

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION
OF QWEST CORPORATION TO RECLASSIFY
LOCAL EXCHANGE SERVICES AS FULLY
COMPETITIVE

TC03-057

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Transcript of Proceedings
July 15, 2003

ORIGINAL

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

COMMISSION STAFF
Rolayne Ailts Wiest
John J. Smith
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Heather Forney
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Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

APPEARANCES BY TELEPHONE

Linn Evans
Matt McCaulley
Mary Lohnes
Tom Simmons
Tom Welk
Colleen Sevold
Larry Toll
Darla Rogers
Kyle White
Tim Goodwin
Pat Mastel

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The following is a TRANSCRIPT OF PROCEEDINGS,
held in the above-entitled matter, at the South Dakota
State Capitol, Room 412, 500 East Capitol Avenue,
Pierre, South Dakota, on the 15th day of July 2003,
commencing at 9:30 a.m.

1 CHAIRMAN SAHR: TC03-057, In the
2 matter of the application of Qwest Corporation to
3 reclassify local exchange services as fully
4 competitive.

5 And there are two questions today. One, shall
6 the Commission grant Prairie Wave's motion to
7 dismiss and, two, shall the Commission grant
8 Midcontinent Communications' second motion for a
9 protective order.

10 Mr. Smith, any suggestion on how to approach
11 these two?

12 (Discussion off the record)

13 MR. SMITH: Just a procedural matter
14 here. We've also received since the agenda went
15 out second motions for protective orders from
16 Prairie Wave, Northern Valley, and MidState, and
17 Black Hills, apparently.

18 And, I guess, my question would be that's not
19 formally noticed. Do the parties have an objection
20 to considering all of these today? Otherwise, we
21 will have to schedule an ad hoc meeting.

22 MR. WELK: Mr. Smith, this is
23 Tom Welk on behalf of Qwest, and Black Hills tried
24 to send me theirs yesterday, which I couldn't open
25 and send an e-mail back. Although, I think

1 Mr. Goodwin has read it.

2 The rest of them I have read. The issues
3 permeate the same through all of them, and we're
4 prepared to, you know, explain and argue those
5 portions. I haven't seen Black Hills' so I can't
6 represent, you know, what its issue is. I assume
7 it's similar to the rest of them, but I haven't
8 read it.

9 But in so far as Prairie Wave and MidState's
10 and Northern Valley, I believe they're all the same
11 issues so we could address it.

12 MR. SMITH: Okay. Thank you. I
13 haven't seen Black Hills' either.

14 CHAIRMAN SAHR: All right. So do we
15 want to take the Prairie Wave motion to dismiss
16 first?

17 MR. SMITH: Uh-huh. I think so.

18 CHAIRMAN SAHR: Why don't we go in
19 order and take the Prairie Wave motion to dismiss
20 and, Mr. McCaulley, if you want to go ahead and
21 proceed on behalf of Prairie Wave, please.

22 MR. MCCAULLEY: Thank you,
23 Mr. Chairman, members of the Commission. This
24 motion to dismiss was filed based on the Qwest
25 application that had been previously filed in this

1 docket, filed back on July 2, 2003.

2 And it was filed under the premise that when
3 the legislature passed SDCL 49-31-86 and 49-31-84
4 it set a water line, if you will, of 200,000
5 customers that gave Qwest extended pricing
6 flexibility outside of the Commission's authority
7 or outside of the Commission's review.

8 And the purpose of the motion to dismiss was
9 so long as Qwest was over 200,000 customers, that
10 it was -- this matter was not right for Commission
11 review because of the latitude and the authority
12 granted to Qwest under 49-31-86.

13 And so in the interest of time this morning,
14 Mr. Chairman, Qwest has now in response to the
15 motion to dismiss filed a response and provided an
16 affidavit setting forth that they are below the
17 200,000 water line set forth in 49-31-86.

18 So in the interest of expediency, and I think
19 just in the time of the Commission, because we do
20 have the pending motion for protective orders as
21 well, I think that's the first issue the Commission
22 needs to deal with.

23 And, obviously, as I set forth in my brief
24 under Section -- Part E on page 6 of the brief for
25 the motion to dismiss, if Qwest is below the

1 200,000 total residential retail access lines, then
2 the motion to dismiss is no longer right for review
3 and that argument -- and the motion to dismiss then
4 should be denied.

5 So I'll just put that forward to the
6 Commission that based on Qwest's response, based on
7 the record at this point in time since the motion
8 was filed it no longer appears this claim is right.
9 But I believe it would be, as far as Prairie Wave
10 is concerned, a finding of fact necessary -- or
11 finding necessary by the Commission that Qwest is
12 below the 200,000 water line set forth in 49-31-86,
13 and, in the sense they are, the motion to dismiss
14 has no further merit.

15 CHAIRMAN SAHR: Thank you.

16 MR. SMITH: Well, at a minimum then
17 because there's an issue of fact related to that,
18 it would not be proper, correct, for a motion to
19 dismiss? We would be talking about a motion for
20 summary judgment, if anything.

21 Is that a fair characterization?

22 MR. MCCAULLEY: Mr. Smith, yes. And
23 the motion to dismiss is, of course, based on the
24 Administrative Rules of the Commission, which allow
25 the Commission to grant the motion to dismiss at

1 any point in time.

2 The procedures are not set forward in the
3 Administrative Rules with regard to the filing of a
4 motion to dismiss and entertaining it.

5 Other parts of the Administrative Rules do
6 incorporate the Rules of Civil Procedure, but the
7 rule this was filed under does not.

8 MR. SMITH: We have in the past --
9 and I don't know, Mr. McCaulley, if you've been
10 involved in one of those -- treated the directions
11 to the Commission to abide by the Rules of Civil
12 Procedure as binding on us.

13 And we do generally treat a motion to dismiss,
14 if it's under appropriate circumstances, as a
15 motion for summary judgment. However, I guess it
16 would be my feeling that at a minimum here there's
17 an issue of fact concerning the 200,000 lines. And
18 I'm expressing no view whatsoever as to the legal
19 significance of that.

20 But because of that and because I don't
21 think -- because we have one affidavit that states
22 its below and we have apparently another document
23 that states it's above, to me at most -- the most
24 we can say is that we have some conflicting
25 evidence. And I don't think it's appropriate for a

1 motion for summary judgment.

2 MR. MCCAULLEY: Mr. Smith,
3 Mr. Chairman, if I might just respond. I
4 understand that the way these have been treated in
5 the past -- and I certainly am not contesting that.

6 The conflicting evidence comes from Qwest, and
7 the motion to dismiss was based on the factual
8 allegations set forth in Qwest's own Complaint. So
9 I do not deny at this time there is a conflict and
10 the information has changed since the brief was
11 filed.

12 So I would agree, Mr. Smith, at this point in
13 time the record does reflect a factual dispute from
14 Qwest's own statements with regards to number of
15 customers or residential lines they presently serve
16 in South Dakota.

17 And to the extend that Qwest has offered
18 evidence that would bring them below the 200,000
19 water line, then I believe you're correct, this
20 motion to dismiss is not proper at this point in
21 time in light of the new evidence that Qwest has
22 introduced.

23 MR. SMITH: Thank you. I guess I
24 would recommend the Commission deny -- are you
25 withdrawing the motion, Mr. McCaulley, or should

1 the Commission just vote to deny it?

2 MR. MCCAULLEY: My client has
3 instructed me at this time not to withdraw the
4 motion. So I think the Commission should entertain
5 it accordingly.

6 MR. GOODWIN: Mr. Chairman and
7 Mr. Smith, this is Tim Goodwin on behalf of Qwest.
8 Before you do that I would like to clear up one
9 apparent misconception, and that is that there's a
10 conflict in the evidence.

11 In our application we submitted evidence about
12 the line, the count as of the end of 2002. And
13 that line count was 210,000 and some change. As of
14 June 30, 2002 we had 194,866 lines, and that is the
15 information that is reflected in the affidavit, the
16 uncontested affidavit, that was filed.

17 I don't think there's any fact issue. It is a
18 factual matter, but there is not a factual dispute
19 here, nor is there a conflict in the evidence.
20 It's just a difference in time as to when the line
21 counts were measured.

22 MR. SMITH: Well, in either case we
23 wouldn't be able to make a factual finding that
24 it's over 200,000 based on the current state of the
25 record. So I think -- I can't see how the

1 Commission could really grant a motion to dismiss
2 on that basis at this point, whether treated as a
3 motion to dismiss or motion for summary judgment.

4 CHAIRMAN SAHR: Right. And then I'm
5 going to go ahead and make the motion we deny
6 Prairie Wave's motion to dismiss, and certainly
7 they can bring it up at a later point in time.

8 But I think at this point in time Qwest has
9 made a showing they are below 200,000. And with
10 that in mind, I will make that motion.

11 VICE CHAIR HANSON: Second.

12 COMMISSIONER BURG: I will concur.
13 I'm confused as to why Prairie Wave would not
14 withdraw the motion if they were convinced the
15 affidavit was legitimate and they no longer had a
16 case, but if that is the best way to move ahead is
17 to deny the dismissal, then I'll concur.

18 CHAIRMAN SAHR: Okay. And the next
19 item, shall the Commission grant Midcontinent's
20 second motion for a protective order. And with
21 Mr. Welk's agreement, we're also going to deal with
22 Prairie Wave, Northern Valley, and MidState's
23 request.

24 So, Mr. Gerdes, proceed please.

25 MR. GERDES: Mr. Chairman, members

1 of the Commission, my name is Dave Gerdes. I'm a
2 lawyer from Pierre, and I represent Midcontinent
3 Communications in this proceeding.

4 After we filed our motion it would appear that
5 each of the parties have the same Interrogatory,
6 although it may be numbered differently, depending
7 upon what questions were asked by Qwest. In
8 Midcontinent's case this was the only question that
9 was asked, and it's an Interrogatory in three
10 parts.

11 The information that's requested is in three
12 parts. Interrogatory No. 1(A) asks for average
13 recurring revenue per telephone line reported
14 separately for residential and business customers.
15 We don't have a problem answering that.

16 But B and C we think goes into too much detail
17 and is not necessary based upon the requirements of
18 the statute 49-31-3.2.

19 If you look at the requirements of that
20 statute and the subparts, we submit that this
21 detail -- the level of detail that's called for in
22 subparts B and C of the question simply is not
23 necessary and would improperly invade the business
24 planning -- confidential business planning of
25 Midcontinent as it relates to its bundling

1 strategy.

2 But, more importantly, just because the
3 information is there, that doesn't mean it's
4 required to be produced under the rules of
5 procedure. It has to be relevant to the subject
6 matter of the action.

7 And if it's not necessary for the Commission
8 to decide this action, having that information in
9 the hands of Qwest, then we're not required to
10 produce it. And that's our position here.

11 And even going beyond that, Qwest is taking a
12 very aggressive tack at discovery in this matter.
13 We got past the last confidential squabbles and
14 worked that out, but it seems like here that we're
15 just taking another step further along.

16 As perhaps an aside, but to emphasize my
17 point, I apologize I didn't have this information a
18 week or so ago when we were talking about the first
19 sets of Interrogatories, but one of the things we
20 argued about last time with reference to the first
21 set of Interrogatories was whether or not we
22 should -- we, meaning the interveners, should have
23 to disclose certain information concerning market
24 share.

25 About 10 minutes before I came up here I was

1 given a form that is available on the wholesale
2 Qwest website, at which Qwest wholesale will give
3 any carrier a market share report of what their
4 market share is.

5 Now if Qwest has this information and can give
6 it back to the carriers, why is it that the
7 carriers are being asked to produce it? And I
8 would submit -- and I will hand out to the
9 Commission and staff copies of the form. And I
10 will grant you that I should have had that last
11 week. But the point being that we're just really
12 getting into too much detail here, and Qwest has a
13 lot of information available to them.

14 And in this case talking about subparagraphs B
15 and C, Qwest is simply asking for too much. It's
16 not necessary under the statute. It's highly
17 sensitive information. And, as you can see from
18 the form, a carrier can fill this out, send it in,
19 and Qwest will give them a market share report.
20 It's available on Qwest's wholesale website.

21 So, Mr. Chairman, members of the Commission,
22 while we can agree that we might have to -- that we
23 should perhaps provide an answer to the first
24 question, beyond that, we submit that, number one,
25 it isn't necessary and, number two, it's into

1 information that's just too sensitive.

2 CHAIRMAN SAHR: Thank you very much,
3 Mr. Gerdes. And just so everyone is straight here,
4 your objection is to B and C in that particular
5 Interrogatory. And, like you said, some people
6 it's -- for Midco it's numbered Interrogatory
7 No. 1. For other people it might be 4 or a
8 different number.

9 MR. GERDES: That's correct. But in
10 my looking at the various Interrogatories, they are
11 verbatim. It's just a different number.

12 CHAIRMAN SAHR: Okay. Why don't we
13 go ahead and let's hear from the other interveners.
14 And I know that some actually are also objecting to
15 A as well as B and C. And so I think the other
16 interveners make your case on A as well, and after
17 we go through those people, let's hear from the
18 rest on A, B, and C as a total.

19 So why don't we go next to Prairie Wave then.
20 Mr. McCaulley.

21 MR. MCCAULLEY: Thank you,
22 Mr. Chairman. As is set forth in the brief to the
23 motion for the protective order, page 5 of the
24 brief I found -- there's an Eighth Circuit Court of
25 Appeals case that appears these issues -- this is

1 the second or third hearing we've had dealing with
2 these essential trade secrets or alleged trade
3 secrets and confidential information that Qwest is
4 seeking.

5 And the Remington Arms case deals with
6 Federal Rules of Civil Procedure 26(c)(7), which is
7 identically reproduced in 15-6-26(c)(7). I'm
8 unable to find in the South Dakota Law that deals
9 with the process to reconcile a party attempting to
10 discover trade secret or confidential information
11 and such had to go out to the Eighth Circuit.

12 But I was able to find this Remington Arms
13 case. This case basically details a four-step
14 process when Qwest is seeking to govern this type
15 of information.

16 Prairie Wave is setting forth that the
17 information sought under 4(A), 4(B), and 4(C),
18 numbered in accordance with our Interrogatories, is
19 trade secret information, confidential information,
20 and/or confidential commercial information as
21 provided under applicable law.

22 And without going into the -- I won't repeat
23 the brief but basically what the four-step process
24 is is once Prairie Wave has shown that information
25 to fall within the statutory protection and that

1 the disclosure would be harmful, the burden then
2 shifts to Qwest to show that the information is
3 relevant and necessary to its case.

4 And as set forth therein Prairie Wave fails to
5 see how the information requested passes the simple
6 relevancy test with regard to the showing that
7 Qwest has to make under 3.2 or even necessary to
8 its case. And then after Qwest has made that
9 showing then under the Remington Arms case the
10 Commission would then waive the interest of the
11 parties and potential injury to Prairie Wave that
12 would result.

13 And as Mr. Gerdes set forth, this information
14 that Qwest is seeking is very closely guarded
15 confidential. This has not been released, and
16 Prairie Wave is asking the Commission for
17 protection from Qwest's discovery as we can't even
18 get past the second prong of the Remington Arms
19 analysis.

20 So I would suggest to the Commission that is
21 the proper analysis to follow when considering
22 these requests and also just emphasize the
23 sensitive nature, once again, that Qwest is -- the
24 sensitive nature of the information that Qwest is
25 seeking.

1 And once it's out, once a trade secret has
2 wrongfully been released, it's forever lost, and no
3 confidential agreements or sanctions that may be
4 imposed thereby can ever bring that back. So I'd
5 just ask the Commission for consideration and
6 protection of those trade secrets.

7 Thank you, Mr. Chairman.

8 CHAIRMAN SAHR: Thank you. Next why
9 don't we hear from -- Mr. McCaulley, just so we're
10 straight, you're objecting to A, B, and C; right,
11 all 3?

12 MR. MCCAULLEY: Yes, Mr. Chairman.

13 CHAIRMAN SAHR: Thank you. Why
14 don't we hear next from MidState, please.

15 MS. ROGERS: Yes. Commission, this
16 is Darla Rogers, and when I filed my motion for
17 protective order on behalf of MidState on
18 MidState's Interrogatories it was question No. 1(A)
19 through C.

20 I think I just included B and C on my
21 objections, but then when we actually prepared our
22 responses to the Interrogatories because, of
23 course, they were due, we added A. And so for
24 both, in fact, MidState and Northern Valley we are
25 objecting to and asking a protective order for

1 questions 1(A) through C. And our reasons are the
2 same as already have been expressed here, and I
3 won't take up more of your time.

4 In addition I did request a motion --
5 protective motion on one other question that I
6 think was handled with regard to the first
7 protective order that the Commission entered. And
8 so those are the basis for my objections or my
9 motions for a protective order.

10 CHAIRMAN SAHR: Thank you. And
11 that's for MidState and Northern Valley?

12 MS. ROGERS: For both, yes.

13 CHAIRMAN SAHR: Thank you. Then
14 although Mr. Welk hasn't had the chance to review
15 the Black Hills Fibercom motion, why don't we go
16 ahead and hear from Black Hills just because I
17 think it may help the Commission reach the
18 decision.

19 And would you please indicate whether you're
20 objecting to A, B, C or which one of those --

21 MR. EVANS: Yes, Mr. Chairman. This
22 is Linn Evans representing Black Hills Fibercom in
23 Rapid City. We object to Interrogatories 1(A),
24 (B), and (C). The information is highly
25 confidential information in terms of trade secrets

1 and our business practices.

2 We would also have extraordinary difficulty in
3 actually giving numbers that are what I would call
4 accurate because of our bundling mechanism by which
5 we sell and market our products because we sell
6 cable TV and high speed Internet at the same time.

7 So we will have extraordinary difficulty even
8 getting the numbers together, and to the extent
9 that we do, they would almost be a guess, to be
10 frank about it.

11 Beyond that, I join the arguments of all the
12 other parties that have been submitted thus far.
13 Thank you.

14 CHAIRMAN SAHR: Thank you. Do we
15 have anyone else that is objecting? I think that
16 takes us through all the parties.

17 Then why don't we go ahead and hear from
18 Qwest. Mr. Welk.

19 MR. WELK: Thank you, Mr. Chairman,
20 Commissioners, counsel, and parties. I think the
21 Commission needs to know why Qwest is requesting
22 this information. And taking upon what
23 Commissioner Burg said the other day, if this isn't
24 an issue, we don't need the information.

25 But an issue was interjected by the staff and

1 also the consultant for WorldCom, Black Hills, and
2 Midcontinent regarding what was called the price
3 squeeze issue or the price floor issue.

4 And I'm not the technocrat, but essentially in
5 layman's terms there is a position -- or an
6 argument being made by the staff as to a fully
7 competitive service there should be a price for.
8 There is an argument made by the representative of
9 those companies through their expert that you need
10 to look at Qwest's wholesale prices and juxtapose
11 those against the retail prices and see if people
12 are going to get squeezed out.

13 Well, in preparing our rebuttal testimony, in
14 order to address that issue Qwest is going to hit
15 that issue head on. And one way we can do it is to
16 argue with Qwest surrogate revenues, in essence, to
17 say this is what Qwest gets for a retail line, this
18 is what it costs for a UNE, and show that there's
19 margins and there's not going to be a price
20 squeeze.

21 The more appropriate way to address that issue
22 would be to get the actual revenues from the
23 competitive local exchange carriers and the
24 subelements of those revenues and say is there a
25 price squeeze that's possible here because of the

1 margins between the UNE rates and the retail rates.
2 And that would be the appropriate way to do it.

3 But this issue, and I will concede with other
4 counsel, we don't think it's relevant to the
5 statutory criteria. We don't think that's anything
6 the Commission needs to look at because that's not
7 what the statute is.

8 But this issue has been interjected by the
9 staff and by the expert for the interveners. So
10 now to say, look, you know, we don't want to give
11 you this information but interject the issue, is
12 exactly the point we want to say if it's not an
13 issue, pull it out. And we don't need the
14 information.

15 Or alternatively, as the Commission suggested
16 the other day, if you don't want to give us this
17 information and Qwest uses a surrogate, its own
18 revenue, so to speak, to deflate the issue, then
19 don't complain about the surrogate and its
20 credibility because you wouldn't give us the
21 information.

22 And insofar as the rest of the test, it's no
23 different than what we argued before. If we limit
24 it consistent with the oral order made of the
25 Commission the other day to those persons who would

1 need it -- and that would be Mr. Teitzel and
2 Starla Rook, and to do the analysis on trying to
3 defeat this issue. So it's not a matter of
4 protecting. It's going to be protected the same
5 way it was protected before.

6 But I think the issue is, is this an issue in
7 the case or not. And we don't think it is. But
8 it's been interjected. So for the reason it's been
9 interjected, we're entitled to defeat, and we need
10 the most credible information, unless the
11 Commission will say if you don't want to give it,
12 Qwest is able to use its own information, and
13 that's the end of it.

14 So that's our response.

15 CHAIRMAN SAHR: Thank you. Staff.

16 MS. CREMER: Staff has no opinion.

17 CHAIRMAN SAHR: Thank you.

18 COMMISSIONER BURG: I would be
19 interested, though, on any response on the
20 interjection of the issue that he talked about.

21 MS. CREMER: Well, we certainly
22 raised that as a condition. And I had no idea why
23 he was asking for that information. I mean, I had
24 read the Interrogatories, meant nothing to me.

25 I have not had time to even think about it. I

1 didn't know why he was asking for it. But
2 certainly staff did --

3 COMMISSIONER BURG: Does staff have
4 an objection if it was not -- if it were not
5 considered as they requested by the Commission?

6 MS. CREMER: That you not consider
7 the condition, would we have an objection to that?

8 COMMISSIONER BURG: Right. I mean,
9 because the accusation has been made that you
10 interjected the issue and that either the issue be
11 removed or else they have the right to get this to
12 satisfy the --

13 MS. CREMER: Or I thought his third
14 option was they'll address the issue --

15 COMMISSIONER BURG: Using their --

16 MS. CREMER: -- using their
17 information. Right.

18 COMMISSIONER BURG: And that, staff
19 would not object to?

20 MS. CREMER: I haven't seen their
21 information.

22 COMMISSIONER BURG: Okay.

23 CHAIRMAN SAHR: All right. Well,
24 Mr. Welk has raised an interesting argument. Let's
25 go back and hear from the other parties.

1 Midco.

2 MR. GERDES: Mr. Chairman, members
3 of the Commission, my response to Mr. Qwelk --
4 Mr. Qwest, Mr. Welk, whomever. Excuse me. My
5 response to Mr. Welk is that simply because we
6 object to providing this information, that doesn't
7 necessarily remove the issue.

8 It may be that the Commission would find after
9 the hearing that it was a question of proof as to
10 whether or not either Qwest or the interveners
11 proved their case. But as far as producing this
12 information now, I don't think it changes the fact
13 that the statute doesn't require this level of
14 information.

15 And so for that reason I would disagree with
16 Mr. Welk's position, and I would submit that we
17 need not produce this information. And that
18 doesn't necessarily mean a waiver of the actual
19 proof, and that doesn't necessarily mean -- or,
20 excuse me, that we waive the issue.

21 But, more accurately, it's a question of
22 proof. Did Qwest prove their part of it, or did we
23 prove ours?

24 Now the other thing I'd like to respond to is
25 Mr. Welk's argument that we've already provided for

1 this that it's okay because we've limited the
2 number of people that can see the information.

3 Yes. But as Mr. McCaulley observed, once the
4 information's out, it's out. And if it's not
5 relevant to the issues before the Commission, then
6 it should not have to be produced. And it's our
7 position it's simply not called for by the statute.

8 That level of information isn't relevant to
9 the issues in the case and that Qwest has all the
10 information they need already. And for that reason
11 the motion for protective order should be granted.

12 And, lastly, obviously if the Commission is
13 convinced that subparagraph A of those
14 Interrogatories needn't be produced, then we would
15 just as soon be treated the same as the other
16 interveners on this issue. We happen to think that
17 maybe there was some slight relevance of that
18 information, but if the Commission agreed that
19 subparagraph A need not be answered as well, then
20 we would just as soon be treated in that fashion on
21 our motion as well.

22 MR. SMITH: Mr. Gerdes, I didn't
23 hear you specifically address this price squeeze
24 issue.

25 Do you have a response?

1 MR. GERDES: Well, Mr. Smith, the
2 way I addressed it is to say it's a matter of
3 proof. If we don't prove the price squeeze issue
4 at the hearing, then the Commission cannot rule on
5 that issue.

6 But I don't think just because we object to
7 this level of information that the Commission need
8 necessarily here now say it will or not rule on the
9 price squeeze issue. I think it's something that
10 can and should be considered.

11 MR. SMITH: Well, if the price
12 squeeze issue is considered, are you arguing that
13 the information in these Interrogatories is,
14 nevertheless, irrelevant?

15 MR. GERDES: It's not necessary to
16 be produced by us. Qwest has their own access to
17 information.

18 MR. SMITH: But isn't one of the
19 points of discovery is so they can have access so
20 they know in advance of the hearing what
21 information you or the interveners intend to
22 produce so that they can prepare for that?

23 MR. GERDES: Well, obviously, if we
24 tried to introduce this level of information after
25 having gotten a protective order, I would think the

1 Commission would exclude it.

2 MR. SMITH: That's what I would
3 think.

4 MR. GERDES: Yeah.

5 CHAIRMAN SAHR: All right. Thank
6 you.

7 Prairie Wave, any response?

8 MR. MCCAULLEY: Yes, Mr. Chairman,
9 very briefly. First of all, I'll just note that
10 Prairie Wave has not raised this issue up to this
11 point in the proceedings with regard to Mr. Welk's
12 argument we have not participated in that expert
13 and Mr. Welk pointed out the Commission staff
14 raised the issue.

15 By Mr. Welk's own argument, this information
16 under the statute flatly is not relevant. And it
17 certainly is not necessary to Qwest proving their
18 case.

19 The issue, as I understand that's been raised
20 by Mr. Best and the testimony, is Qwest pricing its
21 own services below cost. And so what relevance the
22 prices of the CLECs have is not entirely clear to
23 me and the prices of the interveners.

24 Now if that's an argument that's going to be
25 raised by the staff and the other parties, I think

1 certainly Qwest's wholesale prices and Qwest's
2 retail costs would be relevant to the inquiry
3 and that's information that they should --
4 (Inaudible) -- but not relevant as to the
5 interveners.

6 And so I think again, just going back, if
7 information's not relevant, it's hard to see how
8 Qwest can make any showing this information's
9 necessary to the case that they have to prove under
10 the statute.

11 CHAIRMAN SAHR: Thank you.
12 MidState, Northern Valley.

13 MS. ROGERS: I believe,
14 Commissioners, that we are in the same boat as
15 Prairie Wave. I do not believe that we have raised
16 this. We have not introduced any testimony from
17 expert witnesses.

18 And so I think that our arguments would
19 certainly follow along the lines of Prairie Wave.

20 I also wanted to clarify, because I wasn't
21 sure I made it clear, that our objection goes to
22 all three subparts of the Interrogatory. And,
23 again, I concur that under the statute this
24 information is not relevant. We've not raised the
25 issue, and we should not be required to provide the

1 information.

2 CHAIRMAN SAHR: Thank you.

3 Black Hills, anything to add?

4 MR. EVANS: Thank you, Mr. Chairman.

5 Yes, just very briefly. As I recall the testimony
6 that Mr. Welk has raised or put into issue, it has
7 to do with price squeezing between the margins for
8 UNE and UNE-P products.

9 Black Hills, as the Commission knows, is a
10 facilities-based telecommunications company, and,
11 therefore, UNEs and UNE-Ps is almost -- none of our
12 business is related to those products. Therefore,
13 asking us for revenues pertaining to our sale of
14 residential and business customers is related to
15 our imbedded costs in our facilities and not in any
16 price squeeze issues that might occur with UNEs and
17 UNE-P type products. Thanks.

18 CHAIRMAN SAHR: Thank you.

19 Mr. Welk. Mr. Welk, do you have anything to add?

20 MR. WELK: Not much, but I still
21 have -- I don't know how they get around --
22 Black Hills even, it's their own expert that's
23 interjected the issue. It's not only staff. So
24 they can't say, well, gee, our expert says this but
25 we don't do this type of business. Either it's

1 going to be an issue or not.

2 The only thing that I would say in regard to
3 Mr. McCaulley's point about why do you want to know
4 the CLEC's revenues, because it is important to
5 know what wholesale prices are being charged by
6 Qwest, vis-a-vis the retail rates, but the CLEC's
7 rates and their margins and whether they will be
8 squeezed, if a CLEC has a higher margin than Qwest,
9 the argument's even better that there isn't going
10 to be a price squeeze.

11 So to test the validity of the argument, you
12 need to know the actual margins of those that are
13 out there. But, as we said, this just goes to show
14 you how different people kind of forget what their
15 expert's interjecting, and even though it's not in
16 the statutes, it's there.

17 So either the issue's in or it's out. And if
18 it's in, we ought to get their information, and if
19 it's out and they want to rely on just ours, that's
20 fine, but we shouldn't hear any objections about
21 it's not the right information and it's conjecture.

22 That's simply all we have, your Honor.

23 CHAIRMAN SAHR: Thank you.

24 Ms. Cremer, anything to add?

25 Questions from the Commissioners?

1 VICE CHAIR HANSON: I don't know if
2 I dare tread here right now. There's a number of
3 arguments that I was trying to figure out how they
4 were going to play out here. But am I wrong in
5 looking at this as a cost of service issue and an
6 issue of whether Qwest is attempting to sell their
7 product for less than cost and trying to determine
8 whether or not this should be included?

9 I mean, is that what we're ultimately looking
10 at? Anyone that can help me with that.

11 MR. WELK: Mr. Commissioner, it
12 ought to be the staff or the companies whose expert
13 their sponsoring is the one interjecting the issue.
14 They ought to answer it.

15 VICE CHAIR HANSON: Well, I'm
16 interested in an answer because it appears to me
17 that in dealing with it, it's cost of service.

18 Black Hills, are you willing to give it a
19 shot?

20 MR. WHITE: Yes. It is Kyle White.
21 And although Black Hills Fibercom does not rely
22 much on unbundled network elements as a business
23 plan because we are infrastructure-based, Qwest is
24 alleging in its Complaint that competition exists
25 fully throughout the state.

1 And many of the exchanges do not have
2 infrastructure-based competition. So, as a result,
3 the witnesses that were hired by us, our
4 consultants, have addressed the entire issue of
5 whether all of Qwest's service territory should be
6 declared fully competitive.

7 And so, therefore, they brought in the issue
8 of what I would agree is a cost of service issue.
9 Are Qwest's retail prices below their actual cost
10 of service, and also do they compare favorably as
11 far as their comparison to the wholesale prices
12 that are made available to competitors to provide
13 resale services or provide services using unbundled
14 network elements.

15 So it's basically that. It's not an
16 allegation that the price squeeze is occurring
17 necessarily in our market, but Qwest does allege
18 that a key component in this Complaint is the
19 availability of services to resale, UNE-P, and
20 wireless communications.

21 And we felt those issues needed to be
22 addressed because the issue that Qwest is
23 complaining about is that full competition exists
24 throughout the state and throughout all Qwest's
25 exchanges.

1 VICE CHAIR HANSON: Kyle, do you
2 have the ability to unbundle? Would you have the
3 ability to provide that information?

4 MR. WHITE: The information exists,
5 but I think that if we were pressed to do so, that
6 our existing status of competition with Qwest would
7 cause us to seriously consider whether we would
8 continue to participate in this proceeding.

9 Because that is more important to our business
10 plan than whether Qwest is declared fully
11 competitive.

12 VICE CHAIR HANSON: Well, I agree.
13 It's either -- it seems like a Yogi Berra, but it's
14 either an issue or it's not an issue. And if it's
15 not an issue -- well, if we're not going to ask for
16 the information, then it shouldn't be an issue. We
17 shouldn't be pursuing it.

18 Thank you, Mr. Chairman.

19 CHAIRMAN SAHR: Thank you.
20 Mr. Welk, if I heard you correctly, you were saying
21 that Qwest might acknowledge that A, B, and C -- or
22 I think you did acknowledge that A, B, and C are
23 not relevant to the issue at hand but they're being
24 used to basically defeat the price squeeze, price
25 floor arguments that you felt like were being

1 raised by the other parties; is that correct?

2 MR. WELK: Yeah. I don't think
3 they're part of the statutory. They might be
4 accepted -- as Mr. Gerdes said, that they might be
5 tangentially involved in some of those market
6 issues. But I think, as Dave said, maybe No. A is
7 more relevant to some of the market power issues
8 and market share issues.

9 The others, B and C, are related to price
10 squeeze issues on those subelements. And we're
11 using that information -- you know, we want that
12 information to juxtapose the elements on the UNE-P
13 versus the retail price and to show you what the
14 margins are.

15 And we're already calculating that. We're
16 using our own. We're saying -- you know, we know
17 we're going to be subject to criticism by using
18 only our revenues.

19 CHAIRMAN SAHR: Thank you.

20 Mr. Smith.

21 MR. SMITH: Can I just ask you, Tom,
22 is Qwest intending to object to the entire issue of
23 the relevancy of the price squeeze testimony at the
24 time of hearing?

25 MR. WELK: Yes, it is. There are a

1 number of issues, General Counsel Smith, that are
2 outside of the statutory and this is just one of
3 them and the answer would be yes. We have no
4 choice now because it's in the testimony.

5 MR. SMITH: Okay. Well, I mean, the
6 fact that it's been prefiled, does that mean --
7 that doesn't necessarily mean that you can't object
8 to it, though; right?

9 MR. WELK: No. I will object to it,
10 among a number of other things, at the time of
11 hearing. But if I don't produce something in here
12 now, in the rebuttal testimony then I'm going to
13 hear an objection from counsel saying you didn't
14 put anything in there, Welk.

15 So I have to take the risk whether you're
16 going to sustain it or not. So for the preparation
17 of the rebuttal testimony I have to address if I
18 believe it's a material issue.

19 CHAIRMAN SAHR: Mr. Welk, this is
20 Chairman Sahr. Could you, though, file a motion
21 before hearing to ask to have that excluded or at
22 least --

23 MR. WELK: We intend to,
24 Mr. Chairman, along with a number of other things,
25 but by the time that motion is heard, Chair, it

1 will probably be past the time our testimony is
2 due. So we are trying to busily get our rebuttal
3 testimony done and we will file that motion but
4 what you'll see is rebuttal testimony and then a
5 motion before the hearing.

6 CHAIRMAN SAHR: And realizing that
7 if that could potentially cause you a problem with
8 making the deadline, that is something you could
9 also ask for an extension perhaps strictly to those
10 issues that might relate to a pending motion if you
11 needed an extension of time.

12 So that might be one way to handle it, if you
13 do, in fact, get into that time crunch.

14 Staff, any questions or --

15 MS. CREMER: Staff's point in
16 raising that as a condition in our testimony was
17 that we had no way of knowing if Qwest -- they have
18 a wholesale and retail side. Those are, my
19 understanding, kept separate. And we don't know
20 that they're charging their -- that they're
21 charging the competitors the same as they're
22 charging themselves.

23 So that was just something we were trying to
24 explore and bring that out in making that a part of
25 our testimony, just to assure everyone that that

1 was being done equitably.

2 CHAIRMAN SAHR: Thank you. Any
3 other questions or comments?

4 All right. With that in mind, I'm going to go
5 ahead and make a motion. And, I mean, I will say
6 this. I think we found an area where Mr. Welk and
7 Mr. Gerdes could, in fact, agree. Or they came
8 close to agreements.

9 And I think it is kind of an issue of
10 fairness. It's sort of if you're not going to give
11 the other guy the information, then perhaps you may
12 be in a little bit of a bind if that person objects
13 to not being able to address an issue or part of an
14 issue because they did not get that information.
15 We certainly don't want to put anyone into a
16 Catch-22.

17 With that in mind, though, I think Mr. Gerdes
18 also indicated that Midco -- now we're getting into
19 motions that might be filed, but Midco might have
20 response that there is readily available evidence
21 from other sources that could be used to deflate
22 the price squeeze, price floor issue.

23 And I'll leave it up to Qwest to consider what
24 they want to file going forward, but they certainly
25 have the ability to file a subsequent motion to

1 look into whether or not these things should be
2 decided before hearing. And certainly, as Mr. Welk
3 has indicated before, the deadline is due for
4 discovery.

5 I am going to go ahead and move that as to the
6 Interrogatories that Subsection A, B, and C not be
7 required to be responded to by the -- well, by all
8 the interveners, so to speak, Prairie Wave,
9 MidState, Northern Valley, Midco, and Black Hills
10 Fibercom, realizing, of course, that we do have an
11 issue that Mr. Welk hasn't had the ability to
12 review Black Hills' motion and that Mr. Gerdes
13 just raised the issue as to point A this morning.

14 At the same time, if we're basing this largely
15 on relevancy, I don't think anyone's shown that
16 it's anymore relevant for one party as opposed to
17 another. So I think to save everybody some time,
18 and I think to address what's probably inevitable
19 if further motions were filed by Black Hills or by
20 Midco, I would go ahead and move that A, B, and C
21 not be required to be responded to by the various
22 parties.

23 COMMISSIONER BURG: I'll second
24 that.

25 VICE CHAIR HANSON: I'll concur.

1 And now Mr. Smith is noting we have one more item.

2 Is this noticed for the hearing?

3 MR. SMITH: Yes, it is. Well, it is
4 if it's okay with Tom. This is MidState's
5 objection to your request for Production No. 1,
6 which is in response to a phrase Mr. Benton used in
7 his prefiled testimony.

8 Is that correct, Tom?

9 MR. WELK: Well, I have to look at
10 that. I mean, I was looking through these others.

11 Darla, can you tell me what the particular
12 objection is again?

13 MS. ROGERS: As I recall, and I am
14 not in my office right now so I don't have all of
15 these documents in front of me, but, as I recall,
16 that particular request for production it seemed to
17 me fell within the oral protective order that the
18 Commission entered earlier.

19 I think it requested, was it some type of --
20 it was almost identical to one of the prior
21 requests for production. And so I felt that that
22 oral order covered it.

23 MR. WELK: Okay. Well, that's fine
24 if you believe it does.

25 MR. SMITH: Let me just read you

1 what it says here Tom and Darla, if you can't find
2 it. It says, "Mr. Benton refers to market surveys
3 conducted by MidState. Please provide a copy of
4 the survey instrument and a compilation of all
5 responses. If not apparent from the documents,
6 please specify the date of the survey and location
7 of survey response. Also if not apparent from the
8 documents, please identify how the individuals
9 responded to such survey."

10 Based upon what I could see reading the
11 testimony, the only reference I saw to a market
12 survey appeared to be something that occurred way
13 back in either 1999 or 2000 when MidState made the
14 decision to get into the phone business in
15 Chamberlain.

16 Is that what we're talking about here?

17 MS. ROGERS: I assume that that's
18 what that was --

19 MR. WELK: No. I think it had to do
20 whether it was some -- and without having it in
21 front of me, Mr. Smith, I don't think that was what
22 it was intended to do.

23 I think it was intended to be for surveys of
24 current people. But I shouldn't address it because
25 I can't remember without going back.

1 MR. SMITH: And it looked to me --
2 and I hate to make a recommendation without knowing
3 that. I'm just thinking that the probative value
4 of something of a market survey that a party used
5 before they even entered the market three or four
6 years ago, I mean, right now the market status is
7 as it is, and I'm really questioning whether
8 there's -- honestly, I can't see what the
9 competitive risk of this would be either, if we're
10 talking about that old survey.

11 But on the other hand, I don't see how it's
12 going to be germane to anything.

13 MR. WELK: Mr. Smith, why don't you
14 let Ms. Rogers and I talk about this so we won't
15 waste the Commission's time.

16 MS. ROGERS: We'll work it out.

17 MR. WELK: We'll work it out. But
18 before we go to the next docket, I wanted to give
19 an update to the Commission because I started
20 telling you this two or three weeks ago, and what I
21 predicted about people not giving information is
22 coming to pass.

23 And has the Commission entered any orders on
24 the motion to compel or the protective order yet?
25 I have seen the oral -- read the oral, but is there

1 any written orders entered?

2 MR. SMITH: The order is prepared,
3 and it's on Delayne's desk for signature right now.
4 We'll do our best to get it out to you yet this
5 morning.

6 MR. WELK: Well, and I'm not being
7 critical of that. I'm being critical of the people
8 who haven't provided the information when the
9 Commission orally ordered it. Black Hills Fibercom
10 has filed motions to protective order. They filed
11 one set.

12 I haven't got one information on the
13 second set -- or the first set on the motion to
14 compel or the second set that were due yesterday.
15 Others are floating in. I've got the staff's. I
16 got Midco's, you know, came in today. And
17 Prairie Wave's was timely.

18 But I want to tell you I'm not getting the
19 information that you orally ordered from some
20 people, and I am going to ask that we be able to
21 move the date of the filing of our rebuttal
22 testimony.

23 Because this is exactly what I anticipated
24 would happen. We're getting them at different
25 times. They're not coming in. Some aren't even

1 producing. And so I wanted the Commission to know
2 that.

3 So we're constantly fighting motions for
4 protective order, arguing about these. We're not
5 getting the information and at the same time we're
6 supposed to be doing our testimony. And the
7 Commission should know that.

8 MR. EVANS: If I may, Mr. Chairman,
9 this is Linn Evans, Black Hills. Ours was mailed
10 yesterday. Mr. Welk will receive it today. We
11 have not responded to the motion to compel as we
12 continue to try to gather that data, and we will
13 have it to them as soon as possible.

14 CHAIRMAN SAHR: Thank you.
15 Mr. Gerdes, do you have anything to add?

16 MR. GERDES: The only thing I would
17 say, Mr. Chairman, and I suppose we could talk
18 about this all day, part of the problem is the
19 statutory constraints on the time schedule.

20 I mean, it's very difficult to address all of
21 these issues quickly because they're complex. So,
22 yes, I sympathize with Mr. Welk, but we had the
23 same problems earlier on too. Maybe the solution
24 is to, going forward and for future reference, put
25 a little more leeway in the statute.

1 MR. WELK: Well, it isn't the
2 statute. It's the parties. But I think the
3 solution -- understanding that, you know, we all
4 have other things to do -- is to get an agreement.

5 My recollection of the schedule was that we
6 were supposed to file our rebuttal testimony on
7 July 28, and the hearing actually starts on the
8 12th of August. And I think in order to get
9 everybody there, I think we should appropriately
10 slide that, you know, a few days.

11 I'm assuming -- I accept Mr. Evans's word he's
12 going to work on it and get it done, but that's not
13 fair to us to hold us to the gun while we're
14 waiting for somebody else to get the information.

15 So why don't we just slide when we're supposed
16 to do -- or when we are supposed to provide our
17 testimony. And maybe we move it to the 1st of
18 August. And that still gives, you know, over a
19 week to review it.

20 MR. SMITH: I don't think we can
21 move the date of the hearing, Mr. Welk. But we may
22 be able to slide the discovery deadline.

23 MR. WELK: I didn't suggest moving
24 the hearing date. And I'm saying moving the date
25 of the filing from July 28 to August 1, and then

1 the hearing date stays the same. Because we left
2 about two weeks for the last rebuttal to be read.

3 MR. SMITH: Does anybody have any
4 objection to moving that back since, in fact, the
5 responses have been late?

6 MS. ROGERS: This is Darla. We
7 don't have any objection to that.

8 CHAIRMAN SAHR: They're due the
9 28th; is that right?

10 MR. WELK: Yes.

11 CHAIRMAN SAHR: So it sounds like
12 most people might have been a day, maybe two, late.

13 MR. WELK: Well, I don't have some
14 of them yet.

15 CHAIRMAN SAHR: Okay. Why don't we
16 do this, though. The only concern about moving to
17 the 1st is the 1st is a Friday. And I have a
18 little bit of concern about doing that just because
19 if it -- and, Tom, I'm concerned that if people get
20 it on a Friday, depending on what time of day it
21 is, they lose the weekend to review and they lose a
22 few days.

23 And right now it sounds like most people have
24 either gotten it to you or about to, which puts you
25 forward a couple of days. I would rather go ahead

1 and let's move it up to the 30th, and if anyone has
2 an objection, let me know. But why don't we move
3 Qwest's deadline to the 30th, and, Mr. Welk,
4 certainly if you have information that comes in,
5 you know, much later than today or tomorrow, it
6 certainly would be something that the Commission
7 would understand and consider that you should be
8 entitled to have an appropriate amount of time for
9 you to respond as well.

10 So if everyone's in agreement, why don't we
11 move the date up to the 30th, and that doesn't take
12 away the other people's chance to review it for
13 that weekend. Does that work for everybody?

14 All right. Hearing no objections, then I
15 guess I will move that we move the deadline for
16 Qwest to respond to July 30 from July 28.

17 VICE CHAIR HANSON: Second.

18 COMMISSIONER BURG: Concur.

19 CHAIRMAN SAHR: Let's go ahead and
20 defer action on MidState's objection, and hopefully
21 MidState and Qwest can work to work out that issue.

22 Is there anything else on this case?

23 All right.
24
25

1 STATE OF SOUTH DAKOTA)

2 :SS

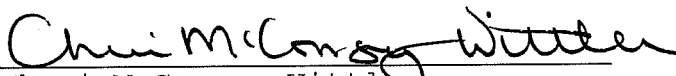
CERTIFICATE

3 COUNTY OF HUGHES)

4
5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter and Notary Public in and for the
7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 15th day of
11 July 2003, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 24th day
14 of July 2003.

15
16
17 
18 Cheri McComsey Wittler,
19 Notary Public and
Registered Professional Reporter

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