10 And she asserts one more fact relating to an
11 e-mail that she got from an attorney at that wholesaler,
12 which kind of highlights the problem that we're facing
13 here, which is that -- and she may very well be correct,
14 that's an important fact and, you know, she'll have an
15 opportunity to argue that.

16 But what she's essentially doing today, this
17 afternoon, at this early stage in the proceeding is she's
18 saying we're going to release some selective facts
19 relating to our relationship with that wholesaler, ones
20 that we think benefit Midcontinent's position and support
21 Midcontinent's position, and because it's so clear that
22 Midcontinent's position is the right position, we're not
23 willing to give Verizon anymore information that would
24 allow Verizon to sort of see the big picture.

25 Again, I just think given the broad scope of

1 discovery it would be appropriate to have access to such
2 documents.

3 CHAIRMAN KOLBECK: Thank you.

4 Ms. Wiest.

5 MS. WIEST: I don't have any questions. I would
6 agree with Staff's recommendation. I would also caution
7 people about mentioning the name of the wholesaler. And
8 maybe we can catch that in the record too.

9 MS. FORD: May I just make one further comment,
10 Your Honor?

11 CHAIRMAN KOLBECK: Sure.

12 MS. FORD: To the extent there's some argument
13 that there may be an ambiguity in the contract, certainly
14 Verizon would have no standing to assert that ambiguity.
15 They're not a party to the contract. And I've certainly
16 never heard in my 18 years of practice of a third party
17 asserting an ambiguity on behalf of themselves when
18 they're not a party to the contract and they certainly
19 aren't a beneficiary of the contract or a supposed
20 beneficiary of the contract.

21 So, again, I'm back to, you know, discovery is a
22 broad-based activity, yes, but it's not unlimited. And
23 you just simply don't get to do discovery on things that
24 aren't even reasonably calculated to lead to the
25 discovery of admissible evidence. And in South Dakota

1 parole evidence, which is extraneous to the contract, is
2 not admissible.

3 CHAIRMAN KOLBECK: Thank you.

4 Any Commissioner questions?

5 Any action by Commissioners?

6 That's an even harder question, isn't it? Could
7 you repeat the Staff recommendation again without the
8 carrier's name.

9 MS. SEMMLER: Exactly. Without the confidential
10 information.

11 Just there's such a distinction between what's
12 allowable in discovery and what's admissible at a
13 hearing. So Staff recommends the information requested
14 be granted as it relates only to the one carrier.

15 CHAIRMAN KOLBECK: Okay. That's what I was
16 thinking.

17 Commissioner Hanson.

18 COMMISSIONER HANSON: Mr. Chairman, I'm -- my
19 notes working through all of this information prior to
20 the meeting I had written down yes, that I was going to
21 vote in favor of this.

22 And now I'm -- after listening to Ms. Ford's
23 arguments, I don't know if I can use the word
24 "compelling" yet or not because -- looking to be tipped
25 over, I think, one way or the other. I'm really

1 struggling with this so I'm interested in hearing
2 viewpoints from yourself and Commissioner Nelson, if you
3 have anything to add.

4 Because, frankly, I'm really struggling with
5 this. I'm prepared to vote yes. On the other hand, if
6 it is, in fact, inadmissible, then why would we vote to
7 support it?

8 So I guess I heard what Ms. Wiest had to say,
9 but I'd like to hear from her again as well.

10 MS. AILTS WIEST: You know, the problem is we
11 just don't know what is in the e-mails. I mean, have
12 they tried to -- within e-mails tried to make any changes
13 to the contract?

14 We just don't know what is possible that they
15 could have discussed with this. And to that extent I
16 think it should be allowed.

17 COMMISSIONER HANSON: Mr. Chairman. But if
18 those discussions were just -- well, part of the
19 negotiation process, isn't it the final piece that
20 counts, the final contract as opposed to discussions that
21 led up to it?

22 MS. AILTS WIEST: The final contract is
23 important. I mean, the question is have they entered --
24 you know, have they made any discussions, have they
25 entered into any site agreements with respect to things

1 that go beyond the contract.

2 COMMISSIONER HANSON: I'm confused. If I'm
3 negotiating a real estate deal or something, it doesn't
4 matter if we talk for two years and have a variety of
5 prices and contingencies and such. It's what we finally
6 end up agreeing to.

7 Am I off base with that in relationship to how
8 it functions here?

9 MS. AILTS WIEST: No. I guess my point was that
10 to the extent that -- again, we don't know what's out
11 there. There could be very little that is out there.
12 But to the extent, you know, perhaps the agreement says
13 something but not everything is covered in that
14 agreement.

15 Is there anything else out there that the
16 parties have informally agreed to or have considered with
17 respect to the exchange of traffic that would be relevant
18 to this.

19 MR. OATWAY: Mr. Chairman, would it be possible
20 for me to make one additional point with respect to
21 this?

22 COMMISSIONER HANSON: That's fine.

23 MR. OATWAY: I think it's a red herring on the
24 part of Midcontinent to suggest that, you know -- I
25 mentioned that as an example they keep negotiation

1 history associated with their wholesale providers. But
2 that's not what this is about.

3 This is documents including contracts and
4 internal and external communications relating to any
5 entity that provides wholesale interexchange services.
6 And the contract, of course -- this has nothing to do
7 with any contract dispute or any interpretation of a
8 contract in the context of a contract litigation.

9 This is -- a contract is important with respect
10 to the economic relationship between Midcontinent and the
11 IXC. But there's a lot more going on potentially when
12 Midcontinent is having communications with an IXC or
13 communications about an IXC that may very well relate to
14 VoIP.

15 They may have to do with, you know, this
16 particular wholesale provider's withholding activities
17 and, you know, whether or not it's withholding on VoIP.

18 Ms. Ford has, in fact, produced one e-mail that
19 she says supports their position on that particular
20 issue. We'd like to see the whole set of documents and
21 communications both internally and external relating to
22 this issue.

23 And so, again, it's not a matter of what's the
24 right way to interpret some provision of their contract
25 with their wholesale provider. It's, you know, what are

1 the documents relevant to the overall economic
2 relationship with the VoIP relationship in particular.
3 That's --

4 COMMISSIONER HANSON: Thank you. Thank you,
5 Mr. Oatway.

6 Mr. Chairman, may I give Ms. Ford one last bite
7 at the apple?

8 If, in fact, you provided one e-mail in that
9 regards, doesn't that open up the door to the other
10 e-mails?

11 MS. FORD: You know, I think I'm sort of quoting
12 a phrase darned if I do and darned if I don't. I was
13 getting beat up for all of my red herrings, which I must
14 have a pretty big refrigerator because I apparently have
15 a lot of red herrings.

16 Frankly, I was working behind the scenes
17 desperately to try and get [REDACTED] agreement to let us
18 release this document. Sorry. Confidential information.
19 To get this carrier's agreement to release this in
20 discovery and in doing so asked for confirmation that I
21 could respond to Verizon's allegation that there's this
22 asymmetrical arbitrage going on.

23 Because, frankly, Midcontinent has been saying
24 from the beginning that's just not true. Based on our
25 agreements with our interexchange carriers we believe

1 they are paying switched access charges to Verizon and
2 anybody else they're terminating to. And if they're not,
3 we'd like to know about it.

4 And so I went about the business of getting the
5 carrier's agreement to release and said can you confirm
6 whether or not you are disputing Midcontinent with
7 Verizon and got confirmation back that, no, they are not.

8 I don't think that opens up the door to every
9 e-mail that may have crossed paths between Midcontinent
10 and this other carrier in, you know, the last however
11 many years.

12 And just to add to the point, the agreement also
13 contains a provision that says this agreement may be
14 modified only by a written amendment signed by authorized
15 representation of each party. So this notion that there
16 might be side agreements out there is just -- it's not
17 true.

18 COMMISSIONER HANSON: Thank you. Thank you,
19 Mr. Chairman.

20 CHAIRMAN KOLBECK: All right. Thank you.

21 Actually I have a question for Staff.
22 Midcontinent actually opened up a good question. How
23 long of a time frame are we talking here? I know in the
24 first argument they were talking since '06. Does this
25 provide -- "Provide copies of all documents, including

1 contracts" la-la-la-la-la and doesn't really give a time
2 frame. They could be doing business with this company
3 since like 1986. '96.

4 MS. SEMMLER: I guess maybe I would ask Verizon
5 what their needs are -- or what they anticipated when
6 they asked the question.

7 CHAIRMAN KOLBECK: Sure.

8 MR. OATWAY: Yes. The answer is I don't have
9 the initial discovery request in front of me where we had
10 set I think a default date to the extent that we didn't
11 specifically include it in the question.

12 But I would propose the same date that we had
13 put in the previous question that we just discussed,
14 which would be back to 2006. The reason for that is --
15 and, again, we're really not focusing on contracts.
16 We're focusing on understandings and on discussions that
17 may touch on VoIP or may touch on pricing and so on and
18 so forth.

19 And going back to January of 2006 would, I
20 believe, encompass the major period of time during which
21 a lot of these VoIP disputes, including the one with
22 their principal wholesale provider between Verizon and
23 wholesale entities were taking place.

24 So I would -- I would propose January of 2006.
25 Frankly, I'm not sure that we specifically put a date

1 into the initial request.

2 CHAIRMAN KOLBECK: All right. I didn't see one
3 so I just wanted to make sure I didn't miss it.

4 Midcontinent, do you have archives of e-mails
5 for the last five years?

6 MS. FORD: I doubt it, sir.

7 CHAIRMAN KOLBECK: What's that?

8 MS. FORD: I doubt it. I haven't looked. I
9 haven't asked them to see what might be available. So I
10 don't know if we can go back to 2006 or not.

11 CHAIRMAN KOLBECK: Okay.

12 MS. FORD: It may be possible. It probably has
13 more to do with whether the person involved saved them to
14 a folder as opposed to whether they still exist someplace
15 else on the system.

16 CHAIRMAN KOLBECK: Backup or something? Okay.

17 Any other Commissioner questions?

18 Hearing none, any action?

19 I've got something in mind, I guess.

20 I would Motion that we approve this request,
21 only to the carrier specific and only to the extent the
22 records exist.

23 So, in other words, I don't want to get us into
24 a situation where you're obligated to give five years.
25 Well, I really don't think it's realistic that there's

1 going to be e-mails five years old. Somewhere in a
2 server somewhere stored on a shelf. So I don't know how
3 to word that.

4 Ms. Wiest, do you have any suggestions?

5 MS. AILTS WIEST: I assume --

6 CHAIRMAN KOLBECK: To the extent possible? Is
7 that good wording or not?

8 MS. AILTS WIEST: I would just go back to 2006.
9 To the extent they don't exist, they don't exist, and
10 they won't produce them.

11 CHAIRMAN KOLBECK: So only to the carrier
12 specific dating back to 2006, only to the extent that
13 those e-mails even exist.

14 COMMISSIONER HANSON: Mr. Chairman?

15 CHAIRMAN KOLBECK: Yes.

16 COMMISSIONER HANSON: Would you want to also
17 include e-mails prior to the -- well, I guess you can't
18 have it prior to signing of the agreement, no. Never
19 mind.

20 COMMISSIONER NELSON: Mr. Chairman, I would move
21 to amend your Motion by restricting it only to e-mails
22 that refer to VoIP.

23 CHAIRMAN KOLBECK: Okay.

24 COMMISSIONER NELSON: And if I might explain my
25 rationale on that, I mean, the request here is for all.

1 And that can cover a whole lot of things that are not
2 relevant to this issue at all. And if we're looking for
3 something that may be relevant, I think that may clarify
4 it.

5 CHAIRMAN KOLBECK: Okay. Ms. Wiest, would you
6 like to comment on that?

7 MS. AILTS WIEST: I don't know if Verizon has
8 any comment. I guess I don't have an objection to that.

9 CHAIRMAN KOLBECK: Verizon.

10 MR. OATWAY: Yeah. I guess my comment is that I
11 hadn't thought about that, but that's not something we
12 would object to.

13 I would ask, Commissioner, that it be, you know,
14 made clear that that's a broad term. It would include
15 discussions of internet protocol, interconnection, you
16 know, IP-enabled traffic such that it's clear that, you
17 know, the specific acronym "VoIP" doesn't have to be the
18 triggering word.

19 CHAIRMAN KOLBECK: All right. I'll consider
20 that a friendly amendment. And --

21 COMMISSIONER NELSON: And I would take it as
22 such also. And being not intimately familiar with all of
23 the appropriate terms, I think we better spell those out
24 in the Motion, though, before we vote on it.

25 CHAIRMAN KOLBECK: Okay. So the Motion as it

1 stands, if I remember right, is that we would grant the
2 request in Verizon Document Request No. 2, only as it
3 applies to the single carrier and everything
4 electronically dating back to 2006 if it exists, and only
5 pertaining to voice over internet protocol.

6 Does that sound good?

7 COMMISSIONER NELSON: Well, do we need to
8 include the other terms that were -- Mr. Oatway
9 referenced? Do you want to give us those terms again?

10 MR. OATWAY: Sure. I was just suggesting that
11 it also include discussions of any internet protocol or
12 IP issues as well.

13 COMMISSIONER NELSON: That works.

14 MS. AILTS WIEST: One other issue. I think you
15 limited it to electronic. I'd assume you wouldn't want
16 to limit it to just electronic communications since he
17 asked for internal and external communications.

18 CHAIRMAN KOLBECK: No. Not limited to
19 electronic communications but communications. But we
20 want to make sure that some of those communications on
21 the electronic format aren't going to be available.

22 MS. AILTS WIEST: Sure. I just didn't want
23 everything limited to just electronic communications.

24 CHAIRMAN KOLBECK: Okay. Are we good? So it's
25 Verizon Document Request No. 2, information pertaining to

1 the one carrier, all communications dating back to 2006
2 relating to voice over internet protocol and to the
3 extent that they still exist.

4 How does that sound? Do you want me to pat my
5 tummy and rub my head at the same time too?

6 MS. AILTS WIEST: Yeah. The parties are voice
7 over internet protocol. I didn't know if he still wanted
8 his term "IP-enabled traffic" included in that also or --

9 CHAIRMAN KOLBECK: Well, I guess that would be
10 my understanding is voice over internet protocol would be
11 IP traffic.

12 Does anyone disagree with that?

13 MR. OATWAY: If I may, Your Honor, I think
14 IP-enabled traffic or simply IP traffic would be
15 appropriate to include as a distinct -- as a distinct
16 concept.

17 CHAIRMAN KOLBECK: Okay. I'm okay with that.
18 And that's one thing about the lingo, I guess, because I
19 consider VoIP to include all of that, but we'll include
20 that IP traffic.

21 MR. OATWAY: Thank you, Your Honor.

22 CHAIRMAN KOLBECK: Uh-huh. I think there's a
23 Motion in there that someone can decipher.

24 Is there any discussion?

25 COMMISSIONER NELSON: Well, and it's probably

1 apparent from my amendment that this is not an easy issue
2 to ferret out. And, you know, I can readily make good
3 arguments on both sides. But I think given that what the
4 statute requires us to allow, this hits it as close as we
5 can.

6 CHAIRMAN KOLBECK: All right. Thank you.

7 Any other discussion?

8 Hearing none, Commissioner Nelson.

9 COMMISSIONER NELSON: Aye.

10 CHAIRMAN KOLBECK: Commissioner Hanson.

11 COMMISSIONER HANSON: Aye.

12 CHAIRMAN KOLBECK: And Commissioner Kolbeck
13 votes aye also.

14 Can we take about a 10-minute break? Not a
15 smoke break. Just a bathroom break. And we will attack
16 Verizon Document No. 15 and Verizon Document Request
17 No. 1. Thank you.

18 (A short recess is taken)

19 CHAIRMAN KOLBECK: We're going to tackle these
20 last two.

21 Mr. Oatway, are you with us?

22 MR. OATWAY: Yes, I am.

23 CHAIRMAN KOLBECK: How about Mr. Simmons?

24 MR. SIMMONS: I am here.

25 CHAIRMAN KOLBECK: All right. Thank you. Okay.

1 We're ready. Verizon Interrogatory No. 15.

2 Mr. Oatway, please proceed.

3 MR. OATWAY: Yes, sir. So in Interrogatory
4 No. 15 Verizon was asking Midcontinent to describe and to
5 quantify its investments again since January of 2006 to
6 deploy VoIP facilities and VoIP equipment within its
7 network.

8 The purpose of the Interrogatory is simply, you
9 know, to understand the nature of their VoIP network,
10 something about the upgrades that they have made to their
11 network so that's VoIP capable, and, you know, we would
12 say that it's relevant to the proceeding because the
13 proceeding has to do with the VoIP and with IP traffic on
14 their network.

15 I don't know whether or not Midcontinent intends
16 to put at issue its investment levels in its network, its
17 costs for providing network services and sort of any
18 issues associated with its VoIP costs or its network
19 costs, but, you know, absent a Stipulation that they
20 don't plan to put that sort of information at issue in
21 this proceeding, which we find historically is often put
22 at issue by providers that have substantial switched
23 access charges, you know, we're looking to start
24 developing basic information about their network
25 investments and the costs they've put into their networks

1 and that sort of information.

2 CHAIRMAN KOLBECK: Thank you.

3 Ms. Ford.

4 MS. FORD: Well, as we stated in our response,
5 from our perspective, again, this is more of a fishing
6 expedition type of question that looks for information
7 that simply isn't relevant to the issue that is before
8 the Commission.

9 This is not a rate proceeding. This is not a
10 rule-making proceeding where the Commission is being
11 asked to determine what an appropriate rate for VoIP
12 traffic is.

13 The question before the Commission is do the
14 current switched access rates apply or don't they? We
15 believe they do. Verizon doesn't think they do. The
16 answer for the Commission is yes, they do or no, they
17 don't.

18 If the Commission decides, no, they don't, there
19 certainly isn't going to be a record developed in this
20 case where the Commission can then move to the next
21 question, which is what rates should apply. That would
22 be a proceeding that would involve many more players than
23 we have here.

24 And the second point I would make is the
25 switched access rates that Midcontinent currently has on

1 file have been approved by this Commission and by statute
2 are deemed reasonable. They're lawfully approved.
3 They're deemed reasonable. Midcontinent charges the --
4 no greater than the Qwest rate, which is what the
5 Commission has ordered it to do, essentially.

6 So I don't think it's true to say that we can't
7 make an argument that we are entitled to be compensated
8 for our network without opening up the entire financial
9 books of the company to Verizon to make that argument.

10 The FCC has said, and we've pointed this out
11 many times, that people who use the public switched
12 telephone networks should pay for it in the same manner
13 as everybody else. In other words, if people are sending
14 traffic to the public switched telephone network, that
15 they should pay just like anybody else pays.

16 And we believe our switched access tariffs
17 apply. They're lawfully approved. The rate has been
18 approved by the Commission. It's statutorily deemed
19 reasonable. And Midcontinent's underlying investment in
20 this network is not something that Verizon should get to
21 peer into.

22 Midcontinent is a closely held partnership.
23 It's not a publicly traded company that has financial
24 statements all over the web for anybody to see.

25 I just don't see how -- whether every penny

1 Midcontinent invested in the state went towards being
2 able to deliver IP traffic versus if every penny went
3 towards delivering TDM traffic, it would not be relevant
4 to this dispute. Midcontinent has not disputed that it
5 has IP traffic.

6 So, you know, it's not like there's a magic
7 number of your investment that you can make in the state
8 that suddenly turns you from a TDM provider to a VoIP
9 provider.

10 And we just don't see how that information is
11 relevant to the decision before the Commission, which is
12 do switched access charges apply to VoIP traffic or don't
13 they.

14 CHAIRMAN KOLBECK: Thank you.

15 Staff, anything to add?

16 MS. SEMMLER: Not really. Staff doesn't take
17 issue with the fact that this doesn't sound like it's
18 relevant to the issue. And we agree with the depiction
19 of what the issue is, as Ms. Ford stated.

20 However, the discovery has a very broad scope
21 and for the same reason, having nothing to do with
22 relevancy, Staff makes the same recommendation as it did
23 on the prior request.

24 CHAIRMAN KOLBECK: Thank you.

25 Qwest, any response? I mean -- Qwest.

1 Verizon, any response?

2 MR. OATWAY: Yeah. I would just note I won't
3 use the word "red herring" because Kathy is making fun of
4 me on that.

5 MS. FORD: Sorry, Chris.

6 MR. OATWAY: Her presentation has to do with the
7 notion that Verizon is making this position into a
8 rate-making issue. There's nothing about what we said
9 that is suggest we're trying to make this into a
10 rate-making issue at all.

11 If Midcontinent is going to take the position
12 that its network investments and its costs of investing
13 in its network are entirely irrelevant and that none of
14 its witnesses will raise that issue, none of its
15 witnesses will say that it depends on switched access
16 revenue in order to invest in its network, none of its
17 witnesses will make any, you know, arguments along those
18 lines, then she may be right that it's beyond the scope.

19 But absent such a Stipulation, I think we're
20 entitled to get some basic information about their
21 investments.

22 CHAIRMAN KOLBECK: Thank you.

23 Ms. Wiest.

24 MS. AILTS WIEST: Yes. I had a question for
25 Ms. Ford.

1 I think you said that this won't be a record to
2 say what rate will apply. I think in your Count II, the
3 implied in fact contract count. Isn't that what you're
4 going to be asking?

5 To the extent that the Commission would
6 determine that switched access rates don't apply to this
7 type of IP traffic, you are still asking to be
8 compensated for that traffic; correct?

9 MS. FORD: Yes. But I believe the implied in
10 fact contract would be the rate that was being charged
11 prior to the dispute, which is the switched access
12 rate.

13 MS. AILTS WIEST: Well, that would be your
14 position. But my point is is that the whole -- I mean,
15 the whole disagreement on what should be paid to you -- I
16 mean, it certainly can be your position that it's a
17 switched access rate.

18 But under like quantum root, unjust enrichment,
19 all those others, it would just seem to me that there
20 certainly could be relevance to determining, you know,
21 what possible rate should be applied and that's why
22 financial information can be received from -- by Verizon.

23 MS. FORD: I guess from our -- I have a hard
24 time understanding how you could take the financial
25 statements of one company and -- Midcontinent in

1 particular, and from that determine a proper rate to
2 apply. I mean, even in the switched access context the
3 Commission requires some fairly involved cost studies
4 that -- you know, that involve applying different, you
5 know, allocations and things of that nature which take a
6 long time and are fairly expensive to do as we've all
7 heard recently.

8 But you certainly wouldn't look at a company
9 like Midcontinent's financials and based solely on those
10 financials decide a rate that's applicable to a
11 telecommunications service in this state. That's just
12 not how it's done.

13 I mean, typically that would be one piece of
14 information that would be involved in setting a rate for
15 a telecommunications item, but it certainly wouldn't
16 be -- it wouldn't give you enough information to say this
17 is the right rate for recovery of this particular
18 telecommunications service.

19 MS. AILTS WIEST: But it's just not financial
20 statements. They're asking to quantify all investments
21 you've made in this type of technology; correct?

22 MS. FORD: Yeah. I think that's what they're
23 asking for. But, again, even if you had all of that
24 information, that's not -- I mean, I guess my point is
25 there's so much more involved in the rate setting for a

1 telecommunications service or for any service over which
2 this Commission has jurisdiction that even if they had
3 open books to Midcontinent, I don't think the Commission
4 would be in a position to say based on that financial
5 information this is the proper rate for terminating VoIP
6 traffic.

7 MS. AILTS WIEST: Did you have any response,
8 Verizon?

9 MR. OATWAY: Yeah. I mean, I certainly agree
10 with Ms. Ford in that the information we're seeking by
11 itself wouldn't be enough to undertake a traditional
12 rate-making exercise.

13 But I think what we're looking for is something
14 that falls well short of that. She would be arguing
15 burden if we were to seek that kind of information.
16 Although it does go directly to her unjust enrichment
17 claim. You know, the idea behind unjust enrichment
18 involves a quantification of costs.

19 So, you know, from our point of view it's more,
20 you know, akin to sort of rough justice in terms of
21 getting enough information from Midcontinent without --
22 and this also goes to the annual reports, which is the
23 next request, but without imposing really any burden on
24 Midcontinent such that we can assess basic questions
25 associated with network investment, switched access

1 revenues, network costs, basic information about the
2 operations of the business with which we're in
3 litigation.

4 And so, yes, it's true that it wouldn't be
5 enough to precisely set a new rate, but that's not the
6 purpose of the document request.

7 MS. AILTS WIEST: Thank you.

8 CHAIRMAN KOLBECK: All right. Thank you.

9 Any Commissioner questions?

10 I don't really have any questions. I definitely
11 understand Ms. Ford's position, that this is not a
12 rate-making hearing. However, I think that I kind of
13 understand why Verizon would need this if we didn't go
14 into the unjust enrichment.

15 So I would make a Motion that we grant Verizon
16 Interrogatory No. 15.

17 Any Commissioner questions, discussion?

18 And I have to -- while the Commissioners are
19 thinking about that, this is an internal fight that --
20 this is definitely a 50/50 thing. I understand both
21 sides of it, very much understand why it's not
22 appropriate, but on this one I'm falling on the discovery
23 side of it. It is broad.

24 MS. FORD: Could I make one last comment about
25 the unjust enrichment issue? Because our unjust

1 enrichment issue is tied directly to switched access
2 rates.

3 From Midcontinent's perspective, the Commission
4 has set a rate that they say is just and reasonable for
5 the recovery of expenses related to terminating traffic
6 on our network. We believe that's precisely what Verizon
7 is doing.

8 So the .0007 rate that they are paying us is
9 significantly lower than the switched access rate. So in
10 that manner they are being unjustly enriched.

11 The Commission has set what rate other providers
12 should pay Midcontinent for terminating traffic on its
13 network, and they are being unjustly enriched to the tune
14 of whatever .0604 is minus .0007. It's not an unjust
15 enrichment to the point we're saying this is how much
16 recovery we need for terminating VoIP traffic. It is
17 strictly a switched access argument. The rate has been
18 set by the Commission, and it is deemed just and
19 reasonable. So it's unjust enrichment to them to pay
20 less than that rate.

21 CHAIRMAN KOLBECK: And I would agree with you.
22 I would agree with you that the premise of the argument
23 is whether switched access applies or not. However,
24 during the discovery is if they need this information or
25 not.

1 MS. FORD: And I guess that's my trouble. I
2 don't see how having the information gets us anywhere.

3 CHAIRMAN KOLBECK: Yes.

4 MS. FORD: And it's very private information for
5 a partnership that's not publicly traded.

6 MS. AILTS WIEST: What about Verizon's point
7 about entering into a Stipulation? Their concern is that
8 you are going to put cost issues in the record, and so at
9 some point they need to be able to respond to that.

10 MS. FORD: Well, and that was the point I was
11 trying to make earlier. I don't think -- I think
12 Midcontinent is entitled to argue that they deserve
13 compensation for their network, that what Verizon is
14 doing is no different than what any other TDM provider is
15 doing.

16 We're carrying traffic on our network. We're
17 terminating their traffic on our network. And we're
18 entitled to be compensated for that. And we're entitled
19 to be compensated at the rate that the Commission has set
20 for doing that activity.

21 I don't think making that argument means that we
22 have to open up our financial books and prove to them
23 that we need that compensation or that somehow we can't
24 further invest in a state without that compensation.

25 I think it's a -- you know, they're taking it a

1 step further and saying you shouldn't be able to argue
2 anything about needing compensation for your network
3 until you can open up your books and show that you really
4 need it.

5 I mean, fundamentally they're saying, you know,
6 .06042 rate is too much and it should be .0007 because
7 what you're investing in the network is much cheaper than
8 TDM.

9 I don't think the argument that we would make
10 opens up Midcontinent to, you know, have to turn over
11 their financial books.

12 MS. AILTS WIEST: So, Verizon, are you going to
13 be making the argument that lesser rate would apply?

14 MR. OATWAY: The argument that we're making is
15 that the Legacy switched access regime, both interstate
16 and intrastate, doesn't apply and that, you know, we
17 think ultimately the FCC will decide what rate does
18 apply.

19 In the meantime, you know, as we've said in the
20 past, you know, there's precedent, you know, indicating
21 that switched access doesn't apply and that something
22 less than switched access applies.

23 I don't know how to assess -- I think she's sort
24 of flipping the issue on us. What we're trying to do is,
25 you know, anticipate what information -- I mean,

1 discovery is -- you know, this is the second round of
2 discovery. There's at least currently no additional
3 discovery contemplated. We don't know what their
4 witnesses are going to say.

5 We have found that it's very common in these
6 kinds of proceedings for witnesses to make statements
7 that, you know, tribunals listen to about their costs,
8 their network costs, their reliance on switched access,
9 their alleged dependance on switched access for future
10 and past investment.

11 And, you know, what we tried to do was calculate
12 the information that we sought in a way that it wouldn't
13 be burdensome but that would at least get us enough
14 information to generally deal with those kinds of
15 questions to the extent that they arise.

16 And, of course, her argument that this is highly
17 sensitive, you know, corporate information is one that
18 we've dealt with in the context of having both the
19 confidentiality agreement in place and a special
20 agreement for highly confidential information. I'm not
21 sure that this even comes close to qualifying as highly
22 confidential. But if they claim that it does, we will
23 treat it as such and have a heightened level of
24 protection.

25 So I don't think there's a substantial burden

1 argument. We calculated it to not be burdensome. And,
2 yes, it's not enough to do a full rate-making proceeding,
3 but that's not what we're looking to do. We're just
4 trying to get information relevant to their operations
5 because we think it's likely that they'll put that in
6 play in the litigation.

7 MS. AILTS WIEST: Thank you. I would recommend
8 granting the request for Interrogatory No. 15. I think
9 it certainly is possible that Midcontinent will put in
10 information relating to financial dealings and reliance
11 on switched access and network. And so I think at this
12 point or stage in the proceeding Verizon is entitled to
13 that information.

14 CHAIRMAN KOLBECK: Thank you.

15 Any other Commissioner discussion?

16 We do have a Motion to grant it.

17 Any Commissioner questions or discussion?

18 MS. FORD: Was your Motion to grant it back to
19 2006? I apologize.

20 CHAIRMAN KOLBECK: What's that?

21 MS. FORD: Was there a Motion to grant that back
22 to 2006?

23 CHAIRMAN KOLBECK: I believe their first -- yes.
24 The Interrogatory, "Please describe and quantify all
25 investments Midcontinent has made since January 2, 2006."

1 My Motion was to grant it so it would be that.

2 COMMISSIONER NELSON: My only comment, you know,
3 given the statutory standard I'm thinking this is
4 something we have to grant.

5 COMMISSIONER HANSON: Mr. Chairman, I know that
6 the standard is very broad, but I just don't see where
7 this is going to lead to information that would be
8 applicable so I'll be voting no.

9 CHAIRMAN KOLBECK: Okay.
10 Any other discussion?
11 Hearing none, Commissioner Nelson.

12 COMMISSIONER NELSON: Aye.

13 CHAIRMAN KOLBECK: Commissioner Hanson.

14 COMMISSIONER HANSON: No.

15 CHAIRMAN KOLBECK: Commissioner Kolbeck votes
16 aye also.

17 That leads us to our last item, Verizon Document
18 Request No. 1. There is A, B, C, D, E, F, G in those.
19 Have any of those been settled, or are we refining that
20 down to any different requests, I guess would be my first
21 question?

22 MS. FORD: I think it's just Subparts A and E.

23 CHAIRMAN KOLBECK: What's that?

24 MS. FORD: I think it's just Subparts A and E.

25 CHAIRMAN KOLBECK: A and E. That's what I was

1 thinking. How about I just hand it over to Mr. Oatway,
2 and we'll go from there.

3 MR. OATWAY: Sure. Subpart A is, I think, very
4 simple and zero burden in terms of sort of weighing the
5 different factors here. For the same reason that we
6 wanted to understand their network investments just to
7 sort of basically understand, you know, who we're
8 litigating with and to potentially be able to deal with
9 arguments that, you know, we commonly see in these kinds
10 of proceedings relating to alleged dependency on switched
11 access charges and alleged need for particular revenue
12 streams associated with maintaining and deploying
13 networks, what we ask for is simply in Subpart A of
14 Document Request No. 1 all financial statements and
15 annual reports since January 1, 2006, sort of, you know,
16 off-the-shelf material.

17 I understand they would be marked confidential,
18 and we would comply with the confidentiality provisions
19 of the confidentiality agreement that we have in place.
20 But it struck us as being relevant to just basically
21 understanding who we're litigating with and what the sort
22 of economics of their operations are involved.

23 CHAIRMAN KOLBECK: Thank you.

24 Ms. Ford.

25 MS. FORD: I won't repeat all of my arguments.

1 Again, we don't believe this is relevant information that
2 they are entitled to. I would also point out that this
3 is a closely held partnership. They don't do the
4 traditional annual statement, 10-K or whatever it is that
5 publicly traded companies file.

6 So I don't know if they have -- I'd have to ask.
7 I don't know if they have what you would consider an
8 annual report that, for instance, you could find on EDGAR
9 for Verizon. But I guess you've already ordered us to
10 produce the financial statements or the investments so I
11 imagine the investments will be -- from the prior
12 question will be contained within the financial
13 statement.

14 CHAIRMAN KOLBECK: Staff.

15 MS. SEMMLER: The same recommendation. Not
16 basing the decision at all on relevancy, just the
17 discovery standard's broad.

18 CHAIRMAN KOLBECK: All right.

19 Verizon, any reply?

20 MR. OATWAY: No. I think I initially stated
21 our -- would you like me to address Subpart C separately
22 or stick with A for now?

23 CHAIRMAN KOLBECK: Let's just stick with A for
24 now.

25 MR. OATWAY: Okay. Nothing more.

1 CHAIRMAN KOLBECK: Ms. Wiest, any questions?

2 MS. AILTS WIEST: I don't have any questions.

3 CHAIRMAN KOLBECK: Recommendation.

4 MS. AILTS WIEST: I would recommend granting 1A
5 for the same reasons.

6 CHAIRMAN KOLBECK: Okay. Any Commissioner
7 questions?

8 Hearing none, any motions?

9 I would Motion that -- I would Motion to grant
10 Verizon's Document Request No. 1 of all financial
11 statements and annual reports of Midcontinent since
12 January 1, 2006, if they exist.

13 In other words, if that is something that the
14 company regularly puts out and reports and statements to
15 investors, then they should supply that. If the annual
16 reports are something that is not made, then I don't
17 think they should have to supply that.

18 Any discussion on that?

19 COMMISSIONER NELSON: I would just say I'm not
20 going to be supporting this particular Motion. And in my
21 mind I do differentiate this from the earlier question.
22 The earlier question was specifically directed at
23 investment and VoIP. That is the subject matter at hand
24 here.

25 This is a much broader question asking for the

1 entire financial statement of the entire company. In my
2 mind that's a much broader and different question and,
3 therefore, I'll be voting no.

4 CHAIRMAN KOLBECK: Very good.

5 Any other discussion?

6 Hearing none, Commissioner Nelson.

7 COMMISSIONER NELSON: Nay.

8 CHAIRMAN KOLBECK: Commissioner Hanson.

9 COMMISSIONER HANSON: No.

10 CHAIRMAN KOLBECK: Commissioner Kolbeck votes
11 aye. Off there alone on an island again.

12 Is there a positive motion, I guess you would
13 call it, a Motion to deny then?

14 COMMISSIONER NELSON: Move to deny document
15 request 1A.

16 CHAIRMAN KOLBECK: Okay. We have a Motion.

17 Any discussion?

18 Hearing none, Commissioner Nelson.

19 COMMISSIONER NELSON: Aye.

20 CHAIRMAN KOLBECK: Commissioner Hanson.

21 COMMISSIONER HANSON: Aye.

22 CHAIRMAN KOLBECK: Commissioner Kolbeck votes
23 no. Motion succeeds.

24 Now, Mr. Oatway, if you would like to address
25 item E, that would be good.

1 MR. OATWAY: Yes, sir. I think item E is
2 probably the simplest one. And I'll admit it's the
3 farthest down the scale in terms of relevancy.

4 The cable franchises -- you know, and this is
5 really, you know, simply the fact that we're trying to
6 understand the nature of the company that's sued us.

7 But cable franchises in our experience sometimes
8 include information about VoIP service. Very rarely, but
9 I have seen cable franchises in other states anyway that
10 discuss voice. You know, rights of way issues could be
11 relevant to their dual network issues. So we simply
12 asked for that information in order to kind of, you know,
13 have a full record.

14 I think that's about all I have to say about
15 that.

16 CHAIRMAN KOLBECK: Thank you.

17 Ms. Ford.

18 MS. FORD: Again, we don't believe this
19 information is relevant. Cable franchises are completely
20 divorced from phone service, in our opinion. And we just
21 don't see the relevance.

22 And, frankly, again, it doesn't sound like even
23 Verizon knows for sure what it is in those agreements
24 they might be looking for, if you look at their written
25 request in their Motion to Compel. They just think there

1 might be some kind of information in those agreements.
2 But we don't think that's sufficient to require us to
3 produce them.

4 CHAIRMAN KOLBECK: Thank you.
5 Staff.

6 MS. SEMMLER: To the extent any of the requested
7 documents may have information about VoIP services, I
8 believe it is discoverable.

9 CHAIRMAN KOLBECK: Okay.
10 Verizon, any reply?

11 MR. OATWAY: No, not really. You know, I think
12 Staff's point is a fair one that, you know, to the extent
13 that there's no discussion of voice services, I think we
14 would concede that they're not relevant. And, you know,
15 maybe it's a fishing expedition, but it's a matter of
16 trying to develop a full record.

17 CHAIRMAN KOLBECK: Okay.
18 Ms. Wiest, any questions?

19 MS. AILTS WIEST: I don't have any questions.

20 CHAIRMAN KOLBECK: Recommendation.

21 MS. AILTS WIEST: You know, I had trouble with
22 this one. I don't see how Verizon has made much of a
23 case for requesting this information.

24 CHAIRMAN KOLBECK: Sure. All right.
25 Commissioner action or questions?

1 I just have a statement, I think, on a franchise
2 agreement. Anything I've ever been associated with on
3 franchise agreements that deals with satellites and cable
4 and how much cable TV's going to cost and how much a
5 station is going to cost, I don't know -- I think -- I'm
6 inclined to motion that we deny this request. I'll just
7 put it that way.

8 So we have a Motion. Any discussion on the
9 Motion?

10 All right. No discussion. We'll continue to
11 vote.

12 Commissioner Nelson.

13 COMMISSIONER NELSON: Aye.

14 CHAIRMAN KOLBECK: Commissioner Hanson.

15 COMMISSIONER HANSON: I vote no.

16 CHAIRMAN KOLBECK: And Commissioner Kolbeck
17 votes aye also. The Motion passes. So the franchise
18 agreements are out.

19 I believe that is our last item to discuss
20 here today, unless anyone else has anything,
21 procedural schedule, anything they need to speak about.
22 If not --

23 COMMISSIONER NELSON: If I could just make a
24 brief comment, I'd like to thank both sides for resolving
25 the issues that you did before you came here and,

1 secondly, for greatly challenging us today.

2 Thank you.

3 (The proceeding is concluded at 3:08 p.m.)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

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

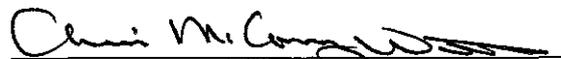
8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 30th day of
11 March, 2011, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 12th day of
14 April, 2011.

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Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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	4	36:20, 59:2	amendment [3] - 39:14, 43:20, 46:1	31:4, 31:21, 33:12, 1
'06 [1] - 39:24 '96 [1] - 40:3 0	4 [7] - 3:6, 3:14, 4:21, 7:1, 7:14, 24:11 412 [1] - 2:7 4C [4] - 19:15, 20:18, 20:23, 21:23 4E [3] - 18:10, 20:17, 20:19	address [2] - 63:21, 65:24 admissible [8] - 19:7, 30:2, 30:9, 31:7, 31:13, 33:25, 34:2, 34:12 admit [3] - 27:23, 28:25, 66:2 advance [1] - 4:18 affect [1] - 17:17 afternoon [3] - 4:7, 15:6, 32:17 AGAINST [1] - 1:5 ago [1] - 17:2 agree [7] - 28:7, 32:6, 33:6, 50:18, 54:9, 56:21, 56:22 agreed [1] - 36:16 agreeing [1] - 36:6 agreement [25] - 23:9, 29:15, 29:17, 29:19, 29:21, 29:22, 30:3, 30:8, 30:10, 30:12, 30:17, 30:24, 31:1, 36:12, 36:14, 38:17, 38:19, 39:5, 39:12, 39:13, 42:18, 59:19, 59:20, 62:19, 68:2 agreements [12] - 6:9, 6:18, 18:12, 23:6, 29:24, 35:25, 38:25, 39:16, 66:23, 67:1, 68:3, 68:18 Ailts [1] - 1:14 ALLTS [28] - 18:9, 19:14, 20:22, 21:4, 21:12, 21:18, 21:20, 35:10, 35:22, 36:9, 42:5, 42:8, 43:7, 44:14, 44:22, 45:6, 51:24, 52:13, 53:19, 54:7, 55:7, 57:6, 58:12, 60:7, 64:2, 64:4, 67:19, 67:21 akin [1] - 54:20 allegation [1] - 38:21 alleged [3] - 59:9, 62:10, 62:11 allocations [1] - 53:5 allow [3] - 8:7, 32:24, 46:4 allowable [1] - 34:12 allowed [1] - 35:16 alone [1] - 65:11 ambiguity [4] - 32:4, 33:13, 33:14, 33:17 ambiguous [1] - 30:13 amend [1] - 42:21 Amended [1] - 4:4	amendments [1] - 29:18 amount [1] - 17:4 analysis [1] - 32:6 analyze [1] - 16:22 AND [1] - 1:5 annual [6] - 54:22, 62:15, 63:4, 63:8, 64:11, 64:15 answer [4] - 4:8, 5:4, 40:8, 48:16 answered [2] - 25:23, 26:5 anticipate [1] - 58:25 anticipated [1] - 40:5 anyway [1] - 66:9 apologize [1] - 60:19 apparent [1] - 46:1 APPEARANCES [2] - 1:19, 2:1 appearing [3] - 3:25, 7:12, 15:6 apple [1] - 38:7 applicability [1] - 5:17 applicable [2] - 53:10, 61:8 applied [1] - 52:21 applies [3] - 44:3, 56:23, 58:22 apply [11] - 48:14, 48:21, 49:17, 50:12, 52:2, 52:6, 53:2, 58:13, 58:16, 58:18, 58:21 applying [1] - 53:4 appointed [1] - 70:8 appreciate [3] - 4:9, 4:19, 25:18 appropriate [7] - 15:22, 32:7, 33:1, 43:23, 45:15, 48:11, 55:22 approve [1] - 41:20 approved [4] - 49:1, 49:2, 49:17, 49:18 April [1] - 70:14 arbitrage [2] - 31:3, 38:22 archives [1] - 41:4 areas [1] - 16:20 argue [3] - 32:15, 57:12, 58:1 argued [1] - 19:18 arguing [1] - 54:14 argument [25] - 4:7, 15:14, 15:20, 17:19, 18:10, 22:25, 23:12, 26:3, 26:4, 30:19,	56:17, 56:22, 57:21, 58:9, 58:13, 58:14, 59:16, 60:1 arguments [6] - 17:14, 34:23, 46:3, 51:17, 62:9, 62:25 arise [1] - 59:15 arrangement [1] - 18:24 arrangements [5] - 6:10, 6:18, 9:18, 9:24, 17:25 art [2] - 7:22, 21:16 ascertain [1] - 5:11 assert [1] - 33:14 asserting [1] - 33:17 asserts [2] - 32:5, 32:10 assess [2] - 54:24, 58:23 assist [1] - 4:8 associated [13] - 5:22, 20:5, 20:7, 20:8, 22:17, 28:13, 28:21, 29:8, 37:1, 47:18, 54:25, 62:12, 68:2 assume [3] - 24:1, 42:5, 44:15 asymmetrical [3] - 17:16, 31:3, 38:22 AT&T [5] - 8:9, 8:13, 8:15, 8:16, 8:17 attached [1] - 70:11 attack [1] - 46:15 attempted [1] - 4:4 attorney [1] - 32:11 authorized [1] - 39:14 available [2] - 41:9, 44:21 Avenue [1] - 2:7 AXTHELM [2] - 10:23, 11:4 Axthelm [1] - 1:18 aye [15] - 26:11, 26:14, 27:5, 27:7, 27:9, 46:9, 46:11, 46:13, 61:12, 61:16, 65:11, 65:19, 65:21, 68:13, 68:17
0007 [3] - 56:8, 56:14, 58:6 0604 [1] - 56:14 06042 [1] - 58:6 1	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
10-K [1] - 63:4 10-minute [1] - 46:14 12th [1] - 70:13 15 [6] - 3:8, 46:16, 47:1, 47:4, 55:16, 60:8 16.12 [1] - 29:19 17 [1] - 3:2 18 [1] - 33:16 1986 [1] - 40:3 1:25 [1] - 2:9 1A [2] - 64:4, 65:15 2	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	8 8 [2] - 3:2, 27:18	A
2 2 [7] - 3:7, 27:11, 27:14, 27:17, 44:2, 44:25, 60:25 2006 [15] - 20:24, 40:14, 40:19, 40:24, 41:10, 42:8, 42:12, 44:4, 45:1, 47:5, 60:19, 60:22, 60:25, 62:15, 64:12 2009 [1] - 25:19 2010 [5] - 21:10, 22:8, 22:10, 24:21, 25:8 2011 [5] - 1:9, 2:8, 21:10, 70:11, 70:14 3	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	8 8 [2] - 3:2, 27:18	A
3 30 [1] - 1:9 30th [2] - 2:8, 70:10 31 [7] - 21:10, 22:9, 22:10, 24:21, 25:3, 25:8, 25:19 3:08 [1] - 69:3	8 8 [2] - 3:2, 27:18	8 8 [2] - 3:2, 27:18	8 8 [2] - 3:2, 27:18	A
3007 [3] - 56:8, 56:14, 58:6 0604 [1] - 56:14 06042 [1] - 58:6 1	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
10-K [1] - 63:4 10-minute [1] - 46:14 12th [1] - 70:13 15 [6] - 3:8, 46:16, 47:1, 47:4, 55:16, 60:8 16.12 [1] - 29:19 17 [1] - 3:2 18 [1] - 33:16 1986 [1] - 40:3 1:25 [1] - 2:9 1A [2] - 64:4, 65:15 2	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
2 2 [7] - 3:7, 27:11, 27:14, 27:17, 44:2, 44:25, 60:25 2006 [15] - 20:24, 40:14, 40:19, 40:24, 41:10, 42:8, 42:12, 44:4, 45:1, 47:5, 60:19, 60:22, 60:25, 62:15, 64:12 2009 [1] - 25:19 2010 [5] - 21:10, 22:8, 22:10, 24:21, 25:8 2011 [5] - 1:9, 2:8, 21:10, 70:11, 70:14 3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
30 [1] - 1:9 30th [2] - 2:8, 70:10 31 [7] - 21:10, 22:9, 22:10, 24:21, 25:3, 25:8, 25:19 3:08 [1] - 69:3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
3007 [3] - 56:8, 56:14, 58:6 0604 [1] - 56:14 06042 [1] - 58:6 1	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
10-K [1] - 63:4 10-minute [1] - 46:14 12th [1] - 70:13 15 [6] - 3:8, 46:16, 47:1, 47:4, 55:16, 60:8 16.12 [1] - 29:19 17 [1] - 3:2 18 [1] - 33:16 1986 [1] - 40:3 1:25 [1] - 2:9 1A [2] - 64:4, 65:15 2	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
2 2 [7] - 3:7, 27:11, 27:14, 27:17, 44:2, 44:25, 60:25 2006 [15] - 20:24, 40:14, 40:19, 40:24, 41:10, 42:8, 42:12, 44:4, 45:1, 47:5, 60:19, 60:22, 60:25, 62:15, 64:12 2009 [1] - 25:19 2010 [5] - 21:10, 22:8, 22:10, 24:21, 25:8 2011 [5] - 1:9, 2:8, 21:10, 70:11, 70:14 3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
30 [1] - 1:9 30th [2] - 2:8, 70:10 31 [7] - 21:10, 22:9, 22:10, 24:21, 25:3, 25:8, 25:19 3:08 [1] - 69:3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
3007 [3] - 56:8, 56:14, 58:6 0604 [1] - 56:14 06042 [1] - 58:6 1	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
10-K [1] - 63:4 10-minute [1] - 46:14 12th [1] - 70:13 15 [6] - 3:8, 46:16, 47:1, 47:4, 55:16, 60:8 16.12 [1] - 29:19 17 [1] - 3:2 18 [1] - 33:16 1986 [1] - 40:3 1:25 [1] - 2:9 1A [2] - 64:4, 65:15 2	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
2 2 [7] - 3:7, 27:11, 27:14, 27:17, 44:2, 44:25, 60:25 2006 [15] - 20:24, 40:14, 40:19, 40:24, 41:10, 42:8, 42:12, 44:4, 45:1, 47:5, 60:19, 60:22, 60:25, 62:15, 64:12 2009 [1] - 25:19 2010 [5] - 21:10, 22:8, 22:10, 24:21, 25:8 2011 [5] - 1:9, 2:8, 21:10, 70:11, 70:14 3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
30 [1] - 1:9 30th [2] - 2:8, 70:10 31 [7] - 21:10, 22:9, 22:10, 24:21, 25:3, 25:8, 25:19 3:08 [1] - 69:3	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A
3007 [3] - 56:8, 56:14, 58:6 0604 [1] - 56:14 06042 [1] - 58:6 1	5 5 [1] - 4:22 50/50 [1] - 55:20 500 [1] - 2:7 53-8-5 [1] - 30:1 5:30 [1] - 4:18	7 7 [1] - 3:2	8 8 [2] - 3:2, 27:18	A

<p>54:4 basic [4] - 47:24, 51:20, 54:24, 55:1 basing [1] - 63:16 basis [1] - 30:16 bathroom [1] - 46:15 bear [1] - 24:10 beat [1] - 38:13 BEFORE [1] - 1:11 beginning [1] - 38:24 behalf [2] - 7:12, 33:17 behind [3] - 6:23, 38:16, 54:17 beneficiary [2] - 33:19, 33:20 benefit [3] - 5:23, 20:12, 32:20 benefits [2] - 17:15, 28:20 better [3] - 4:8, 18:16, 43:23 between [16] - 4:25, 9:6, 9:19, 16:10, 18:1, 18:24, 29:23, 30:7, 30:13, 30:14, 31:6, 31:12, 34:11, 37:10, 39:9, 40:22 beyond [3] - 27:24, 36:1, 51:18 big [2] - 32:24, 38:14 bit [2] - 16:14, 19:14 bite [1] - 38:6 Black [1] - 3:20 BLACK [1] - 1:5 board [1] - 20:2 Bobbi [1] - 1:17 books [5] - 49:9, 54:3, 57:22, 58:3, 58:11 Bourk [1] - 1:17 break [4] - 22:15, 46:14, 46:15 Brett [2] - 1:20, 3:25 Brian [1] - 1:17 brief [1] - 68:24 broad [11] - 6:24, 9:12, 26:17, 32:8, 32:25, 33:22, 43:14, 50:20, 55:23, 61:6, 63:17 broad-based [1] - 33:22 broader [3] - 31:25, 64:25, 65:2 broadly [1] - 20:3 Building [1] - 2:7 burden [4] - 54:15, 54:23, 59:25, 62:4 burdensome [8] - 21:3, 21:11, 22:23, 22:25, 25:1, 29:1,</p>	<p>59:13, 60:1 business [5] - 3:21, 9:15, 39:4, 40:2, 55:2 BUSINESS [1] - 1:6 Business [1] - 3:21 BY [2] - 1:4, 2:1</p> <p style="text-align: center;">C</p> <p>cable [6] - 66:4, 66:7, 66:9, 66:19, 68:3, 68:4 calculate [1] - 59:11 calculated [3] - 19:7, 33:24, 60:1 capable [1] - 47:11 Capitol [2] - 2:6, 2:7 carrier [19] - 7:18, 7:23, 7:24, 8:8, 8:10, 9:8, 9:22, 18:12, 18:13, 24:3, 29:4, 31:17, 34:14, 39:10, 41:21, 42:11, 44:3, 45:1 carrier's [3] - 34:8, 38:19, 39:5 carriers [29] - 5:1, 5:6, 5:10, 5:14, 5:15, 6:8, 6:13, 6:15, 6:16, 7:16, 8:1, 8:3, 8:4, 8:23, 9:4, 9:6, 9:7, 9:20, 10:1, 17:1, 17:9, 21:17, 23:7, 23:16, 23:21, 24:1, 24:4, 26:19, 38:25 carry [1] - 5:1 carrying [1] - 57:16 case [7] - 6:22, 9:2, 16:6, 16:17, 24:1, 48:20, 67:23 catch [1] - 33:8 caution [1] - 33:6 certain [1] - 21:18 certainly [10] - 33:13, 33:15, 33:18, 48:19, 52:16, 52:20, 53:8, 53:15, 54:9, 60:9 CERTIFICATE [1] - 70:2 Certified [2] - 70:6, 70:19 CERTIFY [1] - 70:8 CHAIRMAN [100] - 1:12, 1:12, 3:1, 4:9, 4:13, 7:2, 7:5, 7:8, 10:9, 10:14, 10:18, 10:20, 10:25, 15:2, 15:9, 15:17, 18:7,</p>	<p>21:21, 22:11, 22:18, 23:1, 23:4, 23:6, 24:6, 24:23, 25:6, 25:15, 26:8, 26:12, 26:14, 27:6, 27:8, 29:11, 31:10, 31:18, 33:3, 33:11, 34:3, 34:15, 39:20, 40:7, 41:2, 41:7, 41:11, 41:16, 42:6, 42:11, 42:15, 42:23, 43:5, 43:9, 43:19, 43:25, 44:18, 44:24, 45:9, 45:17, 45:22, 46:6, 46:10, 46:12, 46:19, 46:23, 46:25, 48:2, 50:14, 50:24, 51:22, 55:8, 56:21, 57:3, 60:14, 60:20, 60:23, 61:9, 61:13, 61:15, 61:23, 61:25, 62:23, 63:14, 63:18, 63:23, 64:1, 64:3, 64:6, 65:4, 65:8, 65:10, 65:16, 65:20, 65:22, 66:16, 67:4, 67:9, 67:17, 67:20, 67:24, 68:14, 68:16 chairman [11] - 3:24, 7:10, 25:14, 34:18, 35:17, 36:19, 38:6, 39:19, 42:14, 42:20, 61:5 chairs [1] - 27:11 challenging [1] - 69:1 change [1] - 21:25 changes [1] - 35:12 charged [1] - 52:10 charges [9] - 3:22, 5:7, 5:17, 8:18, 39:1, 47:23, 49:3, 50:12, 62:11 CHARGES [1] - 1:7 cheaper [1] - 58:7 check [1] - 10:23 checking [1] - 20:18 Cheri [3] - 1:24, 3:17, 70:18 CHERI [1] - 70:5 choice [2] - 8:7, 8:8 choose [1] - 8:8 chooses [1] - 8:9 chosen [4] - 7:22, 7:24, 8:13, 20:9 Chris [1] - 51:5 CHRIS [1] - 1:13 Christopher [1] - 2:2 claim [2] - 54:17, 59:22 clarify [5] - 18:11,</p>	<p>25:4, 25:7, 25:11, 43:3 clause [1] - 29:20 clear [7] - 16:3, 29:14, 30:5, 30:12, 32:21, 43:14, 43:16 cleared [1] - 10:6 clearly [1] - 17:22 client's [1] - 16:18 close [2] - 46:4, 59:21 closely [2] - 49:22, 63:3 code [1] - 30:1 coming [4] - 4:13, 17:5, 17:8, 18:17 commencing [1] - 2:8 comment [8] - 15:10, 33:9, 43:6, 43:8, 43:10, 55:24, 61:2, 68:24 Commission [20] - 4:20, 19:12, 48:8, 48:10, 48:13, 48:16, 48:18, 48:20, 49:1, 49:5, 49:18, 50:11, 52:5, 53:3, 54:2, 54:3, 56:3, 56:11, 56:18, 57:19 COMMISSION [3] - 1:1, 1:11, 1:14 Commission's [1] - 28:1 Commissioner [35] - 4:2, 21:21, 23:13, 24:6, 26:10, 26:12, 27:4, 27:6, 27:8, 34:4, 34:17, 35:2, 41:17, 43:13, 46:8, 46:10, 46:12, 55:9, 55:17, 60:15, 60:17, 61:11, 61:13, 61:15, 64:6, 65:6, 65:8, 65:10, 65:18, 65:20, 65:22, 67:25, 68:12, 68:14, 68:16 COMMISSIONER [39] - 1:13, 23:14, 24:20, 24:25, 25:14, 25:16, 26:11, 26:13, 27:5, 27:7, 34:18, 35:17, 36:2, 36:22, 38:4, 39:18, 42:14, 42:16, 42:20, 42:24, 43:21, 44:7, 44:13, 45:25, 46:9, 46:11, 61:2, 61:5, 61:12, 61:14, 64:19, 65:7, 65:9, 65:14, 65:19, 65:21, 68:13, 68:15, 68:23 Commissioners [4] -</p>	<p>3:25, 7:12, 34:5, 2 55:18 common [3] - 23:17, 23:20, 59:5 commonly [1] - 62:9 Communications [2] - 1:20, 3:19 communications [15] - 3:21, 27:20, 28:9, 28:23, 37:4, 37:12, 37:13, 37:21, 44:16, 44:17, 44:19, 44:20, 44:23, 45:1 COMMUNICATIONS [2] - 1:4, 1:6 companies [3] - 9:23, 17:6, 63:5 company [8] - 40:2, 49:9, 49:23, 52:25, 53:8, 64:14, 65:1, 66:6 Compel [3] - 4:23, 27:18, 66:25 compelling [1] - 34:24 compensated [4] - 49:7, 52:8, 57:18, 57:19 compensation [4] - 57:13, 57:23, 57:24, 58:2 COMPLAINT [1] - 1:4 Complaint [3] - 3:19, 5:4, 9:13 complete [1] - 19:11 completely [1] - 66:19 comply [1] - 62:18 concede [1] - 67:14 concept [1] - 45:16 concern [1] - 57:7 concerns [1] - 23:10 conclude [1] - 15:24 concluded [1] - 69:3 concrete [1] - 19:22 confidential [15] - 10:5, 10:6, 10:8, 11:5, 11:6, 15:1, 22:20, 25:12, 25:25, 26:20, 34:9, 38:18, 59:20, 59:22, 62:17 confidentiality [3] - 59:19, 62:18, 62:19 confirm [1] - 39:5 confirmation [2] - 38:20, 39:7 confirmed [1] - 30:24 confused [1] - 36:2 consider [3] - 43:19, 45:19, 63:7 considered [1] - 36:16 consist [1] - 22:15</p>
--	--	--	---	--

<p>consistent [1] - 24:22 constitutes [1] - 29:22 contained [1] - 63:12 contaminated [1] - 59:3 contemporaneous [1] - 29:24 contend [1] - 30:16 context [3] - 37:8, 53:2, 59:18 contingencies [1] - 36:5 continue [3] - 25:22, 27:3, 68:10 continues [1] - 5:20 contract [29] - 5:25, 19:3, 23:18, 28:6, 28:8, 28:16, 28:18, 28:24, 31:21, 31:22, 32:4, 33:13, 33:15, 33:18, 33:19, 33:20, 34:1, 35:13, 35:20, 35:22, 36:1, 37:6, 37:7, 37:8, 37:9, 37:24, 52:3, 52:10 contract's [1] - 31:24 contracted [1] - 16:25 contracting [2] - 19:20, 23:22 contracts [9] - 6:14, 6:15, 17:25, 24:4, 27:19, 28:2, 37:3, 40:1, 40:15 control [4] - 8:10, 9:9, 23:25, 26:25 convince [1] - 31:2 copies [2] - 27:19, 39:25 core [1] - 20:21 corporate [1] - 59:17 correct [9] - 3:3, 10:15, 22:13, 22:16, 23:20, 32:13, 52:8, 53:21, 70:11 correctly [3] - 22:9, 22:12, 23:16 correspondence [1] - 31:6 cost [4] - 53:3, 57:8, 68:4, 68:5 costs [9] - 47:17, 47:18, 47:19, 47:25, 51:12, 54:18, 55:1, 59:7, 59:8 counsel [1] - 30:21 Count [1] - 52:2 count [1] - 52:3 country [1] - 24:2 counts [1] - 35:20</p>	<p>COUNTY [1] - 70:3 couple [2] - 21:5, 21:22 course [3] - 19:5, 37:6, 59:16 cover [1] - 43:1 covered [1] - 36:13 crossed [1] - 39:9 crossing [1] - 20:19 CRR [1] - 1:24 crucial [2] - 16:6, 19:9 current [2] - 32:1, 48:14 custodian [1] - 29:4 customer [4] - 8:9, 8:13, 9:7, 9:20 customers [22] - 4:25, 5:25, 6:7, 7:17, 7:21, 7:23, 7:25, 8:4, 8:7, 9:3, 18:18, 18:19, 19:16, 19:18, 19:19, 20:8, 20:9, 21:8, 21:15, 24:13, 24:14, 25:9</p>	<p>49:3, 49:18, 56:18 default [1] - 40:10 defense [1] - 6:22 defenses [1] - 5:3 definitely [2] - 55:10, 55:20 deliver [3] - 6:11, 8:17, 50:2 delivered [3] - 9:7, 17:6, 18:17 delivering [3] - 5:6, 5:14, 50:3 delivers [1] - 8:15 Demaris [2] - 1:18, 10:22 denied [1] - 28:2 deny [4] - 26:16, 65:13, 65:14, 68:6 dependance [1] - 59:9 dependency [1] - 62:10 depiction [1] - 50:18 deploy [1] - 47:6 deploying [1] - 62:12 derive [1] - 5:23 describe [4] - 15:22, 21:4, 47:4, 60:24 described [1] - 6:17 deserve [1] - 57:12 designate [1] - 24:21 designated [1] - 18:19 designed [1] - 9:12 desperately [1] - 38:17 detail [1] - 10:4 detailing [1] - 4:2 determine [3] - 48:11, 52:6, 53:1 determined [1] - 31:13 determining [1] - 52:20 develop [1] - 67:16 developed [1] - 48:19 developing [3] - 19:12, 29:9, 47:24 different [8] - 18:3, 21:17, 29:17, 53:4, 57:14, 61:20, 62:5, 65:2 differentiate [1] - 64:21 dig [1] - 31:8 direct [1] - 19:3 directed [1] - 64:22 directly [9] - 5:25, 9:1, 19:10, 19:17, 19:19, 20:8, 20:21, 54:16, 56:1 disagree [2] - 32:7, 45:12</p>	<p>disagreement [1] - 52:15 discoverable [1] - 67:8 discovery [24] - 6:21, 6:23, 9:12, 15:21, 15:25, 16:15, 17:11, 19:6, 28:10, 32:8, 33:1, 33:21, 33:23, 33:25, 34:12, 38:20, 40:9, 50:20, 55:22, 56:24, 59:1, 59:2, 59:3, 63:17 discuss [6] - 3:12, 24:18, 26:15, 66:10, 68:19 discussed [3] - 28:19, 35:15, 40:13 discusses [1] - 19:10 discussing [1] - 3:18 discussion [17] - 17:25, 25:13, 26:8, 27:2, 28:3, 45:24, 46:7, 55:17, 60:15, 60:17, 61:10, 64:18, 65:5, 65:17, 67:13, 68:8, 68:10 discussions [9] - 28:13, 28:15, 31:25, 35:18, 35:20, 35:24, 40:16, 43:15, 44:11 dispute [12] - 5:20, 8:6, 8:24, 8:25, 9:14, 15:21, 20:2, 20:3, 26:23, 37:7, 50:4, 52:11 disputed [3] - 5:16, 17:9, 50:4 disputer [3] - 20:1, 20:4, 20:13 disputers [4] - 17:7, 18:17, 18:19, 20:2 disputes [3] - 4:20, 20:1, 40:21 disputing [4] - 20:6, 20:7, 30:22, 39:6 distance [5] - 8:10, 8:14, 9:22, 18:20, 20:11 distinct [2] - 45:15 distinction [2] - 31:12, 34:11 divorced [1] - 66:20 DO [1] - 70:8 Docket [3] - 3:18, 27:10, 27:14 Document [8] - 3:7, 3:9, 44:2, 44:25, 46:16, 61:17, 62:14, 64:10</p>	<p>document [4] - 38:18, 46:16, 55:6, 65:14 documents [9] - 27:19, 29:5, 29:21, 33:2, 37:3, 37:20, 38:1, 39:25, 67:7 done [4] - 4:5, 16:14, 32:6, 53:12 door [2] - 38:9, 39:8 dotting [1] - 20:19 doubt [2] - 41:6, 41:8 down [5] - 25:19, 26:18, 34:20, 61:20, 66:3 dual [1] - 66:11 duly [1] - 70:8 duly-appointed [1] - 70:8 during [3] - 25:24, 40:20, 56:24</p>
D				E
	<p>D/B/A [1] - 1:6 Dakota [7] - 2:6, 2:8, 30:1, 31:5, 33:25, 70:7, 70:13 DAKOTA [2] - 1:2, 70:1 Darla [1] - 15:6 darned [2] - 38:12 data [4] - 20:15, 20:19, 22:6, 25:4 date [6] - 21:18, 21:19, 22:7, 40:10, 40:12, 40:25 Dated [1] - 70:13 dating [3] - 42:12, 44:4, 45:1 deal [7] - 3:4, 3:7, 23:4, 25:17, 36:3, 59:14, 62:8 dealings [1] - 60:10 deals [2] - 29:4, 68:3 dealt [1] - 59:18 December [7] - 21:10, 22:9, 22:10, 24:21, 25:3, 25:8, 25:19 decide [2] - 53:10, 58:17 decides [1] - 48:18 decipher [1] - 45:23 decision [4] - 5:8, 19:13, 50:11, 63:16 deemed [4] - 49:2,</p>			<p>e-mail [10] - 28:11, 28:12, 29:2, 30:10, 30:20, 31:5, 32:11, 37:18, 38:8, 39:9 e-mails [9] - 28:23, 35:11, 35:12, 38:10, 41:4, 42:1, 42:13, 42:17, 42:21 early [1] - 32:17 easier [1] - 10:7 East [1] - 2:7 easy [1] - 46:1 economic [13] - 4:24, 5:21, 5:23, 6:4, 8:20, 17:14, 17:15, 29:9, 31:23, 32:2, 37:10, 38:1 economics [2] - 16:10, 62:22 EDGAR [1] - 63:8 either [1] - 9:1 electronic [5] - 44:15, 44:16, 44:19, 44:21, 44:23 electronically [1] - 44:4 enabled [3] - 43:16, 45:8, 45:14 encompass [1] - 40:20 end [6] - 5:7, 15:1, 16:10, 21:10, 22:8, 36:6 ended [1] - 9:13 engaged [2] - 31:3, 31:21</p>

<p>enriched [2] - 56:10, 56:13</p> <p>enrichment [8] - 52:18, 54:16, 54:17, 55:14, 55:25, 56:1, 56:15, 56:19</p> <p>entered [3] - 28:18, 35:23, 35:25</p> <p>entering [1] - 57:7</p> <p>entire [6] - 16:1, 24:2, 29:22, 49:8, 65:1</p> <p>entirely [1] - 51:13</p> <p>entities [1] - 40:23</p> <p>entitled [9] - 2:6, 49:7, 51:20, 57:12, 57:18, 60:12, 63:2, 70:10</p> <p>entity [3] - 27:20, 28:10, 37:5</p> <p>equal [1] - 8:6</p> <p>equipment [1] - 47:6</p> <p>essentially [3] - 17:19, 32:16, 49:5</p> <p>estate [1] - 36:3</p> <p>evidence [7] - 16:7, 19:7, 30:2, 30:6, 32:3, 33:25, 34:1</p> <p>exactly [2] - 6:21, 34:9</p> <p>example [7] - 8:13, 16:24, 17:24, 19:10, 19:22, 19:25, 36:25</p> <p>exchange [2] - 16:25, 36:17</p> <p>exchanges [1] - 16:13</p> <p>exclusively [1] - 15:20</p> <p>exercise [1] - 54:12</p> <p>exist [8] - 31:5, 41:14, 41:22, 42:9, 42:13, 45:3, 64:12</p> <p>exists [1] - 44:4</p> <p>expedition [2] - 48:6, 67:15</p> <p>expenses [1] - 56:5</p> <p>expensive [1] - 53:6</p> <p>experience [1] - 66:7</p> <p>experts [1] - 16:21</p> <p>explain [1] - 42:24</p> <p>explained [1] - 15:15</p> <p>extent [20] - 5:22, 5:24, 18:15, 28:17, 28:18, 32:4, 33:12, 35:15, 36:10, 36:12, 40:10, 41:21, 42:6, 42:9, 42:12, 45:3, 52:5, 59:15, 67:6, 67:12</p> <p>external [4] - 28:9, 37:4, 37:21, 44:17</p> <p>extraneous [1] - 34:1</p>	<p style="text-align: center;">F</p> <p>facilities [1] - 47:6</p> <p>facing [1] - 32:12</p> <p>fact [12] - 5:23, 15:21, 29:16, 32:10, 32:14, 35:6, 37:18, 38:8, 50:17, 52:3, 52:10, 66:5</p> <p>factors [1] - 62:5</p> <p>facts [3] - 15:25, 16:1, 32:18</p> <p>fair [1] - 67:12</p> <p>fairly [3] - 29:14, 53:3, 53:6</p> <p>falling [1] - 55:22</p> <p>falls [1] - 54:14</p> <p>familiar [1] - 43:22</p> <p>far [3] - 6:12, 20:16</p> <p>farthest [1] - 66:3</p> <p>favor [1] - 34:21</p> <p>FCC [2] - 49:10, 58:17</p> <p>ferret [1] - 46:2</p> <p>fight [1] - 55:19</p> <p>figure [1] - 18:16</p> <p>file [3] - 4:4, 49:1, 63:5</p> <p>FILED [1] - 1:4</p> <p>filed [3] - 3:19, 4:23, 9:14</p> <p>final [3] - 35:19, 35:20, 35:22</p> <p>finally [1] - 36:5</p> <p>financial [14] - 49:8, 49:23, 52:22, 52:24, 53:19, 54:4, 57:22, 58:11, 60:10, 62:14, 63:10, 63:12, 64:10, 65:1</p> <p>financials [2] - 53:9, 53:10</p> <p>fine [3] - 4:11, 25:16, 36:22</p> <p>first [10] - 3:6, 3:16, 7:15, 10:9, 18:15, 19:8, 27:15, 39:24, 60:23, 61:20</p> <p>fishing [2] - 48:5, 67:15</p> <p>five [5] - 22:1, 24:17, 41:5, 41:24, 42:1</p> <p>flipping [1] - 58:24</p> <p>flow [1] - 19:23</p> <p>fluent [1] - 24:10</p> <p>focusing [2] - 40:15, 40:16</p> <p>folder [1] - 41:14</p> <p>follow [1] - 23:15</p> <p>following [2] - 11:6, 16:5</p>	<p>FOR [1] - 1:6</p> <p>forced [1] - 23:8</p> <p>FORD [32] - 7:10, 10:13, 11:3, 22:6, 22:14, 22:24, 23:3, 23:5, 23:23, 25:2, 29:13, 33:9, 33:12, 38:11, 41:6, 41:8, 41:12, 48:4, 51:5, 52:9, 52:23, 53:22, 55:24, 57:1, 57:4, 57:10, 60:18, 60:21, 61:22, 61:24, 62:25, 66:18</p> <p>Ford [18] - 1:20, 7:12, 23:19, 25:23, 26:5, 27:12, 28:4, 29:12, 31:20, 32:5, 37:18, 38:6, 48:3, 50:19, 51:25, 54:10, 62:24, 66:17</p> <p>Ford's [2] - 34:22, 55:11</p> <p>format [1] - 44:21</p> <p>forth [3] - 5:3, 6:5, 40:18</p> <p>forthcoming [1] - 26:20</p> <p>four [3] - 3:12, 4:17, 10:1</p> <p>frame [3] - 15:23, 39:23, 40:2</p> <p>franchise [3] - 68:1, 68:3, 68:17</p> <p>franchises [4] - 66:4, 66:7, 66:9, 66:19</p> <p>frankly [10] - 6:2, 8:5, 8:23, 30:19, 32:5, 35:4, 38:16, 38:23, 40:25, 66:22</p> <p>friendly [1] - 43:20</p> <p>front [2] - 4:20, 40:9</p> <p>full [5] - 19:12, 29:9, 60:2, 66:13, 67:16</p> <p>fully [1] - 15:14</p> <p>fun [1] - 51:3</p> <p>functions [1] - 36:8</p> <p>fundamentally [1] - 58:5</p> <p>future [2] - 32:1, 59:9</p> <p style="text-align: center;">G</p> <p>GARY [1] - 1:12</p> <p>generally [1] - 59:14</p> <p>given [13] - 6:14, 6:15, 7:23, 16:14, 17:19, 21:8, 22:6, 22:18, 22:19, 25:11, 32:25,</p>	<p>46:3, 61:3</p> <p>grabs [1] - 9:16</p> <p>grant [1] - 20:15, 24:12, 24:15, 44:1, 55:15, 60:16, 60:18, 60:21, 61:1, 61:4, 64:9</p> <p>granted [1] - 34:14</p> <p>granting [2] - 60:8, 64:4</p> <p>great [2] - 25:17, 28:5</p> <p>greater [2] - 20:7, 49:4</p> <p>greatly [1] - 69:1</p> <p>Greg [1] - 1:16</p> <p>guess [21] - 4:22, 21:7, 21:23, 24:3, 27:15, 27:25, 35:8, 36:9, 40:4, 41:19, 42:17, 43:8, 43:10, 45:9, 45:18, 52:23, 53:24, 57:1, 61:20, 63:9, 65:12</p> <p style="text-align: center;">H</p> <p>hand [4] - 28:24, 35:5, 62:1, 64:23</p> <p>handling [1] - 4:6</p> <p>hands [1] - 6:25</p> <p>HANSON [19] - 1:12, 25:14, 25:16, 26:13, 27:7, 34:18, 35:17, 36:2, 36:22, 38:4, 39:18, 42:14, 42:16, 46:11, 61:5, 61:14, 65:9, 65:21, 68:15</p> <p>Hanson [8] - 26:12, 27:6, 34:17, 46:10, 61:13, 65:8, 65:20, 68:14</p> <p>happy [2] - 4:16, 4:17</p> <p>hard [1] - 52:23</p> <p>harder [1] - 34:6</p> <p>head [1] - 45:5</p> <p>hear [3] - 4:11, 35:9</p> <p>heard [4] - 15:2, 33:16, 35:8, 53:7</p> <p>hearing [13] - 26:9, 26:21, 27:3, 31:14, 34:13, 35:1, 41:18, 46:8, 55:12, 61:11, 64:8, 65:6, 65:18</p> <p>heightened [1] - 59:23</p> <p>held [3] - 2:5, 49:22, 63:3</p> <p>helps [2] - 19:11</p> <p>HEREBY [1] - 70:8</p> <p>herring [2] - 36:23, 51:3</p>	<p>herrings [2] - 38:13, 38:15</p> <p>highlights [1] - 32:12</p> <p>highly [4] - 18:4, 59:16, 59:20, 59:21</p> <p>Hills [1] - 3:20</p> <p>HILLS [1] - 1:5</p> <p>historically [1] - 47:21</p> <p>history [3] - 28:12, 30:10, 37:1</p> <p>hits [1] - 46:4</p> <p>Honor [4] - 4:12, 33:10, 45:13, 45:21</p> <p style="text-align: center;">I</p> <p>Idea [4] - 6:22, 17:20, 24:8, 54:17</p> <p>identified [4] - 10:2, 17:4, 24:16, 25:10</p> <p>identify [2] - 8:2, 25:9</p> <p>identity [1] - 7:15</p> <p>II [1] - 52:2</p> <p>imagine [1] - 63:11</p> <p>implied [2] - 52:3, 52:9</p> <p>important [6] - 16:9, 20:16, 28:16, 32:14, 35:23, 37:9</p> <p>imposing [1] - 54:23</p> <p>IN [1] - 1:4</p> <p>inadmissible [1] - 35:6</p> <p>INC [2] - 1:5, 1:6</p> <p>inclined [1] - 68:6</p> <p>include [10] - 16:22, 40:11, 42:17, 43:14, 44:8, 44:11, 45:15, 45:19, 66:8</p> <p>included [1] - 45:8</p> <p>including [5] - 27:19, 29:21, 37:3, 39:25, 40:21</p> <p>incorrect [1] - 17:15</p> <p>indicated [4] - 20:24, 23:16, 27:22, 28:5</p> <p>indicating [1] - 58:20</p> <p>indirect [1] - 20:12</p> <p>individual [1] - 8:3</p> <p>industry [3] - 16:24, 23:17, 23:20</p> <p>informally [1] - 36:16</p> <p>information [66] - 4:24, 5:12, 5:21, 6:7, 6:19, 6:25, 7:19, 8:5, 8:21, 9:11, 9:17, 16:5, 16:15, 16:16, 16:18, 17:11, 17:23, 18:6, 19:9, 19:21,</p>
---	--	---	---	--

<p>19:24, 20:23, 25:12, 25:25, 28:13, 31:16, 32:23, 34:10, 34:13, 34:19, 38:18, 44:25, 47:20, 47:24, 48:1, 48:6, 50:10, 51:20, 52:22, 53:14, 53:16, 53:24, 54:5, 54:10, 54:15, 54:21, 55:1, 56:24, 57:2, 57:4, 58:25, 59:12, 59:14, 59:17, 59:20, 60:4, 60:10, 60:13, 61:7, 63:1, 66:8, 66:12, 66:19, 67:1, 67:7, 67:23</p> <p>informed [1] - 9:25</p> <p>initial [4] - 4:22, 27:18, 40:9, 41:1</p> <p>instance [2] - 8:9, 63:8</p> <p>integrated [2] - 30:4, 30:11</p> <p>integration [1] - 29:20</p> <p>intended [1] - 6:23</p> <p>intends [1] - 47:15</p> <p>intent [2] - 30:4, 30:17</p> <p>interconnection [1] - 43:15</p> <p>interest [1] - 29:8</p> <p>interested [3] - 20:5, 22:12, 35:1</p> <p>interexchange [18] - 5:1, 5:5, 5:9, 5:13, 5:15, 6:11, 7:18, 7:22, 7:24, 8:8, 9:8, 9:19, 10:1, 21:17, 27:21, 30:21, 37:5, 38:25</p> <p>internal [4] - 28:9, 37:4, 44:17, 55:19</p> <p>internally [1] - 37:21</p> <p>internet [7] - 11:3, 43:15, 44:5, 44:11, 45:2, 45:7, 45:10</p> <p>interpret [1] - 37:24</p> <p>interpretation [2] - 31:22, 37:7</p> <p>interpreted [1] - 30:3</p> <p>Interrogatories [2] - 4:17, 30:20</p> <p>Interrogatory [12] - 3:2, 3:6, 3:8, 3:14, 4:21, 7:1, 7:14, 24:11, 47:1, 47:3, 55:16, 60:8</p> <p>interrogatory [5] - 5:19, 6:6, 15:8, 47:8, 60:24</p> <p>interstate [1] - 58:15</p>	<p>Interveners [3] - 1:21, 15:4, 15:7</p> <p>intimately [1] - 43:22</p> <p>intrastate [1] - 58:16</p> <p>introduced [1] - 21:16</p> <p>invest [2] - 51:16, 57:24</p> <p>invested [1] - 50:1</p> <p>investing [2] - 51:12, 58:7</p> <p>investment [6] - 47:16, 49:19, 50:7, 54:25, 59:10, 64:23</p> <p>investments [9] - 47:5, 47:25, 51:12, 51:21, 53:20, 60:25, 62:6, 63:10, 63:11</p> <p>investors [1] - 64:15</p> <p>involve [2] - 48:22, 53:4</p> <p>involved [8] - 8:20, 9:5, 18:13, 41:13, 53:3, 53:14, 53:25, 62:22</p> <p>involves [3] - 8:25, 9:20, 54:18</p> <p>IP [11] - 43:16, 44:12, 45:8, 45:11, 45:14, 45:20, 47:13, 50:2, 50:5, 52:7</p> <p>IP-enabled [3] - 43:16, 45:8, 45:14</p> <p>ironic [1] - 30:18</p> <p>irrelevant [5] - 16:2, 16:18, 16:20, 17:23, 51:13</p> <p>island [1] - 65:11</p> <p>issue [20] - 28:17, 29:8, 37:20, 37:22, 43:2, 44:14, 46:1, 47:16, 47:20, 47:22, 48:7, 50:17, 50:18, 50:19, 51:8, 51:10, 51:14, 55:25, 56:1, 58:24</p> <p>issues [10] - 5:21, 15:23, 17:17, 20:21, 44:12, 47:18, 57:8, 66:10, 66:11, 68:25</p> <p>item [8] - 24:11, 24:18, 26:15, 53:15, 61:17, 65:25, 66:1, 68:19</p> <p>itself [4] - 19:9, 30:11, 31:1, 54:11</p> <p>IXC [8] - 20:6, 20:7, 20:9, 24:14, 37:11, 37:12, 37:13</p> <p>IXCs [7] - 5:24, 6:1, 6:8, 16:12, 17:3, 19:16, 19:20</p>	<p style="text-align: center;">J</p> <p>January [7] - 20:24, 40:19, 40:24, 47:5, 60:25, 62:15, 64:12</p> <p>job [1] - 4:5</p> <p>John [1] - 1:15</p> <p>jurisdiction [1] - 54:2</p> <p>justice [1] - 54:20</p> <p style="text-align: center;">K</p> <p>Kara [1] - 1:15</p> <p>Kathryn [1] - 1:20</p> <p>Kathy [3] - 7:12, 21:16, 51:3</p> <p>keep [2] - 28:11, 36:25</p> <p>key [1] - 16:7</p> <p>kick [1] - 27:13</p> <p>kind [8] - 3:5, 19:23, 24:8, 32:12, 54:15, 55:12, 66:12, 67:1</p> <p>kinds [5] - 20:14, 28:15, 59:6, 59:14, 62:9</p> <p>Knology [2] - 3:19, 3:20</p> <p>KNOLOGY [2] - 1:4, 1:5</p> <p>known [1] - 5:16</p> <p>knows [2] - 17:6, 66:23</p> <p>Koenecke [4] - 1:20, 3:16, 3:25, 4:16</p> <p>KOENECKE [1] - 3:24</p> <p>Kolbeck [7] - 26:14, 27:8, 46:12, 61:15, 65:10, 65:22, 68:16</p> <p>KOLBECK [99] - 1:12, 3:1, 4:9, 4:13, 7:2, 7:5, 7:8, 10:9, 10:14, 10:18, 10:20, 10:25, 15:2, 15:9, 15:17, 18:7, 21:21, 22:11, 22:18, 23:1, 23:4, 23:6, 24:6, 24:23, 25:6, 25:15, 26:8, 26:12, 26:14, 27:6, 27:8, 29:11, 31:10, 31:18, 33:3, 33:11, 34:3, 34:15, 39:20, 40:7, 41:2, 41:7, 41:11, 41:16, 42:6, 42:11, 42:15, 42:23, 43:5, 43:9, 43:19, 43:25, 44:18, 44:24, 45:9, 45:17, 45:22, 46:6, 46:10, 46:12, 46:19, 46:23, 46:25,</p>	<p>48:2, 50:14, 50:24, 51:22, 55:8, 56:21, 57:3, 60:14, 60:20, 60:23, 61:9, 61:13, 61:15, 61:23, 61:25, 62:23, 63:14, 63:18, 63:23, 64:1, 64:3, 64:6, 65:4, 65:8, 65:10, 65:16, 65:20, 65:22, 66:16, 67:4, 67:9, 67:17, 67:20, 67:24, 68:14, 68:16</p> <p style="text-align: center;">L</p> <p>la-la-la-la-la [1] - 40:1</p> <p>laid [1] - 26:21</p> <p>last [10] - 3:9, 4:4, 24:17, 38:6, 39:10, 41:5, 46:20, 55:24, 61:17, 68:19</p> <p>law [1] - 30:6</p> <p>Law [1] - 31:5</p> <p>lawfully [2] - 49:2, 49:17</p> <p>lead [3] - 19:7, 33:24, 61:7</p> <p>leading [1] - 30:7</p> <p>leads [1] - 61:17</p> <p>least [6] - 20:23, 21:2, 21:3, 21:11, 59:2, 59:13</p> <p>led [1] - 35:21</p> <p>legacy [1] - 58:15</p> <p>lengths [1] - 28:5</p> <p>less [2] - 56:20, 58:22</p> <p>lesser [1] - 58:13</p> <p>level [1] - 59:23</p> <p>levels [1] - 47:16</p> <p>likely [2] - 16:21, 60:5</p> <p>limit [1] - 44:16</p> <p>limited [3] - 44:15, 44:18, 44:23</p> <p>Lindsey [1] - 15:5</p> <p>lindsey [1] - 1:21</p> <p>line [3] - 10:10, 10:12, 10:21</p> <p>lines [2] - 29:3, 51:18</p> <p>lingo [1] - 45:18</p> <p>listen [1] - 59:7</p> <p>listening [1] - 34:22</p> <p>litigating [2] - 62:8, 62:21</p> <p>litigation [7] - 6:3, 6:4, 15:24, 17:18, 37:8, 55:3, 60:6</p> <p>LLC [1] - 1:5</p> <p>local [1] - 16:25</p> <p>look [3] - 18:15, 53:8,</p>	<p>66:24</p> <p>looked [1] - 41:8</p> <p>looking [11] - 5:18, 20:5, 21:12, 21:15, 26:25, 34:24, 43:2, 47:23, 54:13, 60:3, 66:24</p> <p>looks [1] - 48:6</p> <p>loud [2] - 4:10, 7:11</p> <p>lower [2] - 19:20, 56:9</p> <p>lows [1] - 17:16</p> <p style="text-align: center;">M</p> <p>magic [1] - 50:6</p> <p>mail [10] - 28:11, 28:12, 29:2, 30:10, 30:20, 31:5, 32:11, 37:18, 38:8, 39:9</p> <p>mails [9] - 28:23, 35:11, 35:12, 38:10, 41:4, 42:1, 42:13, 42:17, 42:21</p> <p>maintaining [1] - 62:12</p> <p>major [1] - 40:20</p> <p>manner [2] - 49:12, 56:10</p> <p>March [3] - 1:9, 2:8, 70:11</p> <p>marked [1] - 62:17</p> <p>master [1] - 29:19</p> <p>material [1] - 62:16</p> <p>matter [9] - 2:6, 3:18, 29:25, 31:1, 36:4, 37:23, 64:23, 67:15, 70:10</p> <p>MATTER [1] - 1:4</p> <p>matters [1] - 5:5</p> <p>maxed [1] - 4:10</p> <p>MCCOMSEY [1] - 70:5</p> <p>McComsey [2] - 1:24, 70:18</p> <p>MCI [2] - 1:5, 3:21</p> <p>mean [19] - 9:14, 19:17, 20:14, 20:18, 21:5, 21:24, 21:25, 35:11, 35:23, 42:25, 50:25, 52:14, 52:16, 53:2, 53:13, 53:24, 54:9, 58:5, 58:25</p> <p>meaningful [1] - 15:13</p> <p>means [4] - 3:4, 26:4, 30:17, 57:21</p> <p>meantime [1] - 58:19</p> <p>meeting [2] - 25:20, 34:20</p> <p>mention [1] - 3:17</p> <p>mentioned [2] - 17:2,</p>
--	--	---	--	--

<p>36:25 mentioning [1] - 33:7 microphone [1] - 4:10 MidAmerican [1] - 10:9 Midco [1] - 19:16 MIDCONTINENT [1] - 1:4 Midcontinent [77] - 1:20, 3:19, 4:25, 5:14, 5:22, 6:10, 7:9, 7:13, 7:16, 7:17, 7:21, 7:22, 8:2, 8:6, 8:7, 8:10, 8:11, 8:14, 8:19, 8:25, 9:2, 9:6, 9:9, 9:19, 9:21, 9:22, 9:25, 15:3, 16:11, 17:1, 17:9, 18:1, 18:20, 18:25, 20:10, 20:12, 21:3, 21:11, 22:3, 22:7, 24:13, 25:8, 26:19, 27:21, 28:11, 30:14, 30:15, 30:23, 31:6, 36:24, 37:10, 37:12, 38:23, 39:6, 39:9, 39:22, 41:4, 47:4, 47:15, 48:25, 49:3, 49:22, 50:1, 50:4, 51:11, 52:25, 54:3, 54:21, 54:24, 56:12, 57:12, 58:10, 60:9, 60:25, 64:11 Midcontinent's [18] - 4:19, 4:25, 5:1, 5:4, 8:12, 9:15, 16:10, 16:11, 17:5, 23:23, 23:25, 26:24, 32:20, 32:21, 32:22, 49:19, 53:9, 56:3 might [9] - 7:17, 19:19, 20:25, 29:5, 39:16, 41:9, 42:24, 66:24, 67:1 mind [6] - 22:3, 31:15, 41:19, 42:19, 64:21, 65:2 minus [1] - 56:14 mischaracterizes [1] - 31:20 miss [1] - 41:3 missed [2] - 3:11, 25:20 modified [1] - 39:14 moment [1] - 17:2 month [4] - 20:23, 21:5, 22:1, 24:16 months [1] - 21:6 most [2] - 20:16, 24:1 Motion [31] - 4:4, 4:22,</p>	<p>24:18, 25:7, 25:18, 25:21, 26:1, 26:9, 26:16, 27:2, 27:18, 41:20, 42:21, 43:24, 43:25, 45:23, 55:15, 60:16, 60:18, 60:21, 61:1, 64:9, 64:20, 65:13, 65:16, 65:23, 66:25, 68:8, 68:9, 68:17 motion [3] - 24:9, 65:12, 68:6 motions [1] - 64:8 move [3] - 42:20, 48:20, 65:14 moving [1] - 3:15 MR [36] - 3:24, 4:11, 4:15, 7:4, 7:7, 10:17, 10:19, 15:19, 18:14, 19:22, 21:1, 21:7, 21:14, 21:19, 22:16, 27:15, 31:20, 36:19, 36:23, 40:8, 43:10, 44:10, 45:13, 45:21, 46:22, 46:24, 47:3, 51:2, 51:6, 54:9, 58:14, 62:3, 63:20, 63:25, 66:1, 67:11 MS [71] - 7:10, 10:13, 10:23, 11:3, 11:4, 15:5, 15:12, 18:9, 19:14, 20:22, 21:4, 21:12, 21:18, 21:20, 22:6, 22:14, 22:24, 23:3, 23:5, 23:23, 25:2, 29:13, 31:11, 33:5, 33:9, 33:12, 34:9, 35:10, 35:22, 36:9, 38:11, 40:4, 41:6, 41:8, 41:12, 42:5, 42:8, 43:7, 44:14, 44:22, 45:6, 48:4, 50:16, 51:5, 51:24, 52:9, 52:13, 52:23, 53:19, 53:22, 54:7, 55:7, 55:24, 57:1, 57:4, 57:6, 57:10, 58:12, 60:7, 60:18, 60:21, 61:22, 61:24, 62:25, 63:15, 64:2, 64:4, 66:18, 67:6, 67:19, 67:21 multiple [1] - 29:16 musical [1] - 27:11 must [1] - 38:13</p>	<p>20:25 nature [7] - 6:17, 17:16, 28:16, 28:19, 47:9, 53:5, 66:6 nay [1] - 65:7 necessarily [4] - 16:4, 19:1, 32:6 necessary [1] - 26:2 need [15] - 3:12, 8:22, 23:8, 25:11, 26:17, 29:8, 44:7, 55:13, 56:16, 56:24, 57:9, 57:23, 58:4, 62:11, 68:21 needing [1] - 58:2 needs [2] - 9:23, 40:5 negotiating [1] - 36:3 negotiation [3] - 28:12, 35:19, 36:25 negotiations [2] - 29:24, 30:7 Nelson [8] - 26:10, 27:4, 35:2, 46:8, 61:11, 65:6, 65:18, 68:12 NELSON [21] - 1:13, 23:14, 24:20, 24:25, 26:11, 27:5, 42:20, 42:24, 43:21, 44:7, 44:13, 45:25, 46:9, 61:2, 61:12, 64:19, 65:7, 65:14, 65:19, 68:13, 68:23 network [30] - 17:5, 17:6, 24:2, 47:7, 47:9, 47:11, 47:14, 47:16, 47:17, 47:18, 47:24, 49:8, 49:14, 49:20, 51:12, 51:13, 51:16, 54:25, 55:1, 56:6, 56:13, 57:13, 57:16, 57:17, 58:2, 58:7, 59:8, 60:11, 62:6, 66:11 networks [3] - 47:25, 49:12, 62:13 never [2] - 33:16, 42:18 new [1] - 55:5 next [5] - 3:7, 18:14, 20:19, 48:20, 54:23 none [11] - 26:9, 27:3, 41:18, 46:8, 51:13, 51:14, 51:16, 61:11, 64:8, 65:6, 65:18 nonVoIP [2] - 18:3, 28:19 normally [1] - 22:5 Notary [2] - 70:7, 70:18</p>	<p>note [3] - 15:20, 28:4, 51:2 notes [2] - 25:19, 34:19 nothing [7] - 8:11, 8:19, 15:15, 37:6, 50:21, 51:8, 63:25 notion [2] - 39:15, 51:7 number [13] - 7:20, 7:25, 21:8, 21:13, 21:15, 21:23, 22:7, 22:19, 22:20, 24:11, 25:11, 50:7 numbers [5] - 7:23, 8:3, 22:17, 24:21, 25:10</p> <p style="text-align: center;">O</p> <p>Oatway [11] - 2:2, 4:6, 10:12, 10:18, 23:15, 38:5, 44:8, 46:21, 47:2, 62:1, 65:24 OATWAY [33] - 4:11, 4:15, 7:4, 7:7, 10:19, 15:19, 18:14, 19:22, 21:1, 21:7, 21:14, 21:19, 22:16, 27:15, 31:20, 36:19, 36:23, 40:8, 43:10, 44:10, 45:13, 45:21, 46:22, 47:3, 51:2, 51:6, 54:9, 58:14, 62:3, 63:20, 63:25, 66:1, 67:11 object [1] - 43:12 objection [1] - 43:8 obligated [2] - 9:10, 41:24 obviously [1] - 6:22 OF [8] - 1:2, 1:4, 1:5, 2:5, 70:1, 70:3 off-the-shelf [1] - 62:16 often [1] - 47:21 old [1] - 42:1 once [1] - 10:25 one [49] - 3:9, 5:3, 6:14, 10:1, 10:3, 15:11, 15:22, 19:25, 20:4, 21:13, 22:18, 23:1, 23:4, 24:10, 24:12, 24:16, 25:20, 26:3, 28:25, 29:15, 31:16, 32:10, 33:9, 34:14, 34:25, 36:20, 37:18, 38:6, 38:8, 40:21, 41:2, 44:14,</p>	<p>45:1, 45:18, 52:25, 53:13, 55:22, 55:24, 59:17, 66:2, 67:12, 67:22 one-day [1] - 23:4 ones [3] - 7:5, 7:7, 32:19 Onida [1] - 70:13 open [5] - 9:13, 38:9, 54:3, 57:22, 58:3 open-ended [1] - 9:13 opened [1] - 39:22 opening [1] - 49:8 opens [2] - 39:8, 58:10 operations [3] - 55:2, 60:4, 62:22 opinion [3] - 16:16, 27:1, 66:20 opportunity [1] - 32:15 opposed [3] - 20:9, 35:20, 41:14 oral [1] - 29:24 order [3] - 4:3, 51:16, 66:12 ordered [2] - 49:5, 63:9 outcome [1] - 16:6 overall [1] - 38:1 overly [1] - 22:23 own [2] - 5:25, 19:19</p> <p style="text-align: center;">P</p> <p>p.m [2] - 2:9, 69:3 page [2] - 4:22, 27:18 paid [1] - 52:15 paragraph [1] - 29:19 parole [4] - 30:1, 30:6, 32:3, 34:1 part [5] - 10:5, 26:21, 31:24, 35:18, 36:24 particular [13] - 6:8, 15:7, 20:1, 20:4, 21:9, 21:19, 37:16, 37:19, 38:2, 53:1, 53:17, 62:11, 64:20 parties [8] - 6:11, 15:14, 17:12, 23:18, 29:23, 30:7, 36:16, 45:6 partner [1] - 19:3 partnership [3] - 49:22, 57:5, 63:3 party [18] - 3:15, 6:25, 15:22, 16:2, 17:3, 18:13, 18:23, 19:2, 23:21, 30:13, 30:15,</p>
	N			
	<p>name [2] - 33:7, 34:8 narrow [2] - 4:19,</p>			

<p>30:21, 31:6, 33:15, 33:16, 33:18, 39:15 party's [2] - 30:4, 30:17 passes [1] - 68:17 past [3] - 5:16, 58:20, 59:10 pat [1] - 45:4 paths [1] - 39:9 pay [5] - 8:18, 49:12, 49:15, 56:12, 56:19 paying [2] - 39:1, 56:8 payment [1] - 30:23 pays [1] - 49:15 peer [1] - 49:21 penny [2] - 49:25, 50:2 people [5] - 10:11, 21:25, 33:7, 49:11, 49:13 percentage [1] - 18:16 perhaps [1] - 36:12 period [2] - 25:24, 40:20 person [2] - 29:5, 41:13 perspective [3] - 23:24, 48:5, 56:3 pertaining [2] - 44:5, 44:25 phone [4] - 8:14, 10:6, 10:21, 66:20 phrase [1] - 38:12 PIC [1] - 21:25 PIC'd [10] - 7:21, 7:25, 9:3, 9:7, 9:21, 18:18, 19:17, 21:15, 24:14, 25:9 pick [1] - 4:15 picks [1] - 8:13 PICs [1] - 22:7 picture [1] - 32:24 piece [5] - 16:7, 20:16, 27:15, 35:19, 53:13 Pierre [1] - 2:7 place [3] - 40:23, 59:19, 62:19 Plains [1] - 3:20 PLAINS [1] - 1:5 plan [1] - 47:20 play [5] - 6:2, 16:17, 23:8, 23:9, 60:6 players [1] - 48:22 plays [1] - 6:21 point [23] - 8:15, 17:21, 18:11, 19:5, 23:11, 24:3, 24:4, 24:5, 36:9, 36:20, 39:12, 48:24, 52:14, 53:24, 54:19, 56:15, 57:6, 57:9, 57:10,</p>	<p>60:12, 63:2, 67:12 pointed [1] - 49:10 policy [2] - 6:5, 17:17 portion [4] - 10:5, 10:8, 11:6, 15:1 position [13] - 15:7, 16:18, 32:20, 32:21, 32:22, 37:19, 51:7, 51:11, 52:14, 52:16, 54:4, 55:11 positions [1] - 15:15 positive [1] - 65:12 possession [1] - 5:13 possible [7] - 16:19, 35:14, 36:19, 41:12, 42:6, 52:21, 60:9 possibly [2] - 16:22, 18:22 potentially [4] - 18:18, 32:1, 37:11, 62:8 practical [1] - 24:3 practice [3] - 23:17, 23:20, 33:16 precedent [1] - 58:20 precisely [2] - 55:5, 56:6 premise [1] - 56:22 prepared [1] - 35:5 presentation [1] - 51:6 presented [1] - 26:1 presumably [1] - 31:25 pretty [2] - 20:1, 38:14 previous [2] - 28:3, 40:13 prices [1] - 36:5 pricing [4] - 6:17, 18:2, 18:3, 40:17 principal [1] - 40:22 private [1] - 57:4 problem [3] - 19:15, 32:12, 35:10 procedural [1] - 68:21 proceed [1] - 47:2 proceeding [14] - 17:21, 30:2, 30:9, 31:22, 32:17, 47:12, 47:13, 47:21, 48:9, 48:10, 48:22, 60:2, 60:12, 69:3 Proceedings [1] - 1:9 proceedings [5] - 31:8, 59:6, 62:10, 70:9, 70:12 PROCEEDINGS [1] - 2:5 process [1] - 35:19 produce [4] - 28:5, 42:10, 63:10, 67:3</p>	<p>produced [1] - 37:18 Professional [2] - 70:6, 70:19 proper [3] - 17:20, 53:1, 54:5 propose [2] - 40:12, 40:24 protection [1] - 59:24 protocol [6] - 43:15, 44:5, 44:11, 45:2, 45:7, 45:10 prove [1] - 57:22 provide [7] - 8:3, 9:10, 30:10, 31:2, 31:9, 39:25 provided [7] - 7:19, 7:20, 29:16, 29:18, 30:20, 31:17, 38:8 provider [13] - 8:6, 18:20, 28:6, 28:25, 29:10, 29:15, 29:20, 30:21, 37:25, 40:22, 50:8, 50:9, 57:14 provider's [1] - 37:16 providers [12] - 16:11, 16:12, 16:25, 18:1, 18:22, 18:23, 18:25, 19:2, 28:14, 37:1, 47:22, 56:11 provides [2] - 27:20, 37:5 providing [1] - 47:17 provision [2] - 37:24, 39:13 provisions [1] - 62:18 Public [2] - 70:7, 70:18 public [2] - 49:11, 49:14 PUBLIC [2] - 1:1, 1:11 publicly [3] - 49:23, 57:5, 63:5 purpose [3] - 6:6, 47:8, 55:6 pursue [1] - 17:11 put [11] - 5:3, 40:13, 40:25, 47:16, 47:20, 47:21, 47:25, 57:8, 60:5, 60:9, 68:7 puts [1] - 64:14 putting [1] - 6:5</p>	<p>quantum [1] - 52:18 quarter [1] - 21:10 quarterly [1] - 22:4 questions [23] - 4:3, 4:8, 18:8, 21:21, 23:13, 24:7, 25:23, 33:5, 34:4, 41:17, 54:24, 55:9, 55:10, 55:17, 59:15, 60:17, 64:1, 64:2, 64:7, 67:18, 67:19, 67:25 quick [1] - 10:24 quite [3] - 4:5, 6:21, 26:5 quoting [1] - 38:11 Qwest [3] - 49:4, 50:25</p>	<p>reasonable [6] - 29:7, 49:2, 49:3, 49:19, 56:4, 56:19 reasonably [2] - 19:6, 33:24 reasons [1] - 64:5 received [2] - 19:16, 52:22 receiving [1] - 20:12 recently [1] - 53:7 recess [1] - 46:18 recommend [3] - 31:15, 60:7, 64:4 recommendation [6] - 33:6, 34:7, 50:22, 63:15, 64:3, 67:20 recommends [1] - 34:13 record [12] - 10:5, 10:8, 16:1, 19:11, 19:12, 29:9, 33:8, 48:19, 52:1, 57:8, 66:13, 67:16 records [1] - 41:22 recovery [3] - 53:17, 56:5, 56:16 red [4] - 36:23, 38:13, 38:15, 51:3 refer [1] - 42:22 referenced [2] - 29:21, 44:9 refining [1] - 61:19 refrigerator [1] - 38:14 refuses [1] - 8:18 regards [1] - 38:9 regime [1] - 58:15 Registered [2] - 70:5, 70:19 regularly [1] - 64:14 relate [1] - 37:13 related [2] - 9:15, 56:5 relates [2] - 31:16, 34:14 relating [17] - 4:24, 5:21, 9:14, 18:2, 27:20, 28:9, 28:24, 29:25, 31:22, 32:10, 32:19, 37:4, 37:21, 45:2, 60:10, 62:10 relationship [13] - 6:17, 8:12, 8:20, 9:5, 19:4, 29:9, 31:24, 32:9, 32:19, 36:7, 37:10, 38:2 relationships [5] - 4:24, 6:13, 16:10, 17:14, 32:2 release [4] - 32:18, 38:18, 38:19, 39:5 relevance [3] - 22:25,</p>
		<p style="text-align: center;">Q</p> <p>qualifying [1] - 59:21 quantification [1] - 54:18 quantify [3] - 47:5, 53:20, 60:24</p>		

<p>52:20, 66:21 relevancy [8] - 15:20, 17:20, 26:3, 26:4, 31:13, 50:22, 63:16, 66:3 relevant [34] - 6:3, 6:4, 6:24, 8:5, 8:23, 9:17, 15:23, 17:18, 18:4, 18:5, 20:15, 27:23, 28:7, 28:25, 30:8, 31:7, 31:12, 32:3, 32:9, 36:17, 38:1, 43:2, 43:3, 47:12, 48:7, 50:3, 50:11, 50:18, 60:4, 62:20, 63:1, 66:11, 66:19, 67:14 reliance [2] - 59:8, 60:10 remaining [1] - 4:17 remember [1] - 44:1 repeat [2] - 34:7, 62:25 reply [2] - 63:19, 67:10 report [2] - 4:17, 63:8 Reported [1] - 1:24 Reporter [4] - 70:6, 70:19, 70:19 reporter [1] - 70:9 reports [6] - 22:4, 54:22, 62:15, 64:11, 64:14, 64:16 representation [1] - 39:15 request [17] - 20:20, 26:16, 27:10, 27:14, 27:16, 40:9, 41:1, 41:20, 42:25, 44:2, 50:23, 54:23, 55:6, 60:8, 65:15, 66:25, 68:6 Request [8] - 3:7, 3:9, 44:2, 44:25, 46:16, 61:18, 62:14, 64:10 requested [3] - 20:22, 34:13, 67:6 requesting [1] - 67:23 requests [1] - 61:20 require [1] - 67:2 required [1] - 30:10 requires [2] - 46:4, 53:3 resolve [1] - 23:10 resolved [2] - 7:6, 7:7 resolving [1] - 68:24 respect [9] - 4:21, 18:10, 20:15, 20:23, 32:1, 35:25, 36:17, 36:20, 37:9 respond [2] - 38:21,</p>	<p>57:9 response [10] - 7:19, 20:24, 27:17, 29:14, 30:19, 31:19, 48:4, 50:25, 51:1, 54:7 responses [2] - 10:6, 28:10 rest [1] - 16:17 restricting [1] - 42:21 rests [1] - 15:20 revenue [3] - 17:17, 51:16, 62:11 revenues [1] - 55:1 rights [1] - 66:10 Rislov [1] - 1:16 RITER [1] - 15:5 Riter [2] - 1:21, 15:5 RITER-RAPP [1] - 15:5 Riter-Rapp [2] - 1:21, 15:5 Rogers [1] - 15:6 Rolayne [1] - 1:14 room [1] - 11:1 Room [1] - 2:7 root [1] - 52:18 rough [1] - 54:20 round [1] - 59:1 Rounds [1] - 1:17 routing [1] - 20:13 RPR [1] - 1:24 rub [1] - 45:5 rule [2] - 30:6, 48:10 rule-making [1] - 48:10 run [1] - 22:4 Ryan [1] - 1:16</p>	<p>62:9, 66:21, 67:22 seek [1] - 54:15 seeking [5] - 4:23, 16:2, 27:17, 27:19, 54:10 seem [1] - 52:19 sees [1] - 15:23 selected [1] - 6:8 selective [1] - 32:18 SEMMLER [7] - 15:12, 31:11, 34:9, 40:4, 50:16, 63:15, 67:6 Semmler [1] - 1:15 sending [4] - 9:1, 9:2, 18:21, 49:13 sense [2] - 24:20, 24:24 sensitive [1] - 59:17 separately [2] - 7:14, 63:21 server [2] - 29:2, 42:2 service [7] - 20:11, 53:11, 53:18, 54:1, 66:8, 66:20 Services [1] - 3:22 services [5] - 27:21, 37:5, 47:17, 67:7, 67:13 SERVICES [2] - 1:6, 1:6 set [10] - 5:21, 30:20, 31:25, 37:20, 40:10, 55:5, 56:4, 56:11, 56:18, 57:19 setting [2] - 53:14, 53:25 settled [2] - 3:2, 61:19 seven [1] - 29:17 several [2] - 5:13, 16:20 shelf [2] - 42:2, 62:16 short [2] - 46:18, 54:14 shorthand [2] - 70:9 show [1] - 58:3 sic [1] - 10:12 side [2] - 39:16, 55:23 sides [3] - 46:3, 55:21, 68:24 signed [2] - 30:11, 39:14 significantly [1] - 56:9 signing [1] - 42:18 SIMMONS [2] - 10:17, 46:24 Simmons [5] - 2:2, 10:13, 10:14, 10:16, 46:23 simple [1] - 62:4 simplest [1] - 66:2</p>	<p>simply [15] - 6:19, 9:2, 16:2, 26:1, 26:16, 28:22, 30:16, 32:5, 33:23, 45:14, 47:8, 48:7, 62:13, 66:5, 66:11 single [4] - 27:23, 28:6, 28:24, 44:3 site [1] - 35:25 situation [2] - 8:21, 41:24 Smith [1] - 1:15 smoke [1] - 46:15 snapshot [4] - 21:2, 21:3, 21:5, 24:12 solely [2] - 26:4, 53:9 someone [2] - 3:3, 45:23 someplace [1] - 41:14 sometimes [1] - 66:7 somewhere [2] - 42:1, 42:2 sorry [4] - 7:4, 25:15, 38:18, 51:5 sort [15] - 5:9, 19:3, 20:18, 27:24, 32:24, 38:11, 47:17, 47:20, 48:1, 54:20, 58:23, 62:4, 62:7, 62:15, 62:21 sought [2] - 19:6, 59:12 sound [4] - 44:6, 45:4, 50:17, 66:22 South [7] - 2:6, 2:8, 30:1, 31:5, 33:25, 70:7, 70:13 SOUTH [2] - 1:2, 70:1 Soye [1] - 1:16 spans [1] - 24:2 speaks [1] - 31:1 special [1] - 59:19 specific [4] - 17:8, 41:21, 42:12, 43:17 specifically [6] - 5:19, 24:21, 30:22, 40:11, 40:25, 64:22 spell [1] - 43:23 spells [1] - 30:24 SS [1] - 70:2 STAFF [1] - 1:14 Staff [15] - 3:25, 11:2, 15:10, 15:12, 15:15, 31:10, 31:15, 34:7, 34:13, 39:21, 50:15, 50:16, 50:22, 63:14, 67:5 Staff's [2] - 33:6, 67:12 stage [2] - 32:17,</p>	<p>60:12 standard [3] - 19:5, 61:3, 61:6 standard's [1] - 63:17 standing [1] - 33:14 stands [1] - 44:1 start [6] - 3:13, 3:14, 5:8, 19:4, 19:11, 47:23 state [5] - 30:3, 50:1, 50:7, 53:11, 57:24 STATE [2] - 1:2, 70:1 State [2] - 2:6, 70:7 statement [4] - 63:4, 63:13, 65:1, 68:1 statements [8] - 49:24, 52:25, 53:20, 59:6, 62:14, 63:10, 64:11, 64:14 states [1] - 66:9 station [1] - 68:5 statute [2] - 46:4, 49:1 statutorily [1] - 49:18 statutory [1] - 61:3 step [3] - 18:14, 19:8, 58:1 STEVE [1] - 1:12 stick [2] - 63:22, 63:23 still [12] - 4:20, 10:10, 10:16, 19:17, 22:1, 23:6, 25:4, 26:15, 41:14, 45:3, 45:7, 52:7 Stipulation [3] - 47:19, 51:19, 57:7 stop [1] - 24:17 stored [1] - 42:2 streams [1] - 62:12 stretching [1] - 23:7 strictly [1] - 56:17 struck [1] - 62:20 struggling [2] - 35:1, 35:4 studies [1] - 53:3 subject [3] - 5:5, 29:25, 64:23 subpart [2] - 9:18, 62:3 Subpart [6] - 6:9, 7:15, 9:16, 62:13, 63:21 Subparts [2] - 5:19, 7:1 subparts [3] - 7:13, 61:22, 61:24 subpoena [1] - 17:11 subscribe [1] - 7:17 subscribed [1] - 8:4 substantial [3] - 17:4, 47:22, 59:25</p>
S				

<p>succeeds [1] - 65:23 suddenly [2] - 9:15, 50:8 sued [1] - 66:6 sufficient [1] - 67:2 sufficiently [1] - 25:24 suggest [3] - 29:7, 36:24, 51:9 suggesting [1] - 44:10 suggestions [1] - 42:4 SULLY [1] - 70:3 supersedes [1] - 29:23 supply [2] - 64:15, 64:17 support [2] - 32:20, 35:7 supporting [1] - 64:20 supports [2] - 16:16, 37:19 suppose [1] - 16:19 supposed [1] - 33:19 suspicious [1] - 17:10 switched [29] - 5:7, 5:17, 8:18, 17:16, 39:1, 47:22, 48:14, 48:25, 49:11, 49:14, 49:16, 50:12, 51:15, 52:6, 52:11, 52:17, 53:2, 54:25, 56:1, 56:9, 56:17, 56:23, 58:15, 58:21, 58:22, 59:8, 59:9, 60:11, 62:10 system [1] - 41:15 systems [1] - 5:12</p>	<p>54:5, 56:5, 56:12, 56:16, 57:17 terms [8] - 6:3, 30:12, 43:23, 44:8, 44:9, 54:20, 62:4, 66:3 testimony [2] - 6:4, 16:23 THE [7] - 1:1, 1:2, 1:4, 1:5, 1:11 themselves [1] - 33:17 therefore [2] - 18:21, 65:3 they've [7] - 6:12, 6:14, 22:18, 22:19, 29:18, 30:24, 47:25 thinking [4] - 34:16, 55:19, 61:3, 62:1 third [11] - 6:10, 17:3, 17:12, 18:12, 18:23, 19:2, 23:18, 23:21, 25:11, 30:21, 33:16 third-party [5] - 17:3, 18:23, 19:2, 23:21, 30:21 thoughts [1] - 17:10 threads [1] - 28:12 three [5] - 6:13, 6:14, 10:2, 10:3 tied [1] - 56:1 tiers [1] - 26:18 tipped [1] - 34:24 today [4] - 26:21, 32:16, 68:20, 69:1 Tom [2] - 2:2, 10:12 took [1] - 70:9 touch [2] - 40:17 towards [3] - 19:4, 50:1, 50:3 traded [3] - 49:23, 57:5, 63:5 traditional [2] - 54:11, 63:4 traffic [45] - 5:2, 5:6, 5:14, 5:17, 6:11, 8:25, 9:20, 9:22, 16:13, 17:3, 17:5, 17:7, 17:8, 18:3, 18:17, 18:21, 20:2, 20:5, 20:6, 20:13, 28:20, 28:21, 30:23, 36:17, 43:16, 45:8, 45:11, 45:14, 45:20, 47:13, 48:12, 49:14, 50:2, 50:3, 50:5, 50:12, 52:7, 52:8, 54:6, 56:5, 56:12, 56:16, 57:16, 57:17 Transcript [1] - 1:9 TRANSCRIPT [1] - 2:5 transcript [2] - 11:6,</p>	<p>15:1 transcription [1] - 70:12 treat [1] - 59:23 trial [1] - 31:14 tribunals [1] - 59:7 tried [3] - 35:12, 59:11 triggering [1] - 43:18 trouble [2] - 57:1, 67:21 true [5] - 38:24, 39:17, 49:6, 55:4, 70:11 try [1] - 38:17 trying [7] - 31:23, 51:9, 57:11, 58:24, 60:4, 66:5, 67:16 tummy [1] - 45:5 tune [1] - 56:13 turn [3] - 18:5, 29:5, 58:10 turns [2] - 16:19, 50:8 TV's [1] - 68:4 two [15] - 7:13, 10:11, 11:1, 16:5, 17:1, 18:12, 18:25, 23:7, 23:16, 25:10, 26:18, 26:23, 28:2, 36:4, 46:20 type [3] - 48:6, 52:7, 53:21 types [1] - 23:21 typically [2] - 17:2, 53:13</p>	<p>unlimited [1] - 33:22 UNPAID [1] - 1:6 unpaid [1] - 3:22 up [17] - 4:15, 8:14, 9:16, 27:16, 30:7, 30:25, 31:8, 35:21, 36:6, 38:9, 38:13, 39:8, 39:22, 49:8, 57:22, 58:3, 58:10 upgrades [1] - 47:10 users [1] - 16:11 uses [1] - 10:1 UTILITIES [2] - 1:1, 1:11</p>	<p>18:2, 19:1, 19:10, 20:3, 28:17, 28:19, 28:21, 37:14, 37:17, 38:2, 40:17, 40:21, 42:22, 43:17, 45:19, 47:6, 47:9, 47:11, 47:13, 47:18, 48:11, 50:8, 50:12, 54:5, 56:16, 64:23, 66:8, 67:7 volumes [3] - 20:5, 20:6, 20:8 vote [9] - 26:1, 26:9, 27:3, 34:21, 35:5, 35:6, 43:24, 68:11, 68:15 voted [1] - 27:16 votes [7] - 26:14, 27:8, 46:13, 61:15, 65:10, 65:22, 68:17 voting [3] - 26:6, 61:8, 65:3</p>
T		U		W
<p>tackle [1] - 46:19 tandem [1] - 8:15 tariffs [1] - 49:16 TC10-096 [1] - 3:18 tC10-096 [1] - 1:5 TDM [4] - 50:3, 50:8, 57:14, 58:8 technology [1] - 53:21 telecommunications [4] - 53:11, 53:15, 53:18, 54:1 telephone [2] - 49:12, 49:14 TELEPHONE [1] - 2:1 tend [1] - 28:11 term [4] - 7:21, 21:16, 43:14, 45:8 terminate [2] - 16:13, 17:3 terminating [6] - 39:2,</p>	<p>ultimately [1] - 58:17 unambiguous [2] - 30:4, 32:5 unclear [1] - 30:16 under [5] - 23:25, 26:24, 30:1, 31:4, 52:18 underlying [1] - 49:19 understandings [1] - 40:16 understood [1] - 23:16 undertake [1] - 54:11 undisputedly [1] - 32:9 unfortunately [1] - 25:24 unjust [8] - 52:18, 54:16, 54:17, 55:14, 55:25, 56:14, 56:19 unjustly [2] - 56:10, 56:13 unless [1] - 68:20</p>	<p>V</p> <p>variety [1] - 36:4 vein [1] - 23:15 verizon [1] - 51:1 VERIZON [1] - 1:6 Verizon [81] - 1:20, 2:2, 3:5, 3:6, 3:7, 3:8, 3:9, 3:14, 3:15, 3:21, 4:1, 4:7, 4:23, 5:5, 5:6, 5:7, 5:11, 5:15, 7:16, 7:20, 7:24, 8:2, 8:12, 8:17, 8:18, 9:1, 9:25, 10:2, 10:3, 15:3, 15:18, 16:13, 17:6, 18:9, 22:8, 22:12, 24:11, 26:25, 27:10, 27:13, 27:14, 27:18, 30:14, 30:15, 30:23, 31:2, 31:18, 32:23, 32:24, 33:14, 39:1, 39:7, 40:4, 40:22, 43:7, 43:9, 44:2, 44:25, 46:16, 47:1, 47:4, 48:15, 49:9, 49:20, 51:7, 52:22, 54:8, 55:13, 55:15, 56:6, 57:13, 58:12, 60:12, 61:17, 63:9, 63:19, 66:23, 67:10, 67:22 Verizon's [7] - 5:8, 16:13, 17:5, 30:19, 38:21, 57:6, 64:10 versus [2] - 18:19, 50:2 via [2] - 18:22 VICE [1] - 1:12 view [2] - 16:16, 54:19 viewpoints [1] - 35:2 voice [7] - 21:15, 44:5, 45:2, 45:6, 45:10, 66:10, 67:13 VoIP [32] - 5:17, 17:7,</p>	<p>walk [1] - 4:16 wants [1] - 8:2 waste [1] - 28:1 ways [1] - 17:17 web [2] - 11:4, 49:24 week [1] - 4:4 weighing [1] - 62:4 whole [5] - 19:5, 37:20, 43:1, 52:14, 52:15 wholesale [26] - 6:13, 6:15, 6:16, 9:5, 9:18, 9:19, 10:1, 16:11, 16:12, 16:25, 18:1, 18:22, 18:25, 27:21, 28:6, 28:14, 28:24, 29:4, 29:10, 32:8, 37:1, 37:5, 37:16, 37:25, 40:22, 40:23 wholesaler [4] - 27:23, 32:11, 32:19, 33:7 wholesalers [3] - 16:5, 27:22, 28:2 Wiest [9] - 1:14, 18:8, 33:4, 35:8, 42:4, 43:5, 51:23, 64:1, 67:18 WIEST [29] - 18:9, 19:14, 20:22, 21:4, 21:12, 21:18, 21:20, 33:5, 35:10, 35:22, 36:9, 42:5, 42:8, 43:7, 44:14, 44:22,</p>	

45:6, 51:24, 52:13,
53:19, 54:7, 55:7,
57:6, 58:12, 60:7,
64:2, 64:4, 67:19,
67:21

willing [3] - 20:25,
21:2, 32:23

withholding [5] - 5:6,
5:24, 6:1, 37:16,
37:17

witness [1] - 6:5

witnesses [6] - 16:9,
51:14, 51:15, 51:17,
59:4, 59:6

Wittler [2] - 1:24,
70:18

WITTLER [1] - 70:5

word [4] - 34:23, 42:3,
43:18, 51:3

wording [1] - 42:7

words [5] - 17:1,
24:15, 41:23, 49:13,
64:13

works [1] - 44:13

wrestle [1] - 25:22

wrestled [1] - 25:17

written [6] - 25:19,
29:25, 30:8, 34:20,
39:14, 66:24

Y

year [2] - 22:8, 25:20

years [8] - 22:1, 24:17,
33:16, 36:4, 39:11,
41:5, 41:24, 42:1

yourself [1] - 35:2

Z

zero [1] - 62:4