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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION THE PUBLIC UTILITIES COMMISSION

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OF THE STATE OF SOUTH DAKOTA

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 IN THE MATTER OF THE PETITION FOR)
 AN ORDER DIRECTING U S WEST)
 COMMUNICATIONS, INC., TO FILE UPDATES) TC98-187
 TO ITS EXCHANGE AND NETWORK SERVICES)
 CATALOG, ACCESS SERVICE CATALOG,) AGENDA MEETING
 ADVANCED COMMUNICATIONS SERVICES)
 CATALOG, AND PRIVATE LINE TRANSPORT)
 SERVICES CATALOG,)
) and
)
 -----)

IN THE MATTER OF THE COMPLAINT)
 FILED BY BASEC.NET, HURON,)
 SOUTH DAKOTA, AGAINST U S WEST) TC98-194
 COMMUNICATIONS AND FIRSCEL, INC.,)
 REGARDING BILLING ISSUES,)
)
 -----)

HEARD BEFORE THE PUBLIC UTILITIES COMMISSION

PROCEEDINGS: March 11, 1999
 1:30 P.M.
 Room 412, Capitol Building
 Pierre, South Dakota

PUC COMMISSION: Jim Burg, Chairman
 Laska Schoenfelder
 Pam Nelson (By Phone)

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COMMISSION STAFF

PRESENT:

Rolayne Ailts Wiest
Karen Cremer
Camron Hoseck
Harlan Best
Bob Knadle
Gregory A. Rislov
David Jacobson
Michele Farris
Keith Senger
Leni Healy
Shirleen Fugitt
Bill Bullard

Reported by: Lori J. Grode, RMR

A P P E A R A N C E S

Thomas J. Welk, U S West

Colleen Sevold, U S West

Travis Jones, FirstTel

Appearances by Telephone:

Mary Lohnes, Midco Communications

Neil Schmid, FirstTel

Todd Epp, Basec.Net

P R O C E E D I N G S

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2 CHAIRMAN BURG: Good afternoon. I'll call
3 the meeting to order. This is Chairman Jim Burg. I'll
4 call the roll first.

5 (Roll Call.)

6 CHAIRMAN BURG: Anybody I did not call?
7 Okay. Thank you very much.

8 This is an ad hoc meeting. We have three
9 items to take up.

10 The next item is Telecommunication TC98-187,
11 In the Matter of the Petition for an Order Directing
12 U S West Communications to File Updates to its Exchange
13 and Network Service Catalog, Access Service Catalog,
14 Advanced Communication Service Catalog, and Private
15 Line Transport Catalog.

16 The question before the Commission today is
17 shall the Commission grant the motion to quash and how
18 shall the Commission proceed?

19 MS. WIEST: Before we begin, I would just
20 like to ask the parties involved whether there's any
21 objection to considering today staff's objection to the
22 amended order and U S West's motion for a continuance
23 in the interest of time?

24 MR. WELK: No objection by U S West.

25 MS. WIEST: Any objection?

1 MR. HOSECK: No objection.

2 MS. WIEST: Since maybe some of these issues
3 might be somewhat interrelated. For example, we will
4 consider all three of them, but I think we will start
5 with the Motion to Quash.

6 And you can go forward, Mr. Hoseck.

7 MR. HOSECK: Thank you, Mr. Chairman, Members
8 of the Commission:

9 U S West has filed a subpoena for a
10 deposition of an unnamed staff person with the
11 Commission, as well as a subpoena to produce
12 documents. And we have filed a Motion to Quash in this
13 matter listing several grounds. At this point in time
14 I'm not positive as to what exactly U S West may yet
15 desire.

16 It's my understanding and by my own personal
17 knowledge, know that they have been in the office this
18 morning; and we have turned over several documents that
19 we deem to be public documents to them for inspection.
20 And that is perhaps something that they can address at
21 a later point in time.

22 The subpoena, as it talks about a person to
23 have a deposition taken, is directed to the
24 Commission. In the first place, we feel this is
25 improper in that it should be directed toward the staff

1 in that the staff would be the proper party to nominate
2 a representative witness.

3 And the other thing is that I do not think
4 that the subpoena describes with a reasonable
5 particularity the matters on which they seek to have an
6 examination. I think that there is a question of
7 relevance. And because I really don't know what U S
8 West wants, it's difficult for me to know exactly who
9 to nominate in this particular case.

10 And there seems to be some confusion exactly
11 as to the direction that this matter is taking. And,
12 therefore, based on the filing that staff has made in
13 this matter, I would respectfully move the Commission
14 to quash the subpoena as to both the document
15 production and the deposition. Thank you.

16 MS. WIEST: Mr. Welk.

17 MR. WELK: Good afternoon, General Counsel,
18 Mr. Chairman, and Commissioners.

19 As Mr. Hoseck represented, this morning
20 myself and Colleen Sevold, who's the regulatory manager
21 for U S West, reviewed the documents, the public
22 documents that staff counsel believed was responsive to
23 the subpoena.

24 And based upon our approximately three-hour
25 examination this morning and my inquiries to

1 Mr. Hoseck, I think all the documents that we have
2 requested in the subpoena have been produced. Your
3 staff has copied those, and I think within the hour all
4 of the documents we requested to be copied have been
5 copied.

6 The only other inquiry I had about the
7 documents was whether there's a separate file for any
8 correspondence that the staff may have had regarding
9 tariffs after the application for certificate of
10 authority have been approved by the Commission. And it
11 was represented to me that there aren't really any
12 separate files for that that exist.

13 So based on the representations, I believe
14 that all the documents that have been requested in the
15 subpoena have been provided, so to me that issue is
16 moot.

17 What is not moot is the questions that we
18 have about the documents. There is a number of
19 questions. And from what I've been able to tell,
20 probably the person that's the most knowledgeable
21 within the Commission, the Commission staff, about
22 these documents is Mr. Best, who is also going to be a
23 witness in this proceeding.

24 Indeed, the tariffs that we reviewed today
25 are personally in his office, and I believe he's

1 responsible to review those. So I believe Mr. Best is
2 the responsible person that would have the most
3 knowledge, based on at least what we have seen. But I
4 have a number of questions of Mr. Best based upon the
5 documents that I have reviewed.

6 And I would represent to the Commission that
7 I probably have a couple of hours of questions about
8 the documents that I had. And, frankly, it would save
9 time if I could take a couple of hours' deposition
10 before the hearing to save the time before the hearing;
11 or, alternatively, if you want me to ask a couple of
12 hours of questions at the hearing and listen to me go
13 through all the files and documents that I have had
14 copied, you can do that.

15 So, to me, either we're going to do it at the
16 hearing for a couple of hours and get some background
17 information, some of the questions you probably already
18 know and I don't know the answer to so it's
19 background. So what's left out of this issue is
20 whether the deposition of Mr. Best should proceed
21 before the hearing, or to just allow the questions at
22 the hearing.

23 I believe we've set forth in our written
24 response the relevancy of what our inquiry is, and that
25 is our inquiry as to the applicability of how the staff

1 is regulating U S West regarding this matter and other
2 carriers and that is set forth in the response and that
3 is what we intend to pursue to develop our case.

4 Our response clearly indicates that the
5 Commission rules allow discovery. The 50(b)6
6 deposition notice is standard procedure in a
7 corporation or governmental entity, if you don't know
8 who the person is that might know the knowledge. I was
9 assuming it was Mr. Best, but I don't know. I mean the
10 Commission or the staff can designate who they want,
11 but it seems to me that Harlan is the only person that
12 has the knowledge and had the tariff book.

13 So based on my inspection this morning, I've
14 been convinced that Mr. Best would be the most
15 appropriate person; and it's frankly up to whether you
16 want to listen to me for a couple of hours at the
17 hearing go through these documents or you want to
18 economize and provide that I may have a deposition
19 either tomorrow or Monday to save some time at the
20 hearing.

21 So I believe that's where we're at at this
22 motion.

23 MS. WIEST: Mr. Hoseck, Mr. Chairman, Members
24 of the Commission, this does bring in the corollary
25 matter and that is there's a Motion for Continuance on

1 this, and this is scheduled for hearing on Tuesday.
2 And, you know, if we can get this deposition taken
3 prior to that time, what's U S West position on the
4 motion for continuance? Maybe we should discuss that
5 now.

6 MR. WELK: I think the continuance motion
7 depends on what issues you want. If we proceed as
8 Mr. Hoseck wants to proceed on the nature of these
9 catalog filings and that, and we can get the deposition
10 taken tomorrow or Monday, I see no reason for the
11 continuance. If the Commission wants to expand the
12 issues in the hearing notice that have been provided,
13 that's a different story.

14 So what I want to talk about as far as the
15 issues go in the case -- and Mr. Hoseck has also a
16 petition, I'm sure he'd like to speak to about that.
17 But you're aware that there has been some confusion as
18 to what the issues are in this case and how we're going
19 to proceed.

20 There have been letters written by U S West's
21 corporate counsel dated February 24th and March 5 that
22 set forth the concerns. The Commission did enter an
23 Amended Notice of Hearing that set forth its
24 understanding of what the issues were. Mr. Lundy then
25 wrote a letter March 5, 1999, indicating that U S West

1 does not want any misunderstanding as to what U S
2 West's position is regarding the filing of
3 noncompetitive and emerging competitive in competitive
4 situations.

5 So to me it kind of depends on where you want
6 to take the hearing. If you want to confine it to what
7 Mr. Hoseck says is a narrow -- you know, these catalog
8 pages of fully competitive, of those particular pages,
9 there's no need for continuance. If you want to expand
10 it beyond that, we may need some additional time. Not
11 much.

12 MS. WIEST: Go ahead.

13 MR. HOSECK: These are all tied together, and
14 obviously we're going to argue them here. I think what
15 is critical in this matter is that the petition, as
16 originally filed by staff, on October 26th of 1998, was
17 whether U S West must file updates with the PUC for
18 four specified catalogs: Exchange of network services
19 catalog, access services catalog, advanced
20 communications services catalog and private line
21 transport services catalogs.

22 Now, what we are concerned with is that the
23 notice of hearing has limited that the issues that may
24 arise with regard to U S West -- what we thought we
25 were asking for when we filed the petition and that was

1 whether U S West had to file these updates to this
2 catalog.

3 I think that it would be less than frank to
4 say that there are going to be corollary issues that
5 come up with regard to whether or not they have to file
6 these because it does relate to the question of whether
7 or not some of these matters are competing emerging or
8 fully competitive items.

9 And the very critical issue in this is who
10 makes this decision. Because once that decision is
11 made, then the obligation to file arises. And we
12 believe that the law provides that the Commission is to
13 do the classification and reclassification, whatever
14 the case may be, of these services. And that it is not
15 an act that is solely accomplished by U S West. And
16 that then causes the obligation to file the tariff with
17 the respective catalog.

18 And so I think that the basic issue is
19 whether or not they have to file the updates, but I
20 think that there are going to be other corollary issues
21 that just of necessity arise because of the nature of
22 the beast.

23 MS. WIEST: What would be the corollary issue
24 then?

25 MR. HOSECK: Well, this business of whether

1 or not something is competitive or emerging
2 competitive, that type of a determination and who makes
3 that determination. Because it's my understanding --
4 and, of course, this would be factually disputed, I'm
5 sure, that there have been unilateral decisions made by
6 U S West as to what a particular service is. And then
7 based on that unilateral determination of U S West, the
8 decision to file or not file has been made. And I
9 think that that is the corollary issue.

10 MS. WIEST: And those four catalogs that you
11 mention, are those all the catalogs filed by U S West
12 with the Commission? Is that correct or not?

13 MR. HOSECK: There are tariffs that are
14 filed. They're separate.

15 MS. WIEST: Not in these catalogs?

16 MR. HOSECK: Yes.

17 MS. WIEST: And then the catalogs, then, that
18 you mention in your petition, are those only fully
19 competitive services?

20 MR. HOSECK: Not necessarily.

21 MS. WIEST: They would encompass all three
22 categories?

23 MR. HOSECK: They may. I'm not positive at
24 this point in time.

25 MS. WIEST: But there would be other tariffs

1 that would actually encompass some of the other
2 categories such as noncompetitive and emerging
3 competitive?

4 MR. HOSECK: I believe so.

5 MS. WIEST: When you filed the petition, was
6 it your position that U S West was no longer filing all
7 the updates to noncompetitive and emerging competitive,
8 or was the purpose to receive fully competitive
9 offerings?

10 MR. HOSECK: The purpose was to get the
11 information that they had traditionally filed in these
12 four catalogs in which they unilaterally ceased filing
13 as about July 1st, 1998, without any prior notice to
14 staff. That is the crux of the issue. That is the
15 factual setting that caused this to arise. And whether
16 these are competitive emerging, competitive, whatever,
17 is going to vary with the type of service that's
18 involved.

19 However, the very fundamental issue is
20 whether or not they have to file updates of these
21 catalogs because staff has used these in the
22 performance of staff's duties and it's a critical part
23 of our function as we see it.

24 MS. WIEST: Okay. So you're limiting it to
25 these four catalogs and not to other tariff filings, I

1 guess, is my question?

2 MR. HOSECK: That's the nature of our
3 petition, yes. Our petition says they have failed to
4 file in these catalogs.

5 MS. WIEST: And so that necessarily wouldn't
6 address the issue that U S West brought up in its
7 letter in which they stated that they -- it was their
8 position that they didn't have to file certain
9 noncompetitive and emerging competitive filings because
10 they considered some of those to be offered to meet
11 competition; is that correct?

12 MR. HOSECK: That's my understanding of their
13 position. However, I think that one has to view this
14 in a more fundamental sense and that is who makes this
15 determination of what is to be filed and not filed as
16 based upon the classification of the service? Is it
17 U S West or is it the Commission? It's our Commission
18 that -- that is the Commission's function to do the
19 classification.

20 MS. WIEST: But staff's position was that the
21 first order, when it was stated whether U S West should
22 file updates to those four catalogs correctly stated
23 the issue. Would that be reasonable?

24 MR. HOSECK: We had no quarrel with the first
25 Notice of Hearing. The second Notice of Hearing we

1 thought unduly limited the scope of what we had asked
2 for in the first place.

3 MS. WIEST: Because the catalogs you
4 mentioned encompass more than fully competitive
5 offerings?

6 MR. HOSECK: Yes. And, secondly, because of
7 the limitations on the basis of a factual representation,
8 which now U S West has represented to the Commission
9 doesn't constitute their policy anymore.

10 MS. WIEST: So does U S West have a problem
11 with the Commission going back to the original issue
12 which was filing updates to those four catalogs as
13 reflected in staff's original petition?

14 MR. WELK: We don't have any objection if you
15 want to limit it to that. But we want the Commission
16 to know our position on the other issues. And this is
17 an issue that we need a ruling on sometime. I mean
18 this is a new law that we're frankly looking at under
19 49-31-84. And whether you do it in this hearing or
20 another hearing, for us and all telecommunications
21 companies. I mean, it's untested. The Commission has
22 never ruled on it, and so we want a ruling sometime,
23 whether it's this hearing or another deal.

24 MS. WIEST: I guess my question would be is
25 whether just for purposes of economy and putting this

1 in one hearing, whether it wouldn't be better to
2 address that issue as soon as possible because I think
3 it is an important issue.

4 And if we would do that, we could look at a
5 date, for example, two or three weeks down the road and
6 set up the hearing and to address all these issues in
7 one proceeding and take care of them at that time,
8 rather than going forward with what the four catalogs
9 as staff represented and then possibly making having to
10 have another hearing on that other issue that arose
11 when you wrote those letters.

12 MR. WELK: I agree. And I think maybe other
13 carriers have a similar interest. I mean how this
14 issue about filing, whether you're meeting competition,
15 not only affects U S West, it affects all carriers.
16 And I think it's going to be a decision the Commission
17 is going to have to make. What do you have to file in
18 a competitive atmosphere in the state with the
19 Commission? And that's not just a U S West issue.

20 MS. WIEST: Go ahead.

21 MR. HOSECK: Mr. Chairman, members of the
22 Commission, I do not see any reason for a continuance
23 in this matter. I think that the staff is ready to go
24 on and present its case. And as it raises even the
25 issue that U S West has brought up about whether or not

1 this has to be filed under 85 is something that can be
2 addressed as a question of law next Tuesday. I really
3 don't see any necessity for extending this matter.

4 MS. WIEST: But doesn't that involve other
5 catalogs than the ones you mentioned?

6 MR. HOSECK: We're prepared to address the
7 issue of the filing in these four catalogs and whether
8 or not if you want to do it in a test sense, this
9 raises the issue of compliance with 85 with the
10 subsection 85, then we're willing to proceed on that
11 basis.

12 MS. WIEST: Well, my concern is that if there
13 are only four catalogs mentioned in the Notice of
14 Hearing, whether we get into issues that involve other
15 tariff filings. And I have a problem with that.

16 I would recommend that the Commission allow
17 U S West to depose Mr. Best, whatever their preference
18 is. They can depose him beforehand. They can ask him
19 questions at the hearing. It's up to them.

20 And I think that a new Amended Order of
21 Hearing should go out that specifically references the
22 question, in addition to the staff's petition, as to
23 the question of what noncompetitive -- currently
24 classified services of noncompetitive, emerging
25 competitive, what are those filing requirements, and if

1 it's in U S West's opinion that they no longer need to
2 file those because of the statute that allows them to
3 meet competition for those certain filings.

4 And in order to do that, I think that the
5 Commission should then grant a fairly short continuance
6 to allow for that.

7 CHAIRMAN BURG: Do you have a recommendation
8 on the quash request?

9 MS. WIEST: I think the only question on that
10 was the deposition, and that was my recommendation. So
11 there actually would not be any quashing of the
12 motion.

13 MR. HOSECK: Well, obviously I don't agree
14 with the recommendation of General Counsel in this
15 matter. And I think that this thing could proceed at
16 this point in time And that staff is ready to
17 proceed.

18 And I would just remind the Commission we've
19 got a gas rate case coming up for trial that we're
20 going to be doing some preparation on. And, you know,
21 I don't know what the Commission's schedule is in the
22 next month or so, but April, I believe, 19 through the
23 21st is when that is scheduled to take place.

24 And as far as I'm concerned, I think that
25 these issues can be handled next Tuesday.

1 CHAIRMAN BURG: We allowed a comment from
2 them. Do you have a comment from U S West as far as
3 the recommendation of the counsel, of Commission
4 counsel?

5 MR. WELK: No, I don't have any. I would
6 support the recommendation.

7 CHAIRMAN BURG: And you feel that the
8 additional time is necessary? It seems to be an
9 argument now between holding the hearing as the
10 scheduled date or a later date.

11 MR. WELK: Well, yes, I think it would change
12 the scope of the hearing about if you're going to talk
13 about four catalogs. We were intending, depending on
14 what you ruled, to bring in some witnesses to talk
15 about the state of competition. Because that's what's
16 relevant under 49-31-84 as to some of these services
17 and there's different competition for different
18 services.

19 And so we will bring in additional people if
20 it expands to look at the 84. We're not talking about
21 a long hearing. We're talking probably three, four
22 witnesses, but we've got some out-of-state people we
23 want to bring in.

24 CHAIRMAN BURG: If I understand right,
25 Rolayne, your recommendation is it would be better to

1 include that discussion at this hearing than to leave
2 it untouched now and have to address it later?

3 MS. WIEST: Right. I mean it's up to you.
4 We could certainly go forward next week and focus on
5 those four catalogs. But I think it's an important
6 issue that we need to make a decision and I would think
7 that that would be the sooner the better and to
8 encompass it in this would be a good idea.

9 COMMISSIONER NELSON: Is it your contention
10 that the Commission then ought to be deciding whether
11 or not things are competitive or not competitive and
12 what category they fall into? And in order to do that
13 you need these -- at least as you perceive the issue
14 and the discussion that you brought up in the first
15 place, the four catalogs. Is that right?

16 MR. HOSECK: Essentially, yes. And I believe
17 that the evidence will show that there have been
18 decisions made by U S West not to file certain matters
19 with these catalogs based upon their decision as to
20 whether certain items are competitive, noncompetitive,
21 whatever.

22 And that, as I said earlier, was a corollary
23 issue to this matter of whether or not they have to
24 file the updates of these catalogs. And that's the
25 basis for our position on this.

1 COMMISSIONER SCHOENFELDER: I have a couple
2 of questions.

3 COMMISSIONER NELSON: I have one follow-up.
4 I guess I'm saying that you are telling me that you're
5 using these catalogs at least in this case, the four
6 catalogs, to decide whether or not things are
7 competitive or not; which category they would fall
8 into?

9 MR. HOSECK: No. The catalogs are used by
10 staff, primarily staff performing its functions of
11 responding to the public or in resolving complaints or
12 things of that nature. For lack of better words,
13 they're a reference file that the staff goes to.

14 As I said earlier, July 1st the filings quit
15 and without any notice to staff. One of the bases, as
16 we understand it for doing this, is that some of the
17 services that we think should have been filed were
18 universally classified -- excuse me, unilaterally
19 classified by U S West as either noncompetitive or
20 something of that nature; wherein, they take the
21 position that it shouldn't be filed.

22 We're saying that that is a Commission
23 decision in the first place; and that, secondly, we
24 need to have this information to perform our usual
25 functions and we don't have it.

1 COMMISSIONER NELSON: Thank you.

2 COMMISSIONER SCHOENFELDER: I have a couple
3 of questions. And the first one is I have some process
4 problems with this whole docket. And maybe it's just
5 my ineptness, but there's an affidavit in this docket
6 from Colleen Sevold that swears to certain things and
7 it's sworn testimony. And then we have a letter from
8 Mr. Lundy who says know that really isn't right, that
9 isn't our position.

10 And that doesn't seem quite procedurally
11 accurate or the right way to do things in my opinion.
12 Maybe a letter can overturn a sworn affidavit, but I
13 don't really think that's the way we ought to do
14 business here, first of all.

15 Second of all, I thought those things started
16 out to have a narrow issue. And I understand what U S
17 West may want to test that statute to see where we're
18 going to go and where we're going to come from, but
19 this looked like a narrow issue to me.

20 However, I just heard Mr. Welk say that this
21 affects all carriers. Well, I have a concern of going
22 forward too quickly if it affects all carriers because
23 the staff and U S West has been involved in this
24 dispute for quite a period of time and other carriers
25 have thought they didn't belong in it and they're

1 outside of the issue here and suddenly we're going to
2 say next week this is going to affect everybody. You
3 better be prepared to come forward with some
4 testimony.

5 I have some problems. It may meet their
6 legal requirement of due process. Is it fair and is it
7 the way we should do business? I don't think so. So
8 I'm still confused about where we're going. And I
9 don't disagree with General Counsel's recommendation,
10 but I am concerned about due process. I'm concerned
11 about the affidavit. I'm concerned about expanding
12 this into areas that we probably aren't prepared to do
13 so.

14 I understand staff's argument that, well,
15 they don't want to be limited because it may take in
16 some emerging and some noncompetitive issues. But so
17 I'm back to being really confused, and I really would
18 like to have someone -- at least if there are not going
19 to be concessions, at least answer some of my concerns
20 here.

21 CHAIRMAN BURG: Do you want to respond to at
22 least the affidavit?

23 MR. WELK: You've got about three different
24 things.

25 First of all, the affidavit and the letter.

1 Commissioner Schoenfelder is correct that an affidavit
2 was filed by Colleen indicating that filings -- that U
3 S West intended to make filings on emerging competitive
4 and noncompetitive, and that is true. We intend to do
5 that, unless as Mr. Lundy's letter indicates, that it
6 comes within the realm of meeting competition.

7 As you know, the law changed substantially.
8 The legislature passed a statute that said not
9 withstanding any other provision of 49-31, which I
10 think is pretty clear that means regardless of anything
11 else in the Chapter, any telecommunications company may
12 grant any service discount or business practice
13 necessary to meet competition.

14 We don't know the limits of that,
15 Commission. So U S West is grappling the same thing
16 that you are. So we're saying, yes, under the law
17 we're supposed to file non-emerging competitive and
18 noncompetitive. We have this law. And we're looking
19 and saying, look, if it's meeting competition, we don't
20 want to file in those instances where there is
21 competition because you're going to hear evidence that
22 that affects how you compete. If you have to file in a
23 competitive environment, that's going to inhibit you
24 from your competition. And that's part of the
25 testimony.

1 So I understand your concern, but we do not
2 want any misunderstanding with the Commission of what
3 our position is. And we understand the Commission is
4 grappling with the same issue we are.

5 And I want to address the other carrier issue
6 because I think it is important. What you determine
7 regarding this meeting competition is going to affect
8 all carriers. Yes, it's U S West's obligation and,
9 yes, we have some filings that perhaps others don't.

10 But the broader issues, as General Counsel
11 indicated, is a new issue and you're going to have to
12 chart this course. And so whether it's us -- and I do
13 share your concern. If I was another company and we're
14 in this proceeding litigating this, you don't have the
15 benefit of other companies. But what you're going to
16 rule here will affect how you view the statute.

17 So I share the same concern from you. We
18 don't care what you want to do. We just want you to be
19 up front. You know what our position is. If you want
20 to go ahead with four catalogs, that's fine the broader
21 issue is lurking out there for us and other companies.

22 You're going to chart the course. You just
23 tell us how we're going to do it. But we don't want
24 anybody calling and saying, look, you didn't do this,
25 you didn't do that. We're dealing up front with this.

1 We want an answer and we're entitled, and all the
2 carriers are entitled to an answer. You need to select
3 the forum how you want to do that.

4 CHAIRMAN BURG: Let me just ask a question on
5 that. Let me -- if you're doing it to meet
6 competition, and once there is -- so you're saying
7 there are other competitors that are going for the same
8 service?

9 MR. WELK: Sure.

10 CHAIRMAN BURG: Is it then classified wrong?

11 MR. WELK: The classification is irrelevant
12 to meeting competition. This clause, as we interpret
13 it, doesn't make any difference what you classify
14 anything as long as it's going to meet competition.
15 That's the issue we want an answer to.

16 CHAIRMAN BURG: I understand that. But
17 aren't the three classifications competitive, emerging
18 competitive, and noncompetitive?

19 MR. WELK: Correct.

20 CHAIRMAN BURG: And if there's competition,
21 should it not be then classified as competitive?

22 MR. WELK: Not necessarily.

23 CHAIRMAN BURG: And then there is no
24 question.

25 MR. WELK: It doesn't have to be

1 reclassified. We believe the legislature said if
2 you're doing it to meet competition, you can do what
3 you need to do to do it.

4 CHAIRMAN BURG: No, but I understand that.
5 What's the definition then of competitive, emerging
6 competitive, and noncompetitive? I mean on the meaning
7 of the words, it looks to me like once there's
8 competition, it should be reclassified and then there's
9 not a question.

10 MR. WELK: I don't necessarily agree with
11 you, Mr. Chairman, because there could be a competitive
12 environment where there may be a local exchange service
13 that U S West wants to come in and meet or beat the
14 competition of another local exchange carrier. Local
15 exchange service is noncompetitive, but maybe in that
16 local market. And that's what you're going to hear U S
17 West doing.

18 If you want to know, down in Canton in that
19 area there's a hot bed of competition that's developing
20 down there. We need to know when they -- when DTG
21 comes into Canton and drops the price, do we have to
22 come up here and if we want to meet that or not meet
23 that? What about intraLATA long distance? We're
24 emerging competitive; others are not. These are the
25 issues we're trying to grapple with.

1 CHAIRMAN BURG: And you're saying you should
2 individually be able to determine that, that there's
3 competition at that particular location?

4 MR. WELK: We have a burden to show you if we
5 do this. That's my opinion. I don't know what U S
6 West's is. What I have said to them is when you say,
7 okay, you did this, U S West, you show us you had
8 competition to meet it.

9 CHAIRMAN BURG: Okay. Camron.

10 MR. HOSECK: Mr. Chairman, members of the
11 Commission. I think that this amply demonstrates that
12 given the fact, facts as they have been raised in the
13 petition, whether or not they have to file in these
14 four catalogs, and given the discussion we've had here
15 today, will raise sufficient facts for the Commission
16 to decide this issue.

17 One component of which is going to be, as I
18 see it, whether or not the Commission has the final
19 authority to determine classifications or whether
20 49-31-84 overrides that. It's a legal question. It
21 can be briefed.

22 And I don't see that a delay is necessary to
23 bring that issue up and put it on in front of the
24 Commission. I think we could come forward and put on a
25 reasonable case confined to the issues as we have in

1 the petition with regard to these four catalogs.

2 And as this legal issue is obviously going to
3 come to the top, it's going to boil to the top, we can
4 brief it to you and it's done with.

5 COMMISSIONER SCHOENFELDER: What about the
6 due process or the fairness to other carriers?

7 MR. HOSECK: Well, I think you have to
8 remember that this was filed November 26th. It went
9 out on our normal fax filing notices to the world. And
10 we had a short hearing on it, I believe it was the
11 first part of November. I don't remember the exact
12 date. And that was noticed. And the public was able
13 to be aware of this. Apparently it's a non-issue or
14 there would have been intervenors in this matter.

15 This has been sitting around. And, quite
16 frankly, one of the time considerations that staff is
17 looking at is that as of July 1st last year this has
18 been a tool with which we have worked in the past which
19 has been taken away. And I think that that should be a
20 Commission decision as to whether or not our being
21 deprived of that was proper or not, not U S West's
22 decision unilaterally.

23 MS. WIEST: So staff's position is that the
24 issues, whether U S West has not made filings because U
25 S West unilaterally decides what is competitive or

1 noncompetitive, as I mean they decide something is
2 fully competitive; is that correct?

3 MR. HOSECK: Ultimately I think that is the
4 way that the thing is headed. And it's not only in the
5 noncompetitive, competitive, it's also in the emerging
6 competitive areas also that we believe there is
7 evidence. Obviously that's something you would hear at
8 the hearing.

9 But, you know, I think that there is a
10 sufficient factual showing here to proceed with this
11 matter. And that if there is a legal question as to
12 the effect of these statutes, it can be briefed.

13 And, you know, we talk about confining this
14 matter. Staff views this as a question of whether or
15 not U S West has to file updates to its catalogs, not
16 whether McLeod or DTG or anybody else has to do
17 anything else. This is with regard to the regulated
18 telecommunications company in this state and what
19 effect these statutes have and, in turn, what their
20 obligation is to file updates.

21 COMMISSIONER NELSON: Mr. Welk, are you
22 saying -- and that maybe I'm leaping to the wrong
23 conclusion here. Because what I think I heard you say,
24 in essence, you don't think it's relevant whether or
25 not something is in a competitive category or emerging;

1 the category doesn't matter because if you deem it's
2 necessary to meet competition, you could do anything
3 you want?

4 MR. WELK: That's right.

5 COMMISSIONER NELSON: So categories aren't
6 relevant?

7 MR. WELK: We contend that's what the
8 legislature said in an act of the statute.

9 MS. WIEST: I guess the point is it appears
10 that there still seem to be more than one issue here.
11 I mean the way I understood staff's position is that
12 it's whether U S West has not made filings because U S
13 West unilaterally decides what is competitive or
14 noncompetitive.

15 Well, that's a different issue than whether U
16 S West has to file offerings classified already
17 classified as noncompetitive and emerging competitive
18 if U S West believes that those filings are filed to
19 meet competition. Those are two separate issues.
20 Would staff agree?

21 MR. HOSECK: No. I think they're
22 interrelated and because it gets to this question of
23 who has made the decision on the classification. Does
24 U S West make it or does the Commission make it, and
25 then what effect does this statute have? So I do not

1 agree.

2 MS. WIEST: Well, the second issue, you keep
3 saying made the decision on the classification. You
4 mean classification between noncompetitive, emerging
5 competitive, and fully competitive.

6 MR. HOSECK: Right.

7 MS. WIEST: But that's not the second issue.
8 It's not a question of how it's classified.

9 MR. HOSECK: It is. Because that has a
10 bearing on their position as to whether or not they
11 have to file in the first place. And that goes back to
12 what we had in our petition. Do they have to file
13 these updates? And they're saying no.

14 CHAIRMAN BURG: That brings -- first of all,
15 how did you find that they were not doing this, that
16 they were not filing?

17 MR. HOSECK: I think it was -- you know, I
18 would to have rely on my witness here, but it's my
19 understanding that he just noticed they weren't coming
20 in.

21 CHAIRMAN BURG: Rolayne, is this a formal
22 kind of hearing where we could not ask that witness --
23 can we ask Harlan how he found out?

24 MS. WIEST: Yeah, but I'm not sure how far
25 you want to go right now, I guess, is the point.

1 CHAIRMAN BURG: Because I've gotten some
2 enlightenment here today, and especially Mr. Welk's
3 comment that it may still be a competitive, a
4 noncompetitive, or emerging competitive service. But
5 for a particular location there is competition so that
6 negates the necessity to file. That's what I'm
7 saying.

8 You know, what you're not filing is what I
9 would say when you meet competition. Would it be
10 zeroed into that competitive location? And how would
11 that be known? Or does it -- does that immediately
12 make it mean the whole universe that that's not -- that
13 you don't have to file on?

14 MR. WELK: That's what you're going to
15 determine. That's what we want to know the answer to.

16 CHAIRMAN BURG: That was the question that I
17 had. You know, that was something that I had not
18 understood until we were here today. Is that you're
19 talking about? Not reclassifying a service, but taking
20 a service and leaving its classification, but
21 determining for a particular location it is now you do
22 have competition and so you do not have the necessity
23 of taking whatever time and approval it would take to
24 get it filed.

25 COMMISSIONER NELSON: But what I heard him

1 say is that he doesn't think the classes are really
2 relevant anymore because if it's deemed necessary to
3 meet competition, he can do whatever. And I don't
4 think that we classify something just basically it's
5 not -- I don't think that we do things so that it only
6 deals with like, for instance, the Canton area. But I
7 don't think that's what I heard you think the intent is
8 either.

9 MR. WELK: I clearly want it understood that
10 U S West's position when this statute was passed, if
11 you have competition down in Canton, that we have the
12 ability under the statute to go and give the consumers
13 a price to meet it. That's what that language -- why
14 else would that notwithstanding paragraph or sentence
15 be in the statute? It's not there for surplusage. And
16 you're going to be determining, Commissioners. You're
17 going to set the chart here. You're going to determine
18 what this means in your opinion.

19 MR. HOSECK: May I respond?

20 CHAIRMAN BURG: Yes.

21 MR. HOSECK: I think that there is a very
22 sharp distinction between what Mr. Welk is talking
23 about, their ability to meet competition, which 84
24 talks about and what we're talking about and that is
25 filing so that we can proceed to do our job in case

1 there's a consumer complaint or consumer inquiry. And
2 they can meet all the competition in the world. We're
3 talking about filing here.

4 CHAIRMAN BURG: Do you have an opinion on
5 whether other people should have to file or not?

6 MR. HOSECK: No, not at this point in time.

7 CHAIRMAN BURG: I mean you were giving a
8 public right to know argument.

9 MR. HOSECK: We're keeping this issue
10 confined to U S West's ability, or rather obligation to
11 file because of their status of being the regulated
12 telecommunications company; and, secondly, the public's
13 right to know as the public when they call us and ask
14 what is the proper charge for a certain service in a
15 certain market, we are able to advise them, or we are
16 able to resolve complaints.

17 CHAIRMAN BURG: But does their right to know
18 go to companies other than U S West?

19 MR. HOSECK: It may if it's in the public
20 arena.

21 COMMISSIONER NELSON: It seems to me that Mr.
22 Welk is trying, in my opinion, to get me to decide at
23 this point in time after the hearing that the
24 interpretation -- our interpretation of that statute
25 that you quoted is that we don't really have those

1 classes anymore because they're not relevant. If you
2 have to meet competition, we can do whatever. So in my
3 opinion that's not the message you intended.

4 MR. WELK: That is clearly my message.

5 COMMISSIONER NELSON: You want us to put on
6 the record now our interpretation of that statute which
7 says that these classes -- and we discussed this when
8 they passed this legislation whether or not that
9 negated all these classes of competitive, emerging
10 competitive, and noncompetitive. And they said, no,
11 no, the classes still exist.

12 But, in essence, it seems to me that in this
13 decision you are kind of saying that the Commission
14 should decide whether or not those classes still exist
15 or don't exist based on the statute that would no
16 longer require them.

17 MR. WELK: We want to know what you think.

18 COMMISSIONER NELSON: Right.

19 CHAIRMAN BURG: But what I heard you say also
20 is that you still have to show -- as long as they're
21 classified in one of those categories, you still have
22 to show that you had a legitimate reason to, in other
23 words, violate the filing based on that and that was
24 competition you have to show.

25 MR. WELK: Correct.

1 CHAIRMAN BURG: We take it case by case.

2 MR. WELK: That's correct. And plus what
3 makes this even more complicated is Camron has said one
4 is the filing issue, one is a competition issue. We
5 have an issue on fully competitive. We don't think you
6 have a regulation that makes you file fully
7 competitive. We want a ruling on that. This
8 proceeding, we believe, will help chart the course.
9 That's why we welcome it. You've got to give us some
10 answers. All we're saying is let's get on with it.
11 Let's find out what the market is.

12 COMMISSIONER NELSON: It does seem that he's
13 trying to make a -- set a legal precedent here for his
14 interpretation. It's also very clear, at least it
15 seems to me on what you've said, that you believe that
16 we no longer really have those classes and because
17 everything is going to be out there to meet competition
18 and we have a new statute that says that's acceptable.

19 MR. HOSECK: Mr. Chairman, staff is ready to
20 tender Witness Best for deposition tomorrow morning.
21 We'll get that out of the way.

22 In light of that, we still think that this
23 thing is something that is triable next Tuesday and we
24 do not want a continuance in any form.

25 I think that this discussion today amply

1 demonstrates that the facts could be developed and the
2 law could be briefed in that period of time. We've
3 been sitting around since July monkeying around with
4 this thing.

5 And, quite frankly, have questioned whether
6 or not, as staff, we have been able to fulfil our
7 function in keeping the public advised. Another
8 continuance is not going to accomplish anything. Thank
9 you.

10 CHAIRMAN BURG: Could I ask General Counsel
11 to restate your recommendation?

12 MS. WIEST: I would like to put out an
13 amended -- another Amended Notice of Hearing and detail
14 the issues and grant a short continuance. I have two
15 separate dates. I have March 24th and April 7th.

16 CHAIRMAN BURG: And would that amended order
17 expand the issues?

18 MS. WIEST: I think it would clarify the
19 issues that are going to be in there. Because I think
20 we have at least three separate issues that the
21 Commission needs to decide. And if you go forward with
22 it the way it is now, I think you're subject to
23 objections that goes outside if you try to make these
24 decisions, and I think you have to make these
25 decisions.

1 CHAIRMAN BURG: Any other comments from
2 Commission?

3 I'm ready to move that we adopt Counsel's
4 recommendation. I think we only get halfway if we
5 don't and that it's more inefficient -- it would not be
6 an efficient way to handle the issues by only taking
7 parts of it at this time when we're fully aware that
8 they've expanded beyond where we were. And I think we
9 can settle them all in a very short time.

10 So I will move that we take the
11 recommendation of Counsel.

12 COMMISSIONER NELSON: I guess I'm not going
13 to support that motion but basically because I think
14 that the catalog issue is one issue and I think the
15 other issues that Mr. Welk raised is also an important
16 issue. But at this point in time I think that the
17 catalog issue is important enough and we should go
18 forward with it.

19 COMMISSIONER SCHOENFELDER: Well, I need to
20 ask Mr. Welk a question on his position on the motion
21 for continuance. You still want the continuance even
22 if you could depose Mr. Best tomorrow morning?

23 MR. WELK: No, not if we're going to confine
24 it, as Commissioner Nelson said, to the catalogs. It's
25 a relatively simple issue.

1 COMMISSIONER SCHOENFELDER: I'm not talking
2 about what Commissioner Nelson said. I'm talking about
3 doing what Commission Counsel said. Do you need the
4 continuance?

5 MR. WELK: If we expand the hearing?

6 COMMISSIONER SCHOENFELDER: If you expand it
7 you need a continuance? If we expand the hearing,
8 Mr. Hoseck, don't you need the continuance? I know
9 you're objecting to it.

10 MR. HOSECK: I'm ready to go to work Tuesday.

11 COMMISSIONER SCHOENFELDER: But it would not
12 harm staff's case if we granted the continuance for a
13 short period of time?

14 MR. HOSECK: Yes, I think it harms it because
15 it delays the whole matter. And we've been diddling
16 around with this thing since the first of July.

17 COMMISSIONER SCHOENFELDER: I'm aware of
18 that, so a couple more days, give or take --

19 MR. HOSECK: I'm not going to concede that,
20 Commissioner.

21 COMMISSIONER NELSON: I'm a little concerned
22 about the due process to other people. Although we
23 started out talking about whether or not U S West
24 should be filing catalogs, talking about U S West, and
25 now we've expanded to putting on record this

1 Commission's determination about what exactly that new
2 statute says.

3 And I don't think this Commission has given a
4 whole lot of thought to that. And I certainly remember
5 the intent was, and the intent in the legislature was
6 they said that those classes were going to still be
7 there, and meeting competition wasn't exactly what we
8 envisioned.

9 Now I think what I heard Mr. Welk say today
10 is that his interpretation is maybe those aren't
11 necessary, or not relevant anymore because anything
12 that they determine, once he's determined has to meet
13 competition is there.

14 So I think his stuff today broadens this
15 thing a lot farther than I want to broaden it at the
16 present time without having other people be really well
17 aware that they have a stake in how we are going to
18 interpret that law.

19 I buy Mr. Hoseck's argument that this has
20 been around since July and other people could have
21 intervened. And if we issue an order and they don't
22 like that order, I assume they can come and argue about
23 it. There will be a notice going out. There is not a
24 due process notice, but a due process problem. It
25 would be a problem with fairness.

1 I'm going to second Commissioner Burg's
2 motion because -- and I respectfully disagree with
3 staff. I don't know how we can separate these issues
4 out and let them stand alone. They're totally
5 integrated. So I'm going to take counsel's
6 recommendation. I do think we need to broaden it. But
7 I do think we need to move it along, so the 24th of
8 March or the 7th of April, either one, is acceptable to
9 me.

10 CHAIRMAN BURG: I would just add because we
11 -- the main reason I said that is because I don't
12 think -- I don't believe we solved anything by taking
13 the initial issue before us. I think everything is
14 still up in the air that nothing would happen until we
15 held the second one anyway. We answer the rest of the
16 questions anyway, and I think we could just as well do
17 them so we have a complete decision here.

18 COMMISSIONER NELSON: I think this is a whole
19 different docket than we started out with.

20 CHAIRMAN BURG: That's okay.

21 COMMISSIONER SCHOENFELDER: We just made a
22 different one. General Counsel, I have to ask
23 procedural questions though. So virtually we don't
24 even have to tack on the motion to quash because both
25 parties have kind of agreed to the deposition.

1 MS. WIEST: They agreed to most of it, but I
2 think they are maybe still objecting to the
3 deposition. So in that respect I guess we deny the
4 motion to quash.

5 COMMISSIONER SCHOENFELDER: I thought his
6 witness was available.

7 MR. HOSECK: We've tendered our witness for
8 tomorrow morning.

9 CHAIRMAN BURG: So everything has been met?

10 COMMISSIONER SCHOENFELDER: We granted the
11 motion to continue.

12 MR. WELK: Do you want to do it tomorrow or
13 Monday or Tuesday? I was going to be back here
14 Tuesday.

15 MS. WIEST: We'll say the question about the
16 motion to quash, that was actually neither granted nor
17 denied because the parties settled that issue. And
18 then the Commission, the other motion for a continuance
19 then will be granted, but that was part of my mine.
20 And as part of that motion also was that they would put
21 out an amended order.

22 COMMISSIONER NELSON: I think Jim should
23 start his motion over again because the motion Jim made
24 doesn't do the other things you said.

25 CHAIRMAN BURG: Yes, it does.

1 COMMISSIONER NELSON: It doesn't say anything
2 about the first three things we already said were moot.

3 CHAIRMAN BURG: But by them agreeing to it,
4 it made the quash moot, the way I understand it; and
5 the rest of them we addressed in the recommendation.

6 MS. WIEST: I believe they have come to an
7 agreement on the discovery issue so I don't believe the
8 Commission needs to rule on it anymore.

9 COMMISSIONER SCHOENFELDER: My question was
10 that we made sure we covered all the motions before us
11 today was what I was trying to make sure that we didn't
12 leave something there that needed to be addressed.

13 MS. WIEST: Staff made an objection to the
14 amended order, but we are changing that amended order
15 and it wasn't a motion.

16 CHAIRMAN BURG: I think everything was
17 covered in the motion. Are there any other issues to
18 come before the Commission on this docket?

19 MR. WELK: Do you want to us get back to you
20 on one of those two dates, March 24th or April 7th?

21 MS. WIEST: Do you have a preference,
22 Camron?

23 MR. HOSECK: I don't have my calendar up
24 here. Probably the 24th.

25 MR. WELK: We will check and get back to

1 you. I'll check with the witnesses and call you.

2 CHAIRMAN BURG: I want to re-ask is there any
3 other issues on this docket?

4 MS. WIEST: I don't believe so.

5 CHAIRMAN BURG: Okay.

6 TC98-194, In the Matter of the Complaint
7 Filed by Basec.Net, Huron, South Dakota, against U S
8 West Communications and FirstTel Incorporated, Regarding
9 Billing Issues.

10 Today shall the Commission grant the request
11 to dismiss the cross-claim of FirstTel, Incorporated,
12 against U S West.

13 And I'm again going to turn it back to
14 Rolayne for clarification because I need a lot of it.

15 MS. WIEST: Like the other one, I would first
16 like to ask, after the agenda went out we received a
17 Motion to Supplement the Record. And my question for
18 the parties is whether there is any objection to the
19 Commission deciding the Motion to Supplement the Record
20 at this time?

21 MR. WELK: I have no objection to deciding
22 that motion at this time.

23 CHAIRMAN BURG: I'll bring Todd Epp in. Do
24 you have anything on this? Any comments on this?

25 MR. EPP: I'm just monitoring again today,

1 sir.

2 MR. JONES: Travis Jones appearing on behalf
3 of Bob Riter for FirstTel. And I would have no
4 objection.

5 MS. WIEST: Okay. Then FirstTel may proceed
6 on their Motion to Supplement the Record.

7 MR. JONES: I would rely on briefs filed by
8 Robert Riter on behalf of FirstTel. I believe that the
9 Motion to Dismiss filed by U S West should be denied by
10 the Commission. I believe that the Commission is the
11 proper body to hear and determine the matter set forth
12 in the complaint filed by Basec.Net, and I would ask
13 the Commission to find them the proper body to hear
14 that.

15 MS. WIEST: Mr. Welk.

16 MR. WELK: I thought the motion was whether
17 they could supplement their argument.

18 MS. WIEST: That's right.

19 MR. WELK: That motion -- we have filed a
20 written opposition that says that FirstTel has not
21 stated why you couldn't have made these arguments
22 before the Commission when we had this hearing two days
23 ago. They did not object at that time that they didn't
24 have sufficient time. They filed a written response.

25 The only reason this matter got continued, in

1 my recollection of what happened, is that General
2 Counsel wanted to review the cases that have been cited
3 by the parties in order to advise the Commission and
4 the Commission wanted to decide it.

5 Once we're done with it, we get a motion that
6 supplements it, and our opposition is we were the
7 moving party. We got this this morning. I got it from
8 the Commission when I was down here today. There's a
9 couple of points that I would respond to orally and
10 could in writing more fully.

11 But if this is going to be the operation that
12 we are -- we argue a motion and when you want to have
13 your ad hoc, we can file another brief, you're going to
14 continue these proceedings on. Your practice has been,
15 at least as long as I've been here, is that when you --
16 after you've heard the arguments, you have your
17 discussion, you can consult with counsel, counsel looks
18 at that, and you come in an ad hoc meeting and answer
19 your decision.

20 Now he's created a precedent. Well, I want
21 to put more information in, and so now we're going to
22 extend the briefing time. So I object to the filing of
23 the supplemental argument. And if the Commission wants
24 to consider it, since we are the moving party, I want
25 the opportunity to respond subsequently to the motion,

1 or to the additional authority that's been cited.

2 MS. WIEST: Does staff have a comment on
3 this?

4 MS. CREMER: Oh, no.

5 MS. WIEST: Meaning you wouldn't respond
6 orally today, is that what you're stating, Mr. Welk?
7 You would want to respond in writing?

8 MR. WELK: I mean if you want me to. But I
9 don't think it's fair I get something this morning up
10 here and have to respond to it. I'm really concerned
11 about the process here. What kind of precedent are we
12 setting? Does that mean when I want to add another
13 brief a couple days late I get the same courtesy? We
14 can re-argue it again and extend it? That hasn't been
15 your process in the past.

16 MS. WIEST: Well, I would recommend that
17 since U S West filed the original motion -- and let me
18 double-check that -- on March 3rd, I believe Mr. Riter,
19 in his oral comments on Tuesday, stated that he hadn't
20 had sufficient time to put something in writing and it
21 was a very short turnaround time. So I would allow the
22 motion to supplement.

23 CHAIRMAN BURG: And then have it -- also give
24 U S West time to get --

25 MS. WIEST: That's up to you.

1 CHAIRMAN BURG: I mean Mr. Riter time to get
2 response to U S West's motion?

3 MS. WIEST: This is their written response to
4 U S West's written Motion to Dismiss the Cross-claim.

5 CHAIRMAN BURG: Any other comments?

6 COMMISSIONER NELSON: How much time did
7 Mr. Riter have to respond?

8 MS. WIEST: I believe this was filed March
9 3rd, and then our Commission meeting where we heard it
10 was March 9th.

11 CHAIRMAN BURG: Is this the only decision we
12 have before us today? I'm trying to get the whole
13 perspective. We also have the one on --

14 MS. WIEST: Depending on this one, the
15 Commission will then go to the merits of the Motion to
16 Dismiss the Cross-claim.

17 CHAIRMAN BURG: Again, I'm going to move that
18 we do enter a motion to supplement because I still
19 think it's the most efficient way to get the whole
20 thing settled. I think we're going to have issues
21 hanging if we don't, even if it takes more time. So
22 I'll move that we do.

23 COMMISSIONER NELSON: I guess I'm going to
24 dissent because I think that I am somewhat sympathetic
25 to Mr. Welk's argument that he didn't like to get here

1 today and have to respond to it. If March 3rd and
2 between March 3rd and March 9th didn't give Mr. Riter
3 an opportunity to respond, it hardly seems fair to me,
4 at least, that Mr. Welk should have to be responding
5 today.

6 CHAIRMAN BURG: He doesn't.

7 COMMISSIONER SCHOENFELDER: I don't know that
8 the dissent is right because I don't intend to decide
9 the motion.

10 COMMISSIONER NELSON: Okay, whatever. I
11 assumed you would go with it.

12 COMMISSIONER SCHOENFELDER: I would like to
13 -- I don't know.

14 CHAIRMAN BURG: Okay. Motion dies for lack
15 of a second.

16 COMMISSIONER SCHOENFELDER: I would like to
17 go to the basic question whether we should dismiss the
18 cross-claim or not. Is that possible?

19 MS. WIEST: I think you have to rule on the
20 Motion to Supplement first.

21 COMMISSIONER SCHOENFELDER: Then I would move
22 we deny the Motion to Supplement.

23 COMMISSIONER NELSON: I'd second.

24 CHAIRMAN BURG: And I will dissent.

25 MS. WIEST: Since the Motion to Supplement

1 was denied, then does the Commission want any further
2 argument from the parties? It's up to the Commission.

3 COMMISSIONER SCHOENFELDER: Not me.

4 MS. WIEST: I would have a recommendation
5 then. I recommend that the Commission grant U S West's
6 Motion to Dismiss the Cross-claim because FirstTel's
7 cross-claim specifically states that it's asking for
8 indemnification pursuant to the resale agreement. And
9 since this is a claim for a specific remedy contained
10 in the resale agreement, the clause in the resale
11 agreement that states a claim is to be resolved by
12 arbitration by a single arbitrator under the American
13 Arbitration Association Rules does apply.

14 COMMISSIONER SCHOENFELDER: Mr. Chairman, I
15 have a motion. And I would move that the Commission
16 adopt General Counsel's recommendation in this matter
17 and dismiss the cross-claim.

18 CHAIRMAN BURG: I'll second that.

19 COMMISSIONER NELSON: I'd concur.

20 CHAIRMAN BURG: Okay. So the request to
21 dismiss the cross-claim has been granted.

22 MS. WIEST: That's it.

23 CHAIRMAN BURG: Any other issues?

24 MS. WIEST: That's it.

25 (THE HEARING CONCLUDED AT 2:30 P.M.)

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF HUGHES)

3

4 I, LORI J. GRODE, Registered Merit Reporter
5 and Notary Public in and for the State of South
6 Dakota:

7 DO HEREBY CERTIFY that the above hearing,
8 pages 1 through 51, inclusive, was recorded
9 stenographically by me and reduced to typewriting.


10 I FURTHER CERTIFY that the foregoing
11 transcript of the said hearing is a true and correct
12 transcript of the stenographic notes at the time and
13 place specified hereinbefore.

14 I FURTHER CERTIFY that I am not a relative or
15 employee or attorney or counsel of any of the parties,
16 nor a relative or employee of such attorney or counsel,
17 or financially interested directly or indirectly in
18 this action.

19 IN WITNESS WHEREOF, I have hereunto set my
20 hand and seal of office at Pierre, South Dakota, this
21 17th day of March 1999.

22

23


Lori J. Grode, RMR, RPR

24

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