

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

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IN THE MATTER OF THE PETITION OF
DIECA COMMUNICATIONS, INC. D/B/A
COVAD COMMUNICATIONS FOR
ARBITRATION OF AN INTERCONNECTION
AGREEMENT WITH QWEST CORPORATION

TC005-056

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Transcript of Proceedings
June 28, 2005

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF

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

APPEARANCES

Melissa Thompson, Qwest
Greg Diamond, DIECA
Brett Koenecke, DIECA

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING
L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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32 APPEARANCES
33
34 Melissa Thompson, Qwest
35 Greg Diamond, DIECA
36 Brett Koenecke, DIECA
37
38 Reported By Cheri McComsey Wittler, RPR, CRR

1 APPEARANCES BY TELEPHONE
2 Rita Mulkern
3 Tom Welk
4 Marlene Bennett
5 Sharon Mullin
6 Larry Hettinger
7
8 =====
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10 TRANSCRIPT OF PROCEEDINGS, held in the
11 above-entitled matter, at the South Dakota State
12 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
13 South Dakota, on the 28th day of June 2005, commencing
14 at 9:30 a.m.
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CHAIRMAN HANSON: TC05-056, In the Matter of the Petition of DIECA Communications, Incorporated doing business as Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation.

Today the Commission will hear oral arguments. And first up is Covad. Good morning.

MR. KOENECKE: Mr. Chairman, Brett Koenecke appearing with Greg Diamond this morning.

MR. DIAMOND: Good morning. My name is Greg Diamond. I am a senior in-house counsel for Covad Communications. I am based out of the Covad Communications' Denver office.

And first of all I'd like to thank the Commissioners for granting me the opportunity for appearing before you today. I realize it is a privilege, and I am grateful for the opportunity.

What is up before the Commission today are two legal issues. We have -- Qwest has filed petitions for arbitrations in other states but has made -- Covad has filed petitions in other states but certain of the states has agreed with Qwest to present certain issues to the Commission as legal issues only so that we filed no prefilled testimony,

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and there's no need for an evidentiary hearing.

The two issues that are before the court is whether this Commission has authority in this arbitration proceeding to require Qwest to unbundle network elements set forth in the Competitive Checklist of Section 271 of the Telecommunications Act of 1996.

A sort of follow-on issue to that is once you resolve that issue is whether the Commission has authority to set rates for those elements pursuant to the Telecom Act's just and reasonable standard. Obviously, Covad believes that the answer to those questions is yes.

Both the FCC and State Commissions have concluded time and again that notwithstanding whether Covad would be impaired without access to certain Section 271 elements, an RBOC like Qwest must make the Competitive Checklist elements available to Covad at just and reasonable rates.

If Qwest had no duty to make Section 271 elements available to requesting carriers, its right to provide in-reach and long distance service would effectively be eviscerated.

Qwest received authority from the FCC to provide in-region long distance service on the

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1 condition that Qwest would provision and continue
2 to provision Section 271 network elements.

3 Now as sort of an introductory comment along
4 with those comments is the idea that in the
5 briefing and in this proceeding Qwest really never
6 comes to grips with the FCC's black letter holding
7 that the regional bell operating companies like
8 Qwest must provision Section 271 elements. It is
9 an absolute obligation as a matter of law, stemming
10 from the Commission -- FCC's seminal Decision in
11 their Triennial Review Order entered and adopted in
12 2003.

13 Qwest in this case relies -- instead of paying
14 any attention to the black letter law of the TRO
15 that was subsequently affirmed by the United States
16 Court of Appeals for the District of Columbia,
17 Qwest instead relies upon four other Commission
18 arbitration Decisions between Qwest and Covad in
19 which those commissions ruled that that -- ruled in
20 favor of Qwest.

21 We would submit that those Decisions were made
22 in error simply because, again, like Qwest, those
23 commissions ignored the black letter -- black
24 letter law that Qwest has an absolute duty to
25 provide Section 271 elements to Covad, irrespective

6

1 of whatever obligations they might have to unbundle
2 Section 251 elements.

3 Now in its Reply Brief Qwest does correctly
4 point out that it provides all the network elements
5 Covad might want pursuant to its FCC access tariff.
6 And, as a consequence, Qwest -- Covad will not be
7 without network elements. The problem with that,
8 of course, is that the FCC access tariffs can be
9 changed by Qwest at any time, and the rates, terms,
10 and conditions of that tariff can be changed at any
11 time either. So it really is up to Qwest as to
12 whether those elements are going to be provided or
13 not. So that really provides little solace at all
14 to Covad in this instance.

15 Getting into some of the details, and again
16 I'll try to keep my comments as brief as I can, we
17 are specifically interested in Checklist Item 4 and
18 5 of the Competitive Checklist. Item 4 refers to
19 local loop transmission, and Item 5 refers to local
20 transport.

21 Now the FCC in three very, very clear and
22 distinct instances in the Triennial Review Order
23 affirmed this black letter law. And this issue was
24 addressed directly in the Triennial Review Order.
25 They say, We continue to believe that the

7

1 requirements of Section 271 establish an
2 independent obligation for BOCs -- bell operating
3 companies -- to provide access to loops, switching,
4 transport, and signaling regardless of any
5 unbundling analysis under Section 271. Again, same
6 Order. As such, BOC obligations under Section 271
7 are not necessarily relieved based on any
8 determination we make under Section 251 of
9 unbundling analysis.

10 And, finally, Checklist Items 4, 5 and 6 -- I
11 mentioned 4 and 5 just before -- separately impose
12 access requirements regarding loop transport,
13 switching, and signaling, without mentioning
14 Section 271. This specific holding was affirmed
15 explicitly on appeal before the D.C. Circuit.

16 Now the -- this rule of law has been upheld
17 and applied by several State Commissions and in our
18 briefing we mentioned both the main Public
19 Utilities Commission as well as the New Hampshire
20 Public Utilities Commission decided these cases.
21 They involved Verizon Communications.

22 Now Qwest argues in its Reply Brief that these
23 two Decisions really had nothing to do with
24 arbitration petitions or interconnection
25 arbitrations. And they're right about that. But

8

1 the bottom line is both of those dockets were
2 pricing dockets involving Verizon's tariffs or its
3 SGAT. Now the SGAT is standard -- excuse me. I'm
4 drawing a blank on what SGAT stands for, but it's
5 basically the terms and conditions available for a
6 requesting carrier who doesn't otherwise opt into
7 or negotiate an Interconnection Agreement with
8 Qwest. So effectively these proceedings are the
9 same.

10 Now on this point one of the hearing examiners
11 in one -- the Maine case specifically said on this
12 question of whether it makes sense for a State
13 Commission to determine whether there are 271
14 unbundling obligations provides states as follows:
15 Indeed, it makes both procedural and substantive
16 sense to allow State Commissions which are more
17 familiar with the individual parties, the wholesale
18 offerings, and the issues of disputes between the
19 parties to monitor ILEC compliance with Section 271
20 by applying the standards prescribed by the FCC,
21 i.e., ensuring that Verizon meets its Checklist
22 Items No. 4, 5, 6, and 9 obligations.

23 On this same point, the main PUC specifically
24 said in affirming the Hearing Examiner's Decision,
25 "State Commissions have the authority to arbitrate

<p>1 Section 271 pricing in the context of Section 252 2 arbitrations." That's where we are today. 3 And then on the same issue, the New Hampshire 4 Public Utilities Commission reached the same 5 conclusion. Just paraphrasing quickly, the FCC's 6 Triennial Review Order has in fact rejected 7 Verizon's argument that once the FCC determined 8 that a UNE is not necessary under Section 271, the 9 corresponding 271 Checklist item should be 10 construed as being satisfied. 11 So there's been obviously some recent activity 12 from the FCC in its Triennial Review Remand Order 13 known as the TRRO where the FCC continues to shrink 14 down the availability of unbundled network elements 15 pursuant to Section 251, meaning certain elements 16 that are no longer available at unbundled network 17 elements rates, meaning the TELRIC rate for those 18 network elements. But Section 271 elements 19 continue to be -- must continue to be made 20 available to requesting carriers. All RBOCs have 21 that continuing obligation. Otherwise, why would 22 the FCC have given them in -- authority to provide 23 in-region long distance service. 24 This takes me really to the next logical 25 question, and I confess there's not a tremendous</p>	<p>9</p>	<p>1 rates. 2 Now to that end we have had the good fortune 3 in working with Qwest very, very cooperatively on 4 entering into commercial agreements for certain 5 facilities such as commercial line sharing and we 6 certainly applaud Qwest in their willingness to 7 enter into these commercial agreements to basically 8 reduce the risk of what is really rate shock. 9 Special access rates are rate shock for us. We 10 really can't do business that way. 11 I was wondering, do I have an opportunity to 12 make any reply comments at all, or is that -- would 13 you typically limit it to -- 14 CHAIRMAN HANSON: Rolayne Wiest is 15 handling this for the Commission. 16 MS. AILTS WIEST: Yes, you will. 17 MR. DIAMOND: I will have a chance 18 to reply. So I will not address the many arguments 19 that Qwest will no doubt bring up, and I will reply 20 at that time. 21 So basically in summary you have 271 22 obligations. You conclude there's a duty there. 23 Once you conclude there's a duty there, then you 24 move to the pricing determination. And, again, we 25 submit TELRIC is a just and reasonable rate.</p>	<p>11</p>
<p>1 amount of law on this issue. Because once you get 2 to the point where you can conclude that there's a 3 duty to provide Section 271 network elements, the 4 only issue that's left is price. 5 Now this issue -- again, this issue of price 6 has not been decided, but the standard is just and 7 reasonable. Now along these lines, the same 8 Maine -- the same Public Utilities Commission out 9 of Maine made the following conclusion, that we 10 have no record basis to conclude that TELRIC rates, 11 the same rates that are available -- the same 12 pricing standard that is applied under Section 251 13 do not qualify as "just and reasonable rates." 14 Covad would and Covad does take the position 15 that this Commission has the authority to set 271 16 rates at the TELRIC level. Clearly TELRIC would be 17 a just and reasonable standard. 18 Now you may hear Qwest argue that, well, wait 19 a second, the FCC has said in the TRO that perhaps 20 we can look at the access tariff that's on file. 21 The problem with the access tariff from our 22 perspective is it's not just and reasonable for 23 Covad to use these rates because we cannot justify 24 it from a business perspective. We simply not -- 25 we simply cannot do business under those kinds of</p>	<p>10</p>	<p>1 Thank you very much, Commissioners. 2 MS. AILTS WIEST: Do the 3 Commissioners -- I'd like to ask some questions. 4 This is Rolayne Wiest, unless the Commissioners 5 have any questions first. 6 MR. DIAMOND: I'm sorry. 7 MS. AILTS WIEST: Go ahead. 8 MR. RISLOV: Hello. I'm 9 Greg Rislov. I do have a couple of questions. 10 MR. DIAMOND: Good morning. Sure. 11 MS. RISLOV: In very general terms, 12 could you explain in your mind what the purpose of 13 251, 252, and 270 are -- 271 in general are, in 14 very, very general terms. 15 MR. DIAMOND: In general 251 sort of 16 sets up the framework by which all incumbent local 17 change carriers, except for rural carriers, have to 18 enter into Interconnection Agreements with any 19 requesting carrier. And under that scheme, 20 State Commissions are charged with the right to 21 arbitrate the terms and conditions of those 22 Interconnection Agreements. 23 Section 271 is different. Section 271 only 24 applies to the regional bell operating companies 25 because when they come to the FCC first they come</p>	<p>12</p>

<p>13</p> <p>1 to this Commission and Qwest came to this</p> <p>2 Commission at one point in time and said please</p> <p>3 recommend to the FCC that we be granted Section 271</p> <p>4 authority, the right to provide in-region long</p> <p>5 distance service.</p> <p>6 We go to the FCC and the Section 271</p> <p>7 specifically said that if you, Qwest, region bell</p> <p>8 operating company, want to provide in-region</p> <p>9 interLATA service, long distance service, you must</p> <p>10 continue to provide those items listed in the</p> <p>11 14-point Competitive Checklist. Now for our</p> <p>12 purposes we're only interested in two of those</p> <p>13 items, loops and transport. Those are the only</p> <p>14 facilities that Covad -- really gets from Covad.</p> <p>15 We don't get switching from Qwest. We don't get</p> <p>16 signaling from Qwest and so forth. Those are the</p> <p>17 two unbundled network elements that we receive. So</p> <p>18 high-level that's really the distinction.</p> <p>19 MR. RISLOV: I appreciate that and</p> <p>20 to follow that up, in general again where do you</p> <p>21 see the jurisdiction residing in those two</p> <p>22 sections?</p> <p>23 MR. DIAMOND: Well, here's -- it's</p> <p>24 not -- Mr. Rislov, to answer your question quite</p> <p>25 candidly, it's not been resolved. What you have</p>	<p>15</p> <p>1 that are set forth in Qwest's SGAT for the State of</p> <p>2 South Dakota. So it only makes sense that this</p> <p>3 Commission would have jurisdiction to set rates for</p> <p>4 Section 271 elements as the New Hampshire</p> <p>5 Commission has concluded.</p> <p>6 The FCC is really not and I don't know of any</p> <p>7 situation where the Commission has been in the</p> <p>8 business of setting rates for network elements.</p> <p>9 But, again, it's not a settled issue. And so I</p> <p>10 would confess that you're making -- you're going to</p> <p>11 have to make a determination based upon the</p> <p>12 persuasive authority that's out there.</p> <p>13 MR. RISLOV: And one final question.</p> <p>14 MR. DIAMOND: Sure.</p> <p>15 MR. RISLOV: With regard to</p> <p>16 impairment, both jurisdictionally and what effect</p> <p>17 any decision of impairment would have on the State</p> <p>18 Commission.</p> <p>19 Where does the jurisdiction in terms of</p> <p>20 impairment lie?</p> <p>21 MR. DIAMOND: Well, impairment --</p> <p>22 the necessary impair standard is set out in</p> <p>23 Section 251, and that analysis is done by the FCC</p> <p>24 as it is done recently, for example, in the</p> <p>25 Triennial Review Remand Order. It made</p>
<p>14</p> <p>1 are competing State Commissions that have reached</p> <p>2 one conclusion and then other state Commissions</p> <p>3 that have reached another conclusion. I'm</p> <p>4 concerned as of whether they have jurisdiction.</p> <p>5 For example, the Washington Commission said</p> <p>6 they don't have jurisdiction because they're</p> <p>7 preempted from making this determination. Well,</p> <p>8 the problem with that is State Commissions don't</p> <p>9 have the authority to engage in preemption</p> <p>10 analysis. Only the FCC can decide whether the</p> <p>11 Telecommunications Act preempts state law. So in</p> <p>12 that regard -- the way I would kind of maybe pitch</p> <p>13 it to you in a little bit more pedestrian terms is,</p> <p>14 Qwest in its briefing never takes issue with the</p> <p>15 concept that it has a duty under Section 271 to</p> <p>16 unbundle certain network elements.</p> <p>17 The problem -- and they come back and say</p> <p>18 instead that this Commission doesn't have</p> <p>19 jurisdiction. But the Commission does have</p> <p>20 jurisdiction because the Commission is</p> <p>21 traditionally charged with setting rates for</p> <p>22 network elements, given that what you do, of</p> <p>23 course, when you determine rates for network</p> <p>24 elements pursuant to Section 251 either by way of</p> <p>25 an arbitration or by way of approving the rates</p>	<p>16</p> <p>1 determinations concerning certain thresholds where</p> <p>2 a requesting carrier or a -- made a determination</p> <p>3 that in some instances certain central offices of</p> <p>4 the regional bell operating companies would not be</p> <p>5 "impaired offices" such that there would be less</p> <p>6 availability of unbundled network elements,</p> <p>7 especially loops. And specifically in the TRRO</p> <p>8 loops and transport were a big ticket item.</p> <p>9 Switching was involved in that as well, but, again,</p> <p>10 Covad is not interested in switching simply because</p> <p>11 it provides its own switching for itself.</p> <p>12 I hope that addresses your questions.</p> <p>13 MR. RISLOV: Sure.</p> <p>14 MS. AILTS WIEST: Commissioners.</p> <p>15 CHAIRMAN HANSON: Nothing.</p> <p>16 VICE CHAIRMAN SAHR: Good morning.</p> <p>17 Mr. Diamond, you had mentioned that if the</p> <p>18 Commission ruled against Covad, that the FCC access</p> <p>19 tariffs would be available but it's subject to</p> <p>20 Qwest's filing that; is that correct?</p> <p>21 MR. DIAMOND: Absolutely. Qwest</p> <p>22 could change those. The FCC, as far as I know, and</p> <p>23 Qwest will certainly correct me if I'm wrong, but</p> <p>24 as far as I know, Qwest can change those tariffs</p> <p>25 any time they want to with notice but without the</p>

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1 need to get FCC approval. And I think they could
2 do that for an interstate tariff as well. I'm not
3 sure about that. Pretty sure that with respect to
4 FCC tariffs, it can change that without notice and
5 can change prices on -- and can change rates I
6 believe on 30 days' notice.

7 VICE CHAIRMAN SAHR: Do you have any
8 recourse or relief if you take issue with those
9 things?

10 MR. DIAMOND: The only recourse we
11 would have is to take the position that those rates
12 were not just and reasonable. And, again, that's a
13 standard that has been the subject of probably some
14 amount of litigation at the federal level. But,
15 again, it is not -- typically not -- in this
16 setting where you're talking about network
17 elements, it's our view that the jurisdiction
18 properly lies with the Commission to determine what
19 those rates ought to be and, again, apply -- I
20 would concede applying the just and reasonable
21 standard. I don't think there's any dispute about
22 that.

23 VICE CHAIRMAN SAHR: I'm just
24 curious. How long do the Agreements typically
25 last? Is there a date --

18

1 MR. DIAMOND: Yes. These Agreements
2 are typically three years long. The date -- the
3 agreed upon date for this particular -- the
4 expiration date that we've agreed upon for this
5 Interconnection Agreement would be in 2008. So,
6 again, three years.

7 VICE CHAIRMAN SAHR: And during that
8 time period are they locked into the current FCC
9 access tariff?

10 MR. DIAMOND: No.

11 VICE CHAIRMAN SAHR: Or they can
12 change certain elements of that?

13 MR. DIAMOND: They can change the
14 rates as they please I believe on 30 days' notice.
15 They're not locked in. The SGAT rates -- if we
16 agreed to rates as to certain facilities that would
17 get attached as an exhibit to the Interconnection
18 Agreement, those rates would be fixed. But, no,
19 those access tariff -- those tariff rates could be
20 changed.

21 VICE CHAIRMAN SAHR: Thank you.

22 MS. AILTS WIEST: Any other
23 questions from the Commissioners?

24 This is Rolayne Wiest. I just had a few
25 questions, just following up on Commissioner Sahr's

19

1 questions. So if Qwest did change its tariff, then
2 you could go to the FCC and dispute those rates?

3 MR. DIAMOND: I believe we could,
4 yes, on the grounds that they weren't just and
5 reasonable. I believe we could, yes.

6 MS. AILTS WIEST: Or if Qwest took
7 away any of those elements, you could go to the FCC
8 and say they weren't complying with Section 271?

9 MR. DIAMOND: Well, yeah. I don't
10 think they would do that, frankly. I was a little
11 bit tongue and cheek before, but bottom line is
12 they probably would not. Qwest probably would not
13 remove Section 271 elements from its access tariff
14 or from its intrastate access tariff either.

15 MS. AILTS WIEST: And can you
16 explain to me the dispute over Section 9.1.1.8?

17 MR. DIAMOND: You know, I don't have
18 the Agreement in front of me. Is it -- which
19 section again?

20 MS. AILTS WIEST: 9.1.1.8.

21 MS. AILTS WIEST: Someone isn't on
22 mute on the phone. If you could put your phone on
23 mute.

24 COMMISSIONER JOHNSON: I'm hearing
25 voices again, and it always makes me nervous.

20

1 MS. GREFF: It's not just you,
2 Dusty.

3 (Discussion off the record)

4 MR. DIAMOND: 9.1.1.8?

5 MS. AILTS WIEST: Yes. What I have
6 is intentionally left blank. I can't see the
7 dispute. But it's listed in the Petition. It's
8 listed in Briefs.

9 MR. DIAMOND: I think it's -- Qwest
10 controls these documents, and my experience has
11 been with Qwest that they do a very good job of
12 tracking what's at issue. They have a person named
13 Mary Sullivan whose job -- exclusive responsibility
14 is to track these Agreements. So based on what's
15 in here, I would say that 9.1.1.8 is not in
16 dispute.

17 Would that be a fair conclusion, Maureen?

18 MS. THOMPSON: Melissa.

19 MR. DIAMOND: Melissa. Excuse me.
20 Melissa.

21 MS. THOMPSON: Yeah. Under the
22 intentionally left blank section I would agree
23 there's probably no dispute --

24 MR. DIAMOND: No dispute at all.

25 MS. AILTS WIEST: We can cross --

21

1 CHAIRMAN HANSON: Excuse me. We
2 have lots of different people talking and people
3 that haven't been quite introduced. It's really
4 difficult for the court reporter. So on some of
5 the questions please wait until the question's
6 completed before you answer, and then when you give
7 those numbers, if you would slow up just a little
8 bit.

9 MR. DIAMOND: Sure. Forgive me.
10 Bad habit of mine, Commissioner.

11 MS. AILTS WIEST: There's still
12 someone that's on the phone who does not have their
13 phone on mute and we can hear them. Would you
14 please put your phones on mute.

15 Well, we'll just have to talk over it. In the
16 Utah Order, I think it was in their Paragraph 33,
17 the Order stated that Covad admitted that only the
18 FCC can enforce noncompliance with the 271
19 Checklist.

20 Would that be an accurate statement?

21 MR. DIAMOND: Yeah. That's an
22 accurate statement, but I don't -- I think the -- I
23 think that what's uncontested here is I don't think
24 Qwest is going to dispute its obligation to provide
25 271 elements. I think what's really the lynch pin

22

1 here is at what rate.

2 We acknowledge that it's not going to be a
3 TELRIC -- the Commission is not required to impose
4 TELRIC rates which it would otherwise be required
5 to do for the purposes of its Section 251 UNE. But
6 for 271 you have the just and reasonable standard
7 which can be -- again, is a more amorphous standard,
8 but we would suggest that TELRIC is at least just
9 and reasonable because it's certainly a lower rate
10 than the access tariff, which again for our
11 purposes from a purely business perspective we
12 don't consider it just and reasonable because we
13 can't make it business case to do business using
14 the access tariff rates.

15 MS. AILTS WIEST: If the Commission
16 were to find we could impose this as an unbundling
17 element, you know, that you're disputing, would
18 there be a further proceeding to decide what the
19 rates are under TELRIC or would you first --

20 MR. DIAMOND: You could have a
21 further proceeding if you wanted to to set the
22 rates, or, alternatively, you could conclude that
23 Qwest use a TELRIC rate, which is a standard
24 that -- a wholesale rate based on an existing cost
25 model.

23

1 And it may be that they already have rates
2 that are consistent with TELRIC already. But,
3 again, nothing precludes this Commission from
4 having further proceedings on the rate, which I
5 would advocate be really within the realm of what
6 State Commissions do, not the FCC.

7 The FCC doesn't have cost dockets. It doesn't
8 admit evidence about -- it doesn't admit evidence
9 about cost models and so forth. It's really
10 something that is traditionally within the realm of
11 the State Commissions since passage of the 1996
12 Telecom Act.

13 MS. AILTS WIEST: Going again to the
14 Utah Order, I believe they quoted -- I think in
15 their Paragraph 44 they quoted the TRO at Paragraph
16 664 and they stated that the FCC implies it has
17 sole authority over such elements and that BOCs
18 should make Section 271 elements available through
19 interstate tariffs or commercial agreements. How
20 would you --

21 MR. DIAMOND: Well, again the
22 problem with that -- obviously that's what it says.
23 It doesn't really deal with the question of rates
24 directly. And you're still faced with this
25 question of, okay, where are we going to end up on

24

1 rates. And that, again, is the most difficult
2 question.

3 And, again, that we know what the standard is,
4 it's just and reasonable, and that's all I can say
5 about that particular section.

6 MS. AILTS WIEST: And then I think
7 Utah also quoted from Paragraph 195 of the TRO more
8 or less stating that if a state required unbundling
9 of a UNE for which the FCC has found no impairment,
10 the FCC stated that such decision would likely
11 conflict with this or substantially prevent
12 implementation of the federal regime in
13 violation --

14 How do you get around that paragraph?

15 MR. DIAMOND: Well, the way I get
16 around it is I go back to the previous
17 statements -- previous very unequivocal statements
18 by the FCC and the TRO -- in the TRO that there is
19 a black letter obligation to unbundle Section 271
20 elements. And I would be hard pressed to -- even
21 if that network element happens to be a network
22 element that the Commission had delisted from the
23 251 obligations.

24 And, again, when it delists them it's saying
25 you, Qwest, or you, RBOC, no longer have an

<p>1 obligation to provision that UNE at TELRIC or 2 wholesale rates. That's what it's really saying. 3 And so what's before this Commission is at what 4 rate are we going to set for UNEs under 5 Section 271. 6 I think everybody is going to concede that the 7 271 obligations continue, given the fact that Qwest 8 has long distance authority in its region. 9 Certainly within South Dakota. 10 MS. AILTS WIEST: You also cite to 11 state authority for stating that these unbundled 12 elements should be provided. If the Commission 13 were to find that we could not add UNEs that the 14 FCC had delisted in order to make that finding, are 15 there any state statutes that we would actually 16 have to find were preempted? 17 MR. DIAMOND: No. You have a 18 general -- you have what I would call a very 19 general unbundling statute, and so you would have 20 the right under that statute to order unbundling. 21 But to answer your question, actually we're 22 not asking you to add to the list that -- the 251 23 list. We're simply asking you to enforce the 24 Section 271 list. They're apples and oranges. 25 There's a delisting of 251 elements at TELRIC</p>	25	<p>1 I think notwithstanding what they said in their 2 Reply Brief, I think they very much will negotiate 3 an amendment with the requesting carriers to 4 implement the provisions of the TRRO. 5 MS. AILTS WIEST: And then -- 6 MR. DIAMOND: And we could as part 7 of that process negotiate perhaps 271 issues as 8 well. Sort of telegraphing our position a little 9 bit. 10 MS. AILTS WIEST: And this is 11 another question you might want to look at the 12 actual Agreement for, but does Covad agree with the 13 delisted UNEs in Qwest's Section 9.1.1.6? Do they 14 agree that that's accurate? It's around page -- 15 MR. DIAMOND: Yeah. Yeah. I have 16 it. That's accurate, yes. That's correct. 17 MS. AILTS WIEST: Okay. That's all 18 I have. 19 MR. DIAMOND: Thank you very much. 20 MS. AILTS WIEST: Are there any 21 other questions from the Commissioners? 22 Thanks. 23 MR. DIAMOND: Thank you very much, 24 very, very much. 25 MS. THOMPSON: Well, good morning,</p>	27
<p>1 rates, but there's a continuing 271 obligation at 2 just and reasonable rates. 3 And that's really the crux, I think, of 4 this -- the issue that's before this Commission 5 today. 6 MS. AILTS WIEST: And then can you 7 respond to Qwest's request to not use the amendment 8 process for removing UNEs from the Interconnection 9 Agreement? You mentioned that in -- 10 MR. DIAMOND: Did they mention that 11 in their Brief? 12 MS. AILTS WIEST: Yes. Page 22 of 13 their Reply Brief. 14 MR. DIAMOND: Actually, my 15 experience has been that Qwest has actually given 16 us in response to the Triennial Review Remand Order 17 that was effective on February 4 they've 18 actually -- unlike the other RBOCs, have said we're 19 not going to stop providing these UNEs. We're 20 going to continue to provide them subject to 21 true-up. And they have actually provided us with a 22 proposed TRRO amendment unlike, again, the other 23 RBOCs. 24 So I commend Qwest for doing that. It has 25 made our life much easier in the Qwest region. So</p>	26	<p>1 Commissioners. My name is Melissa Thompson, and I 2 am appearing this morning on behalf of Qwest 3 Corporation. 4 And this morning's argument feels like kind of 5 a unique opportunity to me because it's the first 6 time since I've started appearing before you where 7 the issue that we are arguing about this morning 8 has been considered by other Commissions and all of 9 those Commissions have ruled in Qwest's favor on 10 that issue. 11 These states include Iowa, Washington, 12 Minnesota, and Utah. The resolution reached in 13 Colorado also supports Qwest's position because 14 there Covad simply agreed to the language that 15 we're disputing this morning. 16 The remaining issue, the one sole issue before 17 the Commission this morning, is whether this 18 Commission will allow Covad to bring Section 271 19 network elements into a proposed Section 251 and 20 252 Interconnection Agreement and apply a rate 21 scheme, that being TELRIC, to those elements in 22 spite of the fact that the FCC and courts have held 23 that those rates do not apply. 24 Is Qwest required to provide access to 25 unbundled network elements under either Section 271</p>	28

1 or under state law even if it is not required to
2 provide that access pursuant to Section 251 and
3 even though that access conflicts with decisions
4 made by the FCC and other courts?

5 In arguing yes, Covad is a basically trying to
6 do an end run around FCC and District Court
7 rulings, particularly the Triennial Review Order,
8 the TRO, and the Triennial Review Remand Order, the
9 TRRO, and other states agreed.

10 In Washington the Commission concluded, "This
11 Commission has no authority under Section 251 or
12 Section 271 of the Act to require Qwest to include
13 Section 271 elements in an Interconnection
14 Agreement. And any unbundling requirement based on
15 state law would likely be preempted as inconsistent
16 with federal law, regardless of the method the
17 state used to require the element."

18 Iowa ruled similarly. There the Utilities
19 Board said, The first question is whether the Board
20 has the authority when arbitrating Interconnection
21 Agreements pursuant to Section 252 to impose
22 unbundling obligations pursuant to Section 271.
23 Section 271(d)(3) of the Act gives the FCC the
24 authority to determine whether an RBOC has complied
25 with those provisions, including the Checklist.

1 The '96 Act gave State Commissions only a
2 consulting role in that determination.

3 The arbitration process that is mandated by
4 Section 252 is concerned only with the
5 implementation of ILEC's obligations under
6 Section 252. In arbitrations again the State
7 Commission only has the authority to impose terms
8 and conditions related to Section 252. Section
9 252(h) specifically states the negotiations it
10 requires are limited to "request for
11 interconnection services or network elements
12 pursuant to Section 251." The Board continued,
13 "Clearly the revisions that are at issue in the
14 arbitration are unbundling obligations pursuant to
15 Section 271, rather than Section 251 obligations.
16 Therefore, the Board lacks jurisdiction or
17 authority to require Qwest to include these
18 elements in an Interconnection Agreement
19 arbitration brought pursuant to Section 252."

20 The Board continued, "The U.S. Supreme Court
21 has stated that the '96 Act does not authorize
22 'blanket access' to incumbent's networks. Rather
23 Section 251(c)(3) authorizes unbundling only as
24 required as by Section 251." Following that,
25 "Section 251(c)(3) authorizes unbundling only as

1 required by Section 251."

2 The Board concluded -- I'm sorry. I misspoke
3 here while I'm reading this. The Board said
4 following that, "Section 251(d)(2) provides that
5 unbundling may be required only if the FCC
6 determines that access to such network elements is
7 necessary and that the failure to provide access to
8 network elements would impair the ability of a
9 telecommunications carrier seeking access to
10 provide the services that it seeks to offer."

11 The Minnesota Commission concluded similarly,
12 finding that it did not have jurisdiction and, in
13 fact, in the Arbitrator's report the Commission
14 actually adopted a part of that report with respect
15 to the issue that's before you today in which the
16 arbitrator said there is no authority by the
17 Commission to determine whether Section 271
18 elements apply in a Section 252 arbitration.

19 As a side note, in Utah the Commission stated
20 "Section 252 is clearly intended to provided
21 mechanisms for the parties to arrive at
22 Interconnection Agreements governing access to
23 network elements required under Section 251.
24 Neither Section 251 or 252 refers in any way to
25 Section 271 law requirements. And certainly

1 neither section anticipates the addition of new
2 Section 252 obligations via incorporation by
3 reference to state law or Section 251."

4 In Iowa, in Minnesota, in Utah, in Washington,
5 and now South Dakota Covad has argued that State
6 Commissions may require Section 271 network
7 elements to be included in arbitrated
8 Interconnection Agreements because of the FCC's
9 decision that BOCs have an independent obligation
10 to provide access to loop switching transport and
11 signaling network elements under the Checklist in
12 271, regardless of the unbundling obligations in
13 Section 251.

14 So what is the difference between a Section
15 271 element and Section 251 element, and who has
16 authority over these elements?

17 The statutory scheme in Section 271 provides
18 that the FCC is solely responsible for determining
19 whether a BOC should be allowed to provide long
20 distance service. The Act requires the FCC to
21 consult with the State Commission as to whether the
22 BOC has met the statutory requirements for
23 providing that service but provides no
24 decision-making authority to the State Commissions.

25 In the case of Indiana Bell Telephone Company

<p style="text-align: right;">33</p> <p>1 v. <u>Indiana Utility Regulatory Commission</u> the court</p> <p>2 stated, "Sections 251 and 252 contemplate State</p> <p>3 Commissions may take affirmative action towards the</p> <p>4 goals of those sections while Section 271 does not</p> <p>5 contemplate substantive conduct on the part of</p> <p>6 State Commissions, thus a savings clause is not</p> <p>7 necessary with respect to Section 271 because the</p> <p>8 State Commissions's role is investigatory and</p> <p>9 consulting, not substantive in nature."</p> <p>10 Consistent with this, as Covad has conceded,</p> <p>11 the FCC has sole authority under Section 271 to</p> <p>12 enforce BOC compliance without any shared</p> <p>13 decision-making with State Commissions. In the</p> <p>14 same way that the FCC has sole authority to enforce</p> <p>15 compliance of BOCs with Section 271, under</p> <p>16 Section 251(d)(2) the FCC has sole authority to</p> <p>17 determine under the necessary and impaired test</p> <p>18 what network elements must be unbundled.</p> <p>19 The D.C. Circuit Court confirmed in USTA II</p> <p>20 that Congress did not allow the FCC to have State</p> <p>21 Commissions perform this test on their behalf. The</p> <p>22 case of the Iowa Utilities Board makes clear that</p> <p>23 the essential prerequisite for unbundling any given</p> <p>24 element under Section 251 is a finding under the</p> <p>25 impairment test, and that is delegated and has been</p>	<p style="text-align: right;">35</p> <p>1 Order and stated that, "We cannot now imagine how a</p> <p>2 state could require unbundling of an element</p> <p>3 consistently with the Act where the FCC has not</p> <p>4 found the statutory impairment test to be</p> <p>5 satisfied."</p> <p>6 Similarly the United States District Court in</p> <p>7 Michigan observed that in USTA II the D.C. Circuit,</p> <p>8 "Rejected the argument that the '96 Act does not</p> <p>9 give the FCC the exclusive authority to make</p> <p>10 unbundling determinations." The court emphasized</p> <p>11 that while the Act permits states to adopt some</p> <p>12 pro competition requirements, they cannot adopt any</p> <p>13 requirements that are inconsistent with the statute</p> <p>14 of the federal regulations.</p> <p>15 The court held specifically that a State</p> <p>16 Commission, "Cannot act in a manner inconsistent</p> <p>17 with federal law and then claim its conduct is</p> <p>18 authorized under state law."</p> <p>19 Consistent with these Decisions in its Bell</p> <p>20 South Declaratory Order the FCC addressed Orders</p> <p>21 from four different State Commissions that required</p> <p>22 Bell South to provide DSL service over unbundled</p> <p>23 loops. This requirement the FCC determined</p> <p>24 effectively obligated Bell South to unbundle an</p> <p>25 element which the FCC had specifically required --</p>
<p style="text-align: right;">34</p> <p>1 established in the FCC.</p> <p>2 If there has been no such FCC finding of</p> <p>3 impairment, the Act does not permit any regulator,</p> <p>4 state or federal, to require unbundling under</p> <p>5 Section 251. In the Triennial Review Order the FCC</p> <p>6 confirmed, "Based on the plain language of the</p> <p>7 statute we conclude that the state authority</p> <p>8 preserved by Section 251(d)(3) is limited to state</p> <p>9 unbundling actions that are consistent with the</p> <p>10 requirements of Section 251 and do not</p> <p>11 substantially prevent the implementation of the</p> <p>12 federal regulatory scheme.</p> <p>13 In the TRO the FCC continued, "If a decision</p> <p>14 pursuant to state law were to require unbundling of</p> <p>15 a network element for which the Commission has</p> <p>16 found no impairment and thus has found that</p> <p>17 unbundling that element would conflict with the</p> <p>18 language of Section 251(d)(2) or otherwise declined</p> <p>19 to require unbundling on a national basis, we</p> <p>20 believe it unlikely that such a decision would fail</p> <p>21 to conflict with and substantially prevent the</p> <p>22 implementation of the federal regulatory regime."</p> <p>23 Federal courts interpreting the '96 Act have</p> <p>24 agreed. In <u>Indiana Telephone Company v. McCarty</u></p> <p>25 the Seventh Circuit cited the Triennial Review</p>	<p style="text-align: right;">36</p> <p>1 specifically refused to require it to unbundle in</p> <p>2 the TRO.</p> <p>3 The FCC stated, "State authority is preserved</p> <p>4 under the Act only to the extent state regulations</p> <p>5 are not inconsistent with the Section 251 because</p> <p>6 it had refused to require ILECs to unbundle these</p> <p>7 loops in the Triennial Review Order." The FCC held</p> <p>8 that the four state Orders requiring such</p> <p>9 unbundling directly conflict and are inconsistent</p> <p>10 with the Commission's rules.</p> <p>11 In addition to arguing that this Commission</p> <p>12 should incorporate Section 271 unbundling</p> <p>13 obligations in a Section 251 252 ICA, Covad</p> <p>14 proposes broad unbundling under state law that</p> <p>15 ignores what the FCC reaffirmed in its Beth South</p> <p>16 Declaratory Order. The FCC reaffirmed in its Bell</p> <p>17 South Declaratory Order that the Act Savings Clause</p> <p>18 is preserved independent state authority only to</p> <p>19 the extent that the authority is consistent with</p> <p>20 the Act.</p> <p>21 Just as an example, the clash between Covad's</p> <p>22 state unbundling demands and the federal unbundling</p> <p>23 scheme is demonstrated by Covad's language proposed</p> <p>24 here in Section 9.3.1.1, which would require Qwest</p> <p>25 to unbundle feeder sub loops. In the Triennial</p>

1 Review Order the FCC refused to give CLECs
2 unbundled access to this element, finding that such
3 access would undermine the object of the Act, "spur
4 deployment of advanced telecommunications
5 capability." A state imposed requirement to
6 unbundle feeder sub loops as here would conflict
7 with the FCC determination.

8 To be clear, Qwest is not arguing the State
9 Commissions have no authority under the Act or
10 under state law to order unbundling. The FCC
11 summarized this issue very well in its Bell South
12 Declaratory Order saying, "In the TRO we rejected
13 both the argument that states are preempted from
14 issuing unbundling requirements as a matter of law
15 and the contrary argument that the states may
16 impose any unbundling framework they deem proper
17 under the state law without regard to the federal
18 regime. Rather, based under the plain language of
19 the statute, we concluded that the state authority
20 preserved by Section 251(d)(3) is limited to state
21 unbundling actions that are consistent with the
22 requirement of Section 251 but do not substantially
23 prevent the implementation of the federal regime."

24 The South Dakota statutes recognize the
25 interplay between federal and state jurisdictions.

1 Covad cited 49-31-15 in its briefing but not
2 49-13-3. Section 49-31-3 says, "The Commission has
3 general supervision and control of all
4 telecommunications companies offering common
5 carrier services within the state, to the extent
6 such business is not otherwise regulated by federal
7 law or regulations."

8 I want to turn now to Qwest's proposed
9 Section 9.1.1.7 -- I'm sorry, to Covad's proposed
10 Section 9.1.1.7 in which existing TELRIC rates
11 would apply to network elements that Qwest provides
12 pursuant to Section 271. Covad in 9.1.1.7 proposes
13 that these rates be granted or allowed in
14 accordance with Sections -- well, until new rates
15 are established under Sections 201 and 2 of the Act
16 or applicable state law.

17 Sections 201 and 202 of the Act governs the
18 rates, terms, and conditions applicable to the
19 unbundling requirements imposed by Section 271.
20 They provide no role for State Commissions. A
21 state administrative agency has no role in the
22 administration of federal law absent express
23 Congressional authorization.

24 The FCC ruled in the Triennial Review Order
25 that it will determine the lawfulness of rates that

1 BOCs charge for Section 271 elements in connection
2 with applications and enforcement proceedings
3 brought under that section. In requesting that the
4 Commission adopt its rate proposal, Covad is asking
5 the Commission to exercise authority it does not
6 have and that rests exclusively with the FCC.

7 Covad's demand for the temporary application
8 of TELRIC pricing to Section 271 elements violates
9 the FCC's TRO. The FCC ruled that any elements a
10 ILEC unbundles pursuant to Section 271 are to be
11 based -- are to be priced on the Section 201
12 202 standard that the rates must not be unjust,
13 unreasonable, or unreasonably discriminatory.

14 As Qwest discussed in its briefing and as I've
15 mentioned here, there is no statutory or other
16 legal basis for including terms and conditions
17 relating to network elements provided under
18 Section 271 and its Section 252 Interconnection
19 Agreement. Indeed, the FCC has defined
20 Interconnection Agreements that must be submitted
21 to State Commissions for approval as only those
22 that contain an ongoing obligation related to
23 elements in 251(b) or (c). Thus the term
24 Interconnection Agreement as used in Section 252
25 encompasses only the terms and conditions relating

1 to the network elements and other services
2 identified in Section 251.

3 The correctness of this interpretation was
4 confirmed in a Decision issued just two weeks ago
5 in a federal court in Montana in which the court
6 ruled that the only Agreements that State
7 Commissions have the authority to approve under
8 Section 252 are Interconnection Agreements that
9 contain Section 251 obligations. This ruling
10 confirms that the Interconnection Agreement
11 resulting from this Section 252 Interconnection
12 Arbitration should only include terms and
13 conditions relating to Section 251.

14 The cases cited by Covad are readily
15 distinguishable. The Maine and New Hampshire
16 Decisions that Covad relies upon so heavily had to
17 do with a state tariff which Verizon promised to
18 file in the context of Section 271 proceedings.
19 The authority in question in those cases had to do
20 and was upon a state tariff, not on Section 271 or
21 the Act.

22 As a final note, it's important for the
23 Commission to keep in mind that just because the
24 party's ICA does not provide for particular
25 elements as unbundled network elements does not

41

1 mean that those elements are not available. Just
2 as Qwest and Covad have executed commercial
3 agreements for commercial lines sharing, they too
4 can reach commercial agreements or go through a
5 tariff to obtain these other elements. And I think
6 Mr. Diamond addressed that issue well.

7 In conclusion, Qwest respectfully asks the
8 Commission to follow the Decisions issued in
9 Minnesota, in Iowa, in Utah, in Washington, find
10 that this Commission does not have authority to
11 require Qwest to offer Section 271 elements as part
12 of a Section 251 252 ICA, and adopt Qwest's
13 proposed language for the parties' Interconnection
14 Agreement.

15 Thank you.

16 MS. AILTS WIEST: Any questions from
17 the Commissioners?

18 VICE CHAIRMAN SAHR: Good morning,
19 Ms. Thompson.

20 You cited the Iowa, Washington, Minnesota, and
21 Utah Decisions. In those cases would you say that
22 it was based primarily on the interpretation of
23 federal law, or was there some sort of state
24 restriction on hearing those proceedings that might
25 not be here and in place in South Dakota?

42

1 MS. THOMPSON: I believe all of
2 those decisions hinged on interpretation of federal
3 law. Taking the Iowa example, just because it's
4 right in front of me and I have quoted from it,
5 Covad made a similar argument in trying to rely on
6 state law to unbundle. The ALJ -- actually it was
7 the Board in this case. The Utilities Board walked
8 through an analysis of that and found -- the Board
9 actually said -- it cited the state law, and then
10 it said, "A finding that the facility is not
11 capable of being duplicated or obtained elsewhere
12 is required by this section of the state law for
13 the Board to find that an element is an essential
14 service and require Qwest to provide that element.
15 Such a finding may not be appropriate where the FCC
16 has found that access to the element is not
17 impaired. At least there is no evidence here that
18 would support such a finding. Thus, in this case,
19 state law does not provide a separate basis for
20 requiring that Qwest provide access to unbundled
21 network elements."

22 And what the Board was going to there was the
23 necessary and impaired test, the fact that Covad
24 had presented no elements that it is impaired or
25 these elements are necessary and therefore denied

43

1 Covad's claim on that basis.

2 VICE CHAIRMAN SAHR: Have any of
3 these cases been appealed?

4 MS. THOMPSON: Not to my knowledge.

5 MR. DIAMOND: Not yet.

6 VICE CHAIRMAN SAHR: Not yet. Thank
7 you.

8 MS. AILTS WIEST: Any other
9 questions from the Commissioners? I just had a
10 couple of questions, Ms. Thompson.

11 I know in the Utah Decision they said -- I
12 mean, they agreed with you, but they did state that
13 they rejected Qwest's apparent view that the Utah
14 Commission is totally preempted by the federal
15 system from enforcing Utah law requiring unbundled
16 access to certain network elements.

17 Was that your view there in Utah? Or is that
18 your view now?

19 MS. THOMPSON: No. Again, we're not
20 talking about a state being completely preempted or
21 talking about a state not having the ability to
22 unbundle.

23 MS. AILTS WIEST: Right. That's why
24 I was confused by that statement.

25 MS. THOMPSON: Yeah. I'm not sure.

44

1 I've got the Decision in front of me. Do you know,
2 what page is that on?

3 MS. AILTS WIEST: That's on page 19
4 of the Arbitration Report and Order, their two
5 different Decisions.

6 MS. THOMPSON: Well, the crux of
7 Qwest's argument is really that states have
8 authority to order unbundling so long as it's not
9 inconsistent with federal law.

10 MS. AILTS WIEST: Okay. And then
11 also in that same Order I believe the Utah
12 Commission deleted your list of former network
13 elements by stating that it was confusing to keep
14 them in. That was in Section 9.1.1.6.

15 Are you familiar with that?

16 MS. THOMPSON: Yes. I'm vaguely
17 familiar with that part of it.

18 MS. AILTS WIEST: And then if you
19 have the actual Agreement that you filed with us or
20 that Covad did, looking at 9.1.1.6, I was kind of
21 confused by how that is -- how that was listed in
22 there.

23 I mean, the Utah Commission specifically lists
24 elements A through R. In your Brief you mentioned
25 18 elements. And then when I go to that page I

45

1 find elements A through P in there.
 2 Can you explain that?
 3 MS. THOMPSON: There may have been
 4 slightly different Agreements filed in Utah than in
 5 South Dakota. So that may be one answer to kind of
 6 the change in the lettering and the reduction in
 7 the number of elements.
 8 MS. AILTS WIEST: It looks like it
 9 was just left off, though. But if you look on page
 10 119, there's two pages 119. One says it's deleted,
 11 and the other one says -- it's a little part where
 12 it's called deleted.
 13 MS. THOMPSON: Yeah. It looks like
 14 this page has been edited as part of the Agreement,
 15 and without Mary Sullivan at my side, I'm sorry, I
 16 can't.
 17 MS. AILTS WIEST: Could you clarify
 18 that perhaps afterwards --
 19 MS. THOMPSON: Absolutely.
 20 MS. AILTS WIEST: -- as to which
 21 elements you're talking about there?
 22 And did you disagree with the Utah
 23 Commission's position that it would be redundant or
 24 confusing to list those elements?
 25 MS. THOMPSON: No. I mean, I think,

46

1 you know, that -- you know, Mr. Diamond's testified
 2 that this is an accurate list. And just so that
 3 the parties are clear, you know, Qwest would like
 4 this list to be included in the Agreement. It's
 5 reflective accurately of federal law.
 6 MS. AILTS WIEST: Okay. And then I
 7 believe Covad stated that an administrative agency
 8 can't find that a state statute has been preempted
 9 or something similar to that.
 10 Is it your -- does Qwest think that we would
 11 need to find that any state law is preempted in
 12 order to agree with your position?
 13 MS. THOMPSON: No, not whatsoever.
 14 MS. AILTS WIEST: And then going to
 15 a question that I asked Diamond, on page 22 I
 16 believe of your Brief, and maybe I mischaracterized
 17 it, but you mentioned that the Commission should
 18 also prove Qwest's language and not require Qwest
 19 to continue providing network elements the FCC has
 20 delisted until the Commission approves an ICA
 21 Agreement.
 22 What section is that under then?
 23 MS. THOMPSON: I'm sorry, Rolayne.
 24 I think I missed the question.
 25 MS. AILTS WIEST: Yeah. Can you go

47

1 to page 22 of your Reply Brief? Do you have that
 2 handy?
 3 MS. THOMPSON: I do.
 4 MS. AILTS WIEST: I asked
 5 Mr. Diamond this, I believe, and he seemed
 6 surprised by it, by using the -- stating -- you can
 7 just read through it. It's just that one paragraph
 8 there.
 9 MS. THOMPSON: I'm not sure which
 10 language this is in the Agreement, but I know that
 11 the point of this provision or this paragraph and
 12 the point that's made here in the Brief is that to
 13 require Qwest to continue to make amendments is
 14 contrary to the parties negotiating independent
 15 commercial agreements and negotiating separately
 16 and transactions for these elements as opposed to
 17 having to come in and seek the Commission's
 18 approval every time, those two things being
 19 contradictory.
 20 MS. AILTS WIEST: Right. I just
 21 thought it was Qwest's position when the TRO first
 22 came out that Qwest was going to go through the
 23 amendment process in order to change this.
 24 Isn't that correct?
 25 MS. THOMPSON: Certainly with

48

1 respect to the change of law provisions and that
 2 kind of thing that are reflected in the
 3 Interconnection Agreements, it certainly has always
 4 been Qwest's representation and intent to follow
 5 the letter of its Interconnection Agreements. So I
 6 think I'm losing you here. Or I'm lost.
 7 MS. AILTS WIEST: Well, if you could
 8 just -- you know, at some point maybe afterwards if
 9 you could just point me to the section where that
 10 language is.
 11 MS. THOMPSON: Sure. Absolutely.
 12 MS. AILTS WIEST: That would be
 13 helpful. Thank you. That's all I had. Any other
 14 questions from the Commissioners?
 15 Thank you.
 16 MS. THOMPSON: Thank you.
 17 MS. AILTS WIEST: And if you would
 18 care to have a rebuttal.
 19 MR. DIAMOND: Yeah. Just a few
 20 clarifying comments only, nothing necessarily to
 21 rebut but just to clarify our position.
 22 Just on the record just that a couple of
 23 clarifying questions. The fact that we didn't
 24 agree or -- the fact that we've agreed to Qwest's
 25 language on this issue in Colorado isn't an

1 admission that -- isn't an admission here. It's
2 not a binding admission here. We made that
3 decision for business reasons unrelated to whether
4 or not we disputed it or not. So I don't think you
5 can give a whole lot of weight to that.

6 Ms. Thompson makes reference to providing
7 blanket access to unbundled network elements. And,
8 again, to sort of emphasize, we're clearly not
9 asking the Commission to provide -- to order Qwest
10 to provide unbundled network elements pursuant to
11 Section 251 at TELRIC rates. What we're saying is
12 there's this whole separate obligation under 271 as
13 an RBOC where they have to unbundle network
14 elements.

15 So we're limited by that list in Section 271.
16 It's not all UNEs or all parts of their network.
17 It's clearly limited by Section 271.

18 Ms. Thompson mentioned that we haven't
19 provided evidence of impairment. And, again, as I
20 indicated in my opening comments, several times,
21 the FCC has made it clear that there is no
22 impairment analysis necessary for the purposes of
23 determining unbundling under Section 271. It's
24 absolutely separate. The necessary and impaired
25 standard is only pursuant to Section 251.

1 And that's it, the only comments I have. If
2 you have any other questions.

3 MS. AILTS WUEST: Any other
4 questions from the Commissioners?

5 If not, thank you.

6 MR. DIAMOND: Thank you very much.

7 CHAIRMAN HANSON: Thank you,
8 Rolayne. That will conclude the hearing.

9 (The hearing is concluded)
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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF HUGHES)
4

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

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 28th day of
11 June 2005, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 8th day
14 of July 2005.
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16
17 
18 Cheri McComsey Wittner,
19 Notary Public and
20 Registered Professional Reporter
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Word Index

	33 [1] 21:16	11 35:16 36:4 36:17 36:20 37:3 37:9 38:15 38:17 40:21 Act's [1] 4:11 Action [1] 33:3 Actions [2] 34:9 37:21 Activity [1] 9:11 Actual [2] 27:12 44:19 Add [2] 25:13 25:22 Addition [2] 32:1 36:11 Address [1] 11:18 Addressed [3] 6:24 35:20 41:6 Addresses [1] 16:12 Administration [1] 38:22 Administrative [2] 38:21 46:7 Admission [3] 49:1 49:1 49:2 Admit [2] 23:8 23:8 Admitted [1] 21:17 Adopt [4] 35:11 35:12 39:4 41:12 Adopted [2] 5:11 31:14 Advanced [1] 37:4 Advocate [1] 23:5 Affirmed [3] 5:15 6:23 7:14 Affirming [1] 8:24 Afterwards [2] 45:18 48:8 Agency [2] 38:21 46:7 Ago [1] 40:4 Agree [5] 20:22 27:12 27:14 46:12 48:24 Agreed [9] 3:23 18:3 18:4 18:16 28:14 29:9 34:24 43:12 48:24 Agreement [20] 1:6 3:5 8:7 18:5 18:18 19:18 26:6 9 27:12 28:20 29:14 30:18 39:19 39:24 40:10 41:14 44:19 45:14 46:4 46:21 47:10 Agreements [20] 11:4 11:7 12:18 12:22 17:24 18:1 20:14 23:19 29:21 31:22 32:8 39:20 40:6 40:8 41:3 41:4 45:4 47:15 48:3 48:5 Ahead [1] 12:7 Ailts [41] 1:13 11:16 12:2 12:7 16:14 18:22 19:6 19:15 19:20 19:21 20:5 20:25 21:11 22:15 23:13 24:6 25:10 26:6 26:12 27:5 27:10 27:17 27:20 41:16 43:8 43:23 44:3 44:10 44:18 45:8 45:17 45:20 46:6 46:14 46:25 47:4 47:20 48:7 48:12 48:17 50:3 ALJ [1] 42:6 Allow [3] 8:16 28:18 33:20 Allowed [2] 32:19 38:13 Alternatively	[1] 22:22 Amendment [4] 26:7 26:22 27:3 47:23 Amendments [1] 47:13 Amorphus [1] 22:7 Amount [2] 10:1 17:14 Analysis [6] 7:5 7:9 14:10 15:23 42:8 49:22 Answer [5] 4:12 13:24 21:6 25:21 45:5 Anticipates [1] 32:1 Apparent [1] 43:13 Appeal [1] 7:15 Appealed [1] 43:3 Appeals [1] 5:16 APPEARANCES [2] 1:20 2:1 Appearing [4] 3:9 3:17 28:2 28:6 Applaud [1] 11:6 Apples [1] 25:24 Applicable [2] 38:16 38:18 Application [1] 39:7 Applications [1] 39:2 Applied [2] 7:17 10:12 Applies [1] 12:24 Apply [5] 17:19 28:20 28:23 31:18 38:11 Applying [2] 8:20 17:20 Appreciate [1] 13:19 Appropriate [1] 42:15 Approval [3] 17:1 39:21 47:18 Approve [1] 40:7 Approves [1] 46:20 Approving [1] 14:25 Arbitrate [2] 8:25 12:21 Arbitrated [1] 32:7 Arbitrating [1] 29:20 Arbitration [12] 1:5 3:4 4:4 5:18 7:24 14:25 30:3 30:14 30:19 31:18 40:12 44:4 Arbitrations [4] 3:21 7:25 9:2 30:6 Arbitrator [1] 31:16 Arbitrator's [1] 31:13 Argue [1] 10:18 Argued [1] 32:5 Argues [1] 7:22 Arguing [4] 28:7 29:5 36:11 37:8 Argument
'96 [4] 30:1 30:21 34:23 35:8 'blanket [1] 30:22	4 [6] 6:17 6:18 7:10 7:11 8:22 26:17 412 [1] 2:8 44 [1] 23:15 49-13-3 [1] 38:2 49-31-15 [1] 38:1 49-31-3 [1] 38:2		
1			
119 [2] 45:10 45:10 14-point [1] 13:11 18 [1] 44:25 19 [1] 44:3 195 [1] 24:7 1996 [2] 4:7 23:11	5 [5] 6:18 6:19 7:10 7:11 8:22 500 [1] 2:8		
2			
2 [1] 38:15 2003 [1] 5:12 2005 [4] 1:8 2:9 51:11 51:14 2008 [1] 18:5 201 [3] 38:15 38:17 39:11 202 [2] 38:17 39:12 22 [3] 26:12 46:15 47:1 251 [37] 6:2 7:8 9:15 10:12 12:13 12:15 14:24 15:23 22:5 24:23 25:22 25:25 28:19 29:2 29:11 30:12 30:15 30:24 31:1 31:23 31:24 32:3 32:13 32:15 33:2 2 33:24 34:5 34:10 36:5 36:13 37:22 40:2 40:9 40:13 41:12 49:11 49:25 251 (b) [1] 39:23 251 (c) (3) [2] 30:23 30:25 251 (d) (2) [3] 31:4 33:16 34:18 251 (d) (3) [2] 34:8 37:20 252 [19] 9:1 12:13 28:20 29:21 30:4 30:6 30:8 30:19 31:18 31:20 31:24 32:2 33:2 2 36:13 39:18 39:24 40:8 40:11 41:12 252 (h) [1] 30:9 270 [1] 12:13 271 [68] 4:6 4:17 4:20 5:2 5:8 5:25 7:1 7:5 7:6 7:14 8:13 8:19 9:1 9:8 9:9 9:18 10:3 10:15 11:21 12:13 12:23 12:23 13:3 13:6 14:15 15:4 19:8 19:13 21:18 21:25 22:6 23:18 24:19 25:5 25:7 25:24 26:1 27:7 28:18 28:25 29:12 29:13 29:22 30:15 31:17 31:25 32:6 32:12 32:15 32:17 33:4 33:7 33:11 33:15 36:12 38:12 38:19 39:1 39:8 39:10 39:18 40:18 40:20 41:11 49:12 49:15 49:17 49:23 271 (d) (3) [1] 29:23 28 [1] 1:8 28th [2] 2:9 51:10	6 [2] 7:10 8:22 664 [1] 23:16		
	8 [1] 51:13		
	9 [1] 8:22 9.1.1.6 [3] 27:13 44:14 44:20 9.1.1.7 [3] 38:9 38:10 38:12 9.1.1.8 [4] 19:16 19:20 20:4 20:15 9.3.1.1 [1] 36:24 9:30 [1] 2:10		
	A		
	A.m. [1] 2:10 Ability [2] 31:8 43:21 Above-entitled [2] 2:7 51:10 Absent [1] 38:22 Absolute [2] 5:9 5:24 Absolutely [4] 16:21 45:19 48:11 49:24 Access [29] 4:16 6:5 6:8 7:3 7:12 10:20 10:21 11:9 16:18 18:9 18:19 19:13 19:14 22:10 22:14 28:24 29:2 29:3 31:6 31:7 31:9 31:22 32:10 37:2 37:3 42:16 42:20 43:16 49:7 Access' [1] 30:22 Accordance [1] 38:14 Accurate [5] 21:20 21:22 27:14 27:16 46:2 Accurately [1] 46:5 Acknowledge [1] 22:2 Act [22] 4:7 14:11 23:12 29:12 29:23 30:1 30:21 32:20 34:3 34:23 35:3 35:8 35:		
3			
30 [2] 17:6 18:14			

Word Index

<p>[7] 9:7 28:4 35:8 37:13 37:15 42:5 44:7</p> <p>Arguments</p> <p>[2] 3:6 11:18</p> <p>Arrive</p> <p>[1] 31:21</p> <p>Attached</p> <p>[2] 18:17 51:11</p> <p>Attention</p> <p>[1] 5:14</p> <p>Authority</p> <p>[35] 4:3 4:10 4:24 8:25 9:22 10:15 13:4 14:9 15:12 23:17 25:8 25:11 29:11 29:20 29:24 30:7 30:17 31:16 32:16 32:24 33:11 33:14 33:16 34:7 35:9 36:3 36:18 36:19 37:9 37:19 39:5 40:7 40:19 41:10 44:8</p> <p>Authorization</p> <p>[1] 38:23</p> <p>Authorize</p> <p>[1] 30:21</p> <p>Authorized</p> <p>[1] 35:18</p> <p>Authorizes</p> <p>[2] 30:23 30:25</p> <p>Availability</p> <p>[2] 9:14 16:6</p> <p>Available</p> <p>[9] 4:19 4:21 8:5 9:16 9:20 10:11 16:19 23:18 41:1</p> <p>Avenue</p> <p>[1] 2:8</p>	<p>[2] 8:1 19:11</p> <p>Brett</p> <p>[2] 1:22 3:9</p> <p>Brief</p> <p>[10] 6:3 6:16 7:22 26:11 26:13 27:2 44:24 46:16 47:1 47:12</p> <p>Briefing</p> <p>[5] 5:5 7:18 14:14 38:1 39:14</p> <p>Briefs</p> <p>[1] 20:8</p> <p>Bring</p> <p>[2] 11:19 28:18</p> <p>Broad</p> <p>[1] 36:14</p> <p>Brought</p> <p>[2] 30:19 39:3</p> <p>Business</p> <p>[10] 3:3 10:24 10:25 11:10 15:8 22:11 22:13 22:13 38:6 49:3</p>	<p>[5] 34:25 38:1 40:14 41:20 42:9</p> <p>Claim</p> <p>[2] 35:17 43:1</p> <p>Clarify</p> <p>[2] 45:17 48:21</p> <p>Clarifying</p> <p>[2] 48:20 48:23</p> <p>Clash</p> <p>[1] 36:21</p> <p>Clause</p> <p>[2] 33:6 36:17</p> <p>Clear</p> <p>[5] 6:21 33:22 37:8 46:3 49:21</p> <p>Clearly</p> <p>[5] 10:16 30:13 31:20 49:8 49:17</p> <p>CLECs</p> <p>[1] 37:1</p> <p>Colorado</p> <p>[2] 28:13 48:25</p> <p>Columbia</p> <p>[1] 5:16</p> <p>Commencing</p> <p>[1] 2:9</p> <p>Commend</p> <p>[1] 26:24</p> <p>Comment</p> <p>[1] 5:3</p> <p>Comments</p> <p>[6] 5:4 6:16 11:12 48:20 49:20 50:1</p> <p>Commercial</p> <p>[8] 11:4 11:5 11:7 23:19 41:2 41:3 41:4 47:15</p> <p>Commission</p> <p>[62] 1:1 1:10 1:13 3:6 3:19 3:24 4:3 4:9 5:10 5:17 7:19 7:20 8:13 9:4 10:8 10:15 11:15 13:1 13:2 14:5 14:18 14:19 14:20 15:3 15:5 15:7 15:18 16:18 17:18 22:3 22:15 23:3 24:22 25:3 25:12 26:4 28:17 28:18 29:10 29:11 30:7 31:11 31:13 31:17 31:19 32:21 33:1 34:15 35:16 36:11 38:2 39:4 39:5 40:23 41:8 41:10 43:14 44:12 44:23 46:17 46:20 49:9</p> <p>Commission's</p> <p>[3] 36:10 45:23 47:17</p> <p>Commissioner</p> <p>[4] 1:12 18:25 19:24 21:10</p> <p>Commissioners</p> <p>[12] 3:16 12:1 12:3 12:4 16:14 18:23 27:21 28:1 41:17 43:9 48:14 50:4</p> <p>Commissions</p> <p>[26] 4:14 5:19 5:23 7:17 8:16 8:25 12:20 14:1 14:2 14:8 23:6 23:11 28:8 28:9 30:1 32:6 32:24 33:3 33:6 33:13 33:21 35:21 37:9 38:20 39:21 40:7</p> <p>Commissions's</p> <p>[1] 33:8</p> <p>Common</p> <p>[1] 38:4</p> <p>Communications</p> <p>[6] 1:4 1:5 3:2 3:3 3:13 7:21</p> <p>Communications'</p> <p>[1] 3:14</p> <p>Companies</p> <p>[5] 5:7 7:3 12:24 16:4 38:4</p> <p>Company</p> <p>[4] 3:4 13:8 32:25 34:24</p> <p>Competing</p> <p>[1] 14:1</p> <p>Competition</p> <p>[1] 35:12</p> <p>Competitive</p> <p>[4] 4:5 4:18 6:18 13:11</p> <p>Completed</p> <p>[1] 21:6</p> <p>Completely</p> <p>[1] 43:20</p> <p>Compliance</p> <p>[3] 8:19 33:12 33:15</p> <p>Complied</p> <p>[1] 29:24</p> <p>Complying</p>	<p>[1] 19:8</p> <p>Concede</p> <p>[2] 17:20 25:6</p> <p>Conceded</p> <p>[1] 33:10</p> <p>Concept</p> <p>[1] 14:15</p> <p>Concerned</p> <p>[2] 14:4 30:4</p> <p>Concerning</p> <p>[1] 16:1</p> <p>Conclude</p> <p>[7] 10:2 10:10 11:22 11:23 22:22 34:7 50:8</p> <p>Concluded</p> <p>[7] 4:15 15:5 29:10 31:2 31:11 37:19 50:9</p> <p>Conclusion</p> <p>[6] 9:5 10:9 14:2 14:3 20:17 41:7</p> <p>Condition</p> <p>[1] 5:1</p> <p>Conditions</p> <p>[8] 6:10 8:5 12:21 30:8 38:18 39:16 39:25 40:13</p> <p>Conduct</p> <p>[2] 33:5 35:17</p> <p>Confess</p> <p>[2] 9:25 15:10</p> <p>Confirmed</p> <p>[3] 33:19 34:6 40:4</p> <p>Confirms</p> <p>[1] 40:10</p> <p>Conflict</p> <p>[5] 24:11 34:17 34:21 36:9 37:6</p> <p>Conflicts</p> <p>[1] 29:3</p> <p>Confused</p> <p>[2] 43:24 44:21</p> <p>Confusing</p> <p>[2] 44:13 45:24</p> <p>Congress</p> <p>[1] 33:20</p> <p>Congressional</p> <p>[1] 38:23</p> <p>Connection</p> <p>[1] 39:1</p> <p>Consequence</p> <p>[1] 6:6</p> <p>Consider</p> <p>[1] 22:12</p> <p>Considered</p> <p>[1] 28:8</p> <p>Consistent</p> <p>[6] 23:2 33:10 34:9 35:19 36:19 37:21</p> <p>Consistently</p> <p>[1] 35:3</p> <p>Construed</p> <p>[1] 9:10</p> <p>Consult</p> <p>[1] 32:21</p> <p>Consulting</p> <p>[2] 30:2 33:9</p> <p>Contain</p> <p>[2] 39:22 40:9</p> <p>Contemplate</p> <p>[2] 33:2 33:5</p> <p>Context</p> <p>[2] 9:1 40:18</p> <p>Continue</p> <p>[9] 5:1 6:25 9:19 9:19 13:10 25:7 26:20 46:19 47:13</p> <p>Continued</p> <p>[3] 30:12 30:20 34:13</p> <p>Continues</p> <p>[1] 9:13</p> <p>Continuing</p> <p>[2] 9:21 26:1</p> <p>Contradictory</p> <p>[1] 47:19</p> <p>Contrary</p> <p>[2] 37:15 47:14</p>
<p>B</p> <p>Bad</p> <p>[1] 21:10</p> <p>Based</p> <p>[10] 3:13 7:7 15:11 20:14 22:24 29:14 34:6 37:18 39:11 41:22</p> <p>Basis</p> <p>[5] 10:10 34:19 39:16 42:19 43:1</p> <p>Behalf</p> <p>[2] 28:2 33:21</p> <p>Believes</p> <p>[1] 4:12</p> <p>Bell</p> <p>[11] 5:7 7:2 12:24 13:7 16:4 32:25 35:19 35:22 35:24 36:16 37:11</p> <p>Bennett</p> <p>[1] 2:3</p> <p>Best</p> <p>[1] 1:16</p> <p>Beth</p> <p>[1] 36:15</p> <p>Between</p> <p>[5] 5:18 8:18 32:14 36:21 37:25</p> <p>Big</p> <p>[1] 16:8</p> <p>Binding</p> <p>[1] 49:2</p> <p>Bit</p> <p>[4] 14:13 19:11 21:8 27:9</p> <p>Black</p> <p>[6] 5:6 5:14 5:23 5:23 6:23 24:19</p> <p>Blank</p> <p>[3] 8:4 20:6 20:22</p> <p>Blanket</p> <p>[1] 49:7</p> <p>Board</p> <p>[13] 29:19 29:19 30:12 30:16 30:20 31:2 31:3 33:22 42:7 42:7 42:8 42:13 42:22</p> <p>BOB</p> <p>[1] 1:11</p> <p>BOC</p> <p>[4] 7:6 32:19 32:22 33:12</p> <p>BOCs</p> <p>[5] 7:2 23:17 32:9 33:15 39:1</p> <p>Bonrud</p> <p>[1] 1:19</p> <p>Bottom</p>	<p>C</p> <p>Candidly</p> <p>[1] 13:25</p> <p>Cannot</p> <p>[5] 10:23 10:25 35:1 35:12 35:16</p> <p>Capability</p> <p>[1] 37:5</p> <p>Capable</p> <p>[1] 42:11</p> <p>Capitol</p> <p>[2] 2:8 2:8</p> <p>Care</p> <p>[1] 48:18</p> <p>Carrier</p> <p>[5] 8:6 12:19 16:2 31:9 38:5</p> <p>Carriers</p> <p>[5] 4:21 9:20 12:17 12:17 27:3</p> <p>Case</p> <p>[7] 5:13 8:11 22:13 32:25 33:22 42:7 42:18</p> <p>Cases</p> <p>[5] 7:20 40:14 40:19 41:21 43:3</p> <p>Central</p> <p>[1] 16:3</p> <p>Certain</p> <p>[11] 3:23 3:24 4:17 9:15 11:4 14:16 16:1 16:3 18:12 18:16 43:16</p> <p>Certainly</p> <p>[7] 11:6 16:23 22:9 25:9 31:25 47:25 48:3</p> <p>CERTIFICATE</p> <p>[1] 51:2</p> <p>CERTIFY</p> <p>[1] 51:8</p> <p>Chairman</p> <p>[17] 1:11 1:11 3:1 3:8 11:14 16:15 16:16 17:7 17:23 18:7 18:11 18:21 21:1 41:18 43:2 43:6 50:7</p> <p>Chance</p> <p>[1] 11:17</p> <p>Change</p> <p>[12] 12:17 16:22 16:24 17:4 17:5 17:5 18:12 18:13 19:1 45:6 47:23 48:1</p> <p>Changed</p> <p>[3] 6:9 6:10 18:20</p> <p>Charge</p> <p>[1] 39:1</p> <p>Charged</p> <p>[2] 12:20 14:21</p> <p>Checklist</p> <p>[11] 4:6 4:18 6:17 6:18 7:10 8:21 9:9 13:11 21:19 29:25 32:11</p> <p>Cheek</p> <p>[1] 19:11</p> <p>Cheri</p> <p>[3] 1:23 51:5 51:18</p> <p>Circuit</p> <p>[4] 7:15 33:19 34:25 35:7</p> <p>Cite</p> <p>[1] 25:10</p> <p>Cited</p>	<p>Claim</p> <p>[2] 35:17 43:1</p> <p>Clarify</p> <p>[2] 45:17 48:21</p> <p>Clarifying</p> <p>[2] 48:20 48:23</p> <p>Clash</p> <p>[1] 36:21</p> <p>Clause</p> <p>[2] 33:6 36:17</p> <p>Clear</p> <p>[5] 6:21 33:22 37:8 46:3 49:21</p> <p>Clearly</p> <p>[5] 10:16 30:13 31:20 49:8 49:17</p> <p>CLECs</p> <p>[1] 37:1</p> <p>Colorado</p> <p>[2] 28:13 48:25</p> <p>Columbia</p> <p>[1] 5:16</p> <p>Commencing</p> <p>[1] 2:9</p> <p>Commend</p> <p>[1] 26:24</p> <p>Comment</p> <p>[1] 5:3</p> <p>Comments</p> <p>[6] 5:4 6:16 11:12 48:20 49:20 50:1</p> <p>Commercial</p> <p>[8] 11:4 11:5 11:7 23:19 41:2 41:3 41:4 47:15</p> <p>Commission</p> <p>[62] 1:1 1:10 1:13 3:6 3:19 3:24 4:3 4:9 5:10 5:17 7:19 7:20 8:13 9:4 10:8 10:15 11:15 13:1 13:2 14:5 14:18 14:19 14:20 15:3 15:5 15:7 15:18 16:18 17:18 22:3 22:15 23:3 24:22 25:3 25:12 26:4 28:17 28:18 29:10 29:11 30:7 31:11 31:13 31:17 31:19 32:21 33:1 34:15 35:16 36:11 38:2 39:4 39:5 40:23 41:8 41:10 43:14 44:12 44:23 46:17 46:20 49:9</p> <p>Commission's</p> <p>[3] 36:10 45:23 47:17</p> <p>Commissioner</p> <p>[4] 1:12 18:25 19:24 21:10</p> <p>Commissioners</p> <p>[12] 3:16 12:1 12:3 12:4 16:14 18:23 27:21 28:1 41:17 43:9 48:14 50:4</p> <p>Commissions</p> <p>[26] 4:14 5:19 5:23 7:17 8:16 8:25 12:20 14:1 14:2 14:8 23:6 23:11 28:8 28:9 30:1 32:6 32:24 33:3 33:6 33:13 33:21 35:21 37:9 38:20 39:21 40:7</p> <p>Commissions's</p> <p>[1] 33:8</p> <p>Common</p> <p>[1] 38:4</p> <p>Communications</p> <p>[6] 1:4 1:5 3:2 3:3 3:13 7:21</p> <p>Communications'</p> <p>[1] 3:14</p> <p>Companies</p> <p>[5] 5:7 7:3 12:24 16:4 38:4</p> <p>Company</p> <p>[4] 3:4 13:8 32:25 34:24</p> <p>Competing</p> <p>[1] 14:1</p> <p>Competition</p> <p>[1] 35:12</p> <p>Competitive</p> <p>[4] 4:5 4:18 6:18 13:11</p> <p>Completed</p> <p>[1] 21:6</p> <p>Completely</p> <p>[1] 43:20</p> <p>Compliance</p> <p>[3] 8:19 33:12 33:15</p> <p>Complied</p> <p>[1] 29:24</p> <p>Complying</p>	<p>Concede</p> <p>[2] 17:20 25:6</p> <p>Conceded</p> <p>[1] 33:10</p> <p>Concept</p> <p>[1] 14:15</p> <p>Concerned</p> <p>[2] 14:4 30:4</p> <p>Concerning</p> <p>[1] 16:1</p> <p>Conclude</p> <p>[7] 10:2 10:10 11:22 11:23 22:22 34:7 50:8</p> <p>Concluded</p> <p>[7] 4:15 15:5 29:10 31:2 31:11 37:19 50:9</p> <p>Conclusion</p> <p>[6] 9:5 10:9 14:2 14:3 20:17 41:7</p> <p>Condition</p> <p>[1] 5:1</p> <p>Conditions</p> <p>[8] 6:10 8:5 12:21 30:8 38:18 39:16 39:25 40:13</p> <p>Conduct</p> <p>[2] 33:5 35:17</p> <p>Confess</p> <p>[2] 9:25 15:10</p> <p>Confirmed</p> <p>[3] 33:19 34:6 40:4</p> <p>Confirms</p> <p>[1] 40:10</p> <p>Conflict</p> <p>[5] 24:11 34:17 34:21 36:9 37:6</p> <p>Conflicts</p> <p>[1] 29:3</p> <p>Confused</p> <p>[2] 43:24 44:21</p> <p>Confusing</p> <p>[2] 44:13 45:24</p> <p>Congress</p> <p>[1] 33:20</p> <p>Congressional</p> <p>[1] 38:23</p> <p>Connection</p> <p>[1] 39:1</p> <p>Consequence</p> <p>[1] 6:6</p> <p>Consider</p> <p>[1] 22:12</p> <p>Considered</p> <p>[1] 28:8</p> <p>Consistent</p> <p>[6] 23:2 33:10 34:9 35:19 36:19 37:21</p> <p>Consistently</p> <p>[1] 35:3</p> <p>Construed</p> <p>[1] 9:10</p> <p>Consult</p> <p>[1] 32:21</p> <p>Consulting</p> <p>[2] 30:2 33:9</p> <p>Contain</p> <p>[2] 39:22 40:9</p> <p>Contemplate</p> <p>[2] 33:2 33:5</p> <p>Context</p> <p>[2] 9:1 40:18</p> <p>Continue</p> <p>[9] 5:1 6:25 9:19 9:19 13:10 25:7 26:20 46:19 47:13</p> <p>Continued</p> <p>[3] 30:12 30:20 34:13</p> <p>Continues</p> <p>[1] 9:13</p> <p>Continuing</p> <p>[2] 9:21 26:1</p> <p>Contradictory</p> <p>[1] 47:19</p> <p>Contrary</p> <p>[2] 37:15 47:14</p>

Word Index

Control [1] 38:3	[10] 5:18 5:21 7:23 29:3 35:19 40:16 41:8 41:21 42:2 44:5	[1] 8:18	[3] 11:2 23:25 29:6	
Controls	Declaratory	Disputing	Enforce	
[1] 20:10	[4] 35:20 36:16 36:17 37:12	[2] 22:17 28:15	[4] 21:18 25:23 33:12 33:14	
Cooperatively	Declined	Distance	Enforcement	
[1] 11:3	[1] 34:18	[7] 4:22 4:25 9:23 13:5 13:9 25:8 32:20	[1] 39:2	
Corporation	Deem	Distinct	Enforcing	
[3] 1:6 3:5 28:3	[1] 37:16	[1] 6:22	[1] 43:15	
Correct	Defined	Distinction	Engage	
[5] 16:20 16:23 27:16 47:24 51:12	[1] 39:19	[1] 13:18	[1] 14:9	
Correctly	Delegated	Distinguishable	Ensuring	
[1] 6:3	[1] 33:25	[1] 40:15	[1] 8:21	
Correctness	Deleted	District	Enter	
[1] 40:3	[3] 44:12 45:10 45:12	[3] 5:16 29:6 35:6	[2] 11:7 12:18	
Corresponding	Delisted	Dockets	Entered	
[1] 9:9	[4] 24:22 25:14 27:13 46:20	[3] 8:1 8:2 23:7	[1] 5:11	
Cost	Delisting	Documents	Entering	
[3] 22:24 23:7 23:9	[1] 25:25	[1] 20:10	[1] 11:4	
Counsel	Delists	Done	Error	
[1] 3:12	[1] 24:24	[2] 15:23 15:24	[1] 5:22	
COUNTY	Demand	Doubt	Epecially	
[1] 51:3	[1] 39:7	[1] 11:19	[1] 16:7	
Couple	Demands	Douglas	Essential	
[3] 12:9 43:10 48:22	[1] 36:22	[1] 1:18	[2] 33:23 42:13	
Course	Demonstrated	Down	Establish	
[2] 6:8 14:23	[1] 36:23	[1] 9:14	[1] 7:1	
Court	Denied	Drawing	Established	
[12] 4:2 5:16 21:4 29:6 30:20 33:1 33:19 35:6 35:10 35:15 40:5 40:5	[1] 42:25	[1] 8:4	[2] 34:1 38:15	
Courts	Denver	DSL	Evidence	
[3] 28:22 29:4 34:23	[1] 3:14	[1] 35:22	[4] 23:8 23:8 42:17 49:19	
Covad	Deployment	Duly-appointed	Evidentiary	
[39] 1:5 3:3 3:7 3:13 3:14 3:22 4:12 4:16 4:19 5:18 5:25 6:5 6:6 6:14 10:14 10:14 10:23 13:14 13:14 16:10 16:18 21:17 27:12 28:14 28:18 29:5 32:5 33:10 36:13 38:1 38:12 39:4 40:14 40:16 41:2 42:5 42:23 44:20 46:7	[1] 37:4	[1] 51:8	[1] 4:1	
Covad's	Details	Duplicated	Eviscerated	
[5] 36:21 36:23 38:9 39:7 43:1	[1] 6:15	[1] 42:11	[1] 4:23	
Cremer	Determination	During	Examiner's	
[1] 1:14	[7] 7:8 11:24 14:7 15:11 16:2 30:2 37:7	[1] 18:7	[1] 8:24	
Cross	Determinations	Dusty	Examiners	
[1] 20:25	[2] 16:1 35:10	[2] 1:12 20:2	[1] 8:10	
CRR	Determine	Duty	Example	
[1] 1:23	[7] 8:13 14:23 17:18 29:24 31:17 33:17 38:25	[6] 4:20 5:24 10:3 11:22 11:23 14:15	[4] 14:5 15:24 36:21 42:3	
Crux	Determined	E		
[2] 26:3 44:6	[2] 9:7 35:23	Easier	Except	
Curious	Determines	[1] 26:25	[1] 12:17	
[1] 17:24	[1] 31:6	East	Exclusive	
Current	Determining	[1] 2:8	[2] 20:13 35:9	
[1] 18:8	[2] 32:18 49:23	Edited	Exclusively	
D		[1] 45:14	[1] 39:6	
D.C.	Diamond	Effect	Excuse	
[3] 7:15 33:19 35:7	[42] 1:21 3:9 3:11 3:12 11:17 12:6 12:10 12:15 13:23 15:14 15:21 16:17 16:21 17:10 18:1 18:10 18:13 19:3 19:9 19:17 20:4 20:9 20:19 20:24 21:9 21:21 22:20 23:21 24:15 25:17 26:10 26:14 27:6 27:15 27:19 27:23 41:6 43:5 46:15 47:5 48:19 50:6	[1] 15:16	[3] 8:3 20:19 21:1	
D/B/A	Diamond's	Effective	Executed	
[1] 1:4	[1] 46:1	[1] 26:17	[1] 41:2	
Dakota	DIECA	Effectively	Exercise	
[12] 1:2 2:7 2:9 15:2 25:9 32:5 37:24 41:25 45:5 51:1 51:7 51:13	[4] 1:4 1:21 1:22 3:2	[3] 4:23 8:8 35:24	[1] 39:5	
Date	Difference	Either	Exhibit	
[4] 17:25 18:2 18:3 18:4	[1] 32:14	[4] 6:11 14:24 19:14 28:25	[1] 18:17	
Dated	Different	Element	Existing	
[1] 51:13	[5] 12:23 21:2 35:21 44:5 45:4	[15] 22:17 24:21 24:22 29:17 32:15 32:15 33:24 34:15 34:17 35:2 35:25 37:2 42:13 42:14 42:16	[2] 22:24 38:10	
Dave	Difficult	Elements	Experience	
[1] 1:17	[2] 21:4 24:1	[77] 4:5 4:10 4:17 4:18 4:21 5:2 5:8 5:25 6:2 6:4 6:7 6:12 9:14 9:15 9:17 9:18 9:18 10:3 13:17 14:16 14:22 14:24 15:4 15:8 16:6 17:17 18:12 19:7 19:13 21:25 23:17 23:18 24:20 25:12 25:25 28:19 28:21 28:25 29:13 30:11 30:18 31:6 31:8 31:18 31:23 32:7 32:11 32:16 33:18 38:11 39:1 39:8 39:9 39:17 39:23 40:1 40:25 40:25 41:1 41:5 41:11 42:21 42:24 42:25 43:16 44:13 44:24 44:25 45:1 45:7 45:21 45:24 46:19 47:16 49:7 49:10 49:14	[2] 20:10 26:15	
Days'	Directly	Elsewhere	Expiration	
[2] 17:6 18:14	[3] 6:24 23:24 36:9	[1] 42:11	[1] 18:4	
Deal	Disagree	Emphasize	Explain	
[1] 23:23	[1] 45:22	[1] 49:8	[3] 12:12 19:16 45:2	
Decide	Discriminatory	Emphasized	Explicitly	
[2] 14:10 22:18	[1] 39:13	[1] 35:10	[1] 7:15	
Decided	Discussed	Encompasses	Express	
[2] 7:20 10:6	[1] 39:14	[1] 39:25	[1] 38:22	
Decision	Discussion	End	Extent	
[11] 5:10 8:24 15:17 24:10 32:9 34:13 34:20 40:4 43:11 44:1 49:3	[1] 20:3		[3] 36:4 36:19 38:5	
Decision-making	Dispute		F	
[2] 32:24 33:13	[8] 17:21 19:2 19:16 20:7 20:16 20:23 20:24 21:24		Faced	
Decisions	Disputed		[1] 23:24	
	[1] 49:4		Facilities	
	Disputes		[3] 11:5 13:14 18:16	
			Facility	
			[1] 42:10	
			Fact	
			[7] 9:6 25:7 28:22 31:13 42:23 48:23 48:24	
			Fail	
			[1] 34:20	

Word Index

Failure [1] 31:7 Fair [1] 20:17 Familiar [3] 8:17 44:15 44:17 Far [2] 16:22 16:24 Farris [1] 1:17 Favor [2] 5:20 28:9 FCC [66] 4:14 4:24 6:5 6:8 6:21 8:20 9:7 9:12 9:13 9:22 10:19 12:25 13:3 13:6 14:10 15:6 15:23 16:18 16:22 17:1 17:4 18:8 19:2 19:7 21:18 23:6 23:7 23:16 24:9 24:10 24:18 25:14 28:22 29:4 29:6 29:23 31:5 32:18 32:20 33:11 33:14 33:16 33:20 34:1 34:2 34:5 34:13 35:3 35:9 35:20 35:23 35:25 36:3 36:7 36:15 36:16 37:1 37:7 37:10 38:24 39:6 39:9 39:19 42:15 46:19 49:21 FCC's [5] 5:6 5:10 9:5 32:8 39:9 February [1] 26:17 Federal [21] 17:14 24:12 29:16 34:4 34:12 34:22 34:23 35:14 35:17 36:22 37:17 37:23 37:25 38:6 38:22 40:5 41:23 42:2 43:14 44:9 46:5 Feeder [2] 36:25 37:6 Few [2] 18:24 48:19 File [2] 10:20 40:18 Filed [5] 3:20 3:22 3:25 44:19 45:4 Filing [1] 16:20 Final [2] 15:13 40:22 Finally [1] 7:10 First [8] 3:7 3:15 12:5 12:25 22:19 28:5 29:19 47:21 Fixed [1] 18:18 Follow [4] 4:8 13:20 41:8 48:4 Follow-on [1] 4:8 Following [4] 10:9 18:25 30:24 31:4 Follows [1] 8:14 Forgive [1] 21:9 Former [1] 44:12 Forney [1] 1:18 Forth [4] 4:5 13:16 15:1 23:9 Fortune [1] 11:2 Four [3] 5:17 35:21 36:8 Framework [2] 12:16 37:16 Frankly [1] 19:10 Front [3] 19:18 42:4 44:1	[8] 12:11 12:13 12:14 12:15 13:20 25:18 25:19 38:3 Given [5] 9:22 14:22 25:7 26:15 33:23 Goals [1] 33:4 Governing [1] 31:22 Governs [1] 38:17 Granted [2] 13:3 38:13 Granting [1] 3:16 Grateful [1] 3:18 Greff [2] 1:15 20:1 Greg [5] 1:15 1:21 3:9 3:12 12:9 Grips [1] 5:6 Grounds [1] 19:4	[1] 5:23 Ignores [1] 36:15 II [2] 33:19 35:7 ILEC [2] 8:19 39:10 ILEC's [1] 30:5 ILECs [1] 36:6 Imagine [1] 35:1 Impair [2] 15:22 31:8 Impaired [7] 4:16 16:5 33:17 42:17 42:23 42:24 49:24 Impairment [11] 15:16 15:17 15:20 15:21 24:9 33:25 34:3 34:16 35:4 49:19 49:22 Implement [1] 27:4 Implementation [5] 24:12 30:5 34:11 34:22 37:23 Implies [1] 23:16 Important [1] 40:22 Impose [6] 7:11 22:3 22:16 29:21 30:7 37:16 Imposed [2] 37:5 38:19 In-house [1] 3:12 In-reach [1] 4:22 In-region [4] 4:25 9:23 13:4 13:8 INC [1] 1:4 Include [4] 28:11 29:12 30:17 40:12 Included [2] 32:7 46:4 Including [2] 29:25 39:16 Inconsistent [6] 29:15 35:13 35:16 36:5 36:9 44:9 Incorporate [1] 36:12 Incorporated [1] 3:3 Incorporation [1] 32:2 Incumbent [1] 12:16 Incumbent's [1] 30:22 Indeed [2] 8:15 39:19 Independent [4] 7:2 32:9 36:18 47:14 Indiana [3] 32:25 33:1 34:24 Indicated [1] 49:20 Individual [1] 8:17 Instance [1] 6:14 Instances [2] 6:22 16:3 Instead [3] 5:13 5:17 14:18 Intended [1] 31:20 Intent [1] 48:4 Intentionally [2] 20:6 20:22	Interconnection [25] 1:5 3:4 7:24 8:7 12:18 12:22 18:5 18:17 26:8 28:20 29:13 29:20 30:11 30:18 31:22 32:8 39:18 39:20 39:24 40:8 40:10 40:11 41:13 48:3 48:5 Interested [3] 6:17 13:12 16:10 InterLATA [1] 13:9 Interplay [1] 37:25 Interpretation [3] 40:3 41:22 42:2 Interpreting [1] 34:23 Interstate [2] 17:2 23:19 Intrastate [1] 19:14 Introduced [1] 21:3 Introductory [1] 5:3 Investigatory [1] 33:8 Involved [2] 7:21 16:9 Involving [1] 8:2 Iowa [7] 28:11 29:18 32:4 33:22 41:9 41:20 42:3 Irrespective [1] 5:25 Issue [22] 4:8 4:9 6:23 9:3 10:1 10:4 10:5 10:5 14:14 15:9 17:8 20:12 26:4 28:7 28:10 28:16 28:16 30:13 31:15 37:11 41:6 48:25 Issued [2] 40:4 41:8 Issues [6] 3:20 3:24 3:25 4:2 8:18 27:7 Issuing [1] 37:14 Item [5] 6:17 6:18 6:19 9:9 16:8 Items [4] 7:10 8:22 13:10 13:13 Itself [1] 16:11
G			
GARY [1] 1:11 General			
H			
Habit [1] 21:10 Hampshire [4] 7:19 9:3 15:4 40:15 Handling [1] 11:15 Handy [1] 47:2 HANSON [6] 1:11 3:1 11:14 16:15 21:1 50:7 Hard [1] 24:20 Harlan [1] 1:16 Hear [3] 3:6 10:18 21:13 Hearing [7] 4:1 8:10 8:24 19:24 41:24 50:8 50:9 Heather [1] 1:18 Heavily [1] 40:16 Held [4] 2:6 28:22 35:15 36:7 Hello [1] 12:8 Helpful [1] 48:13 HEREBY [1] 51:8 Hettinger [1] 2:4 High-level [1] 13:18 Hinged [1] 42:2 Holding [2] 5:6 7:14 Hope [1] 16:12 House [1] 3:12 HUGHES [1] 51:3			
I			
ICA [4] 36:13 40:24 41:12 46:20 Idea [1] 5:4 Identified [1] 40:2 Ignored			
J			
Jacobson [1] 1:17 Job [2] 20:11 20:13 John [1] 1:14 JOHNSON [2] 1:12 19:24 July [1] 51:14 June [3] 1:8 2:9 51:11 Jurisdiction [10] 13:21 14:4 14:6 14:19 14:20 15:3 15:19 17:17 30:16 31:12 Jurisdictionally [1] 15:16 Jurisdictions [1] 37:25 Justify [1] 10:23			
K			
Karen [1] 1:14 Keep [3] 6:16 40:23 44:13 Keith			

Word Index

<p>[1] 1:16 Kind [5] 14:12 28:4 44:20 45:5 48:2 Kinds [1] 10:25 Knowledge [1] 43:4 Known [1] 9:13 Koennecke [3] 1:22 3:8 3:9</p>	<p>[2] 45:8 45:13 Loop [3] 6:19 7:12 32:10 Loops [8] 7:3 13:13 16:7 16:8 35:23 36:7 36:25 37:6 Losing [1] 48:6 Lost [1] 48:6 Lower [1] 22:9 Lynch [1] 21:25</p>	<p>[1] 8:19 Montana [1] 40:5 Morning [11] 3:7 3:10 3:11 12:10 16:16 27:25 28:2 28:7 28:15 28:17 41:18 Morning's [1] 28:4 Most [1] 24:1 Move [1] 11:24 Mulkern [1] 2:2 Mullin [1] 2:3 Must [7] 4:18 5:8 9:19 13:9 33:18 39:12 39:20 Mute [4] 19:22 19:23 21:13 21:14</p>	<p>[1] 35:24 Obligation [10] 5:9 7:2 9:21 21:24 24:19 25:1 26:1 32:9 39:22 49:12 Obligations [15] 6:1 7:6 8:14 8:22 11:22 24:23 25:7 29:22 30:5 30:14 30:15 32:2 32:12 36:13 40:9 Observed [1] 35:7 Obtain [1] 41:5 Obtained [1] 42:11 Obviously [3] 4:12 9:11 23:22 Offer [2] 31:10 41:11 Offering [1] 38:4 Offerings [1] 8:18 Office [1] 3:14 Offices [2] 16:3 16:5 Once [4] 4:8 9:7 10:1 11:23 One [10] 8:10 8:11 13:2 14:2 15:13 28:16 45:5 45:10 45:11 47:7 Ongoing [1] 39:22 Opening [1] 49:20 Operating [5] 5:7 7:2 12:24 13:8 16:4 Opportunity [4] 3:16 3:18 11:11 28:5 Opposed [1] 47:16 Opt [1] 8:6 Oral [1] 3:6 Oranges [1] 25:24 Order [31] 5:11 6:22 6:24 7:6 9:6 9:12 15:25 21:16 21:17 23:14 25:14 25:20 26:16 29:7 29:8 34:5 35:1 35:20 36:7 36:16 36:17 37:1 37:10 37:12 38:24 44:4 44:8 44:11 46:12 47:23 49:9 Orders [2] 35:20 36:8 Otherwise [5] 8:6 9:21 22:4 34:18 38:6 Ought [1] 17:19 Own [1] 16:11</p>
L			
<p>Lacks [1] 30:16 Language [10] 28:14 34:6 34:18 36:23 37:18 41:13 46:18 47:10 48:10 48:25 Larry [1] 2:4 Last [1] 17:25 Law [33] 5:9 5:14 5:24 6:23 7:16 10:1 14:11 29:1 29:15 29:16 31:25 32:3 34:14 35:17 35:18 36:14 37:10 37:14 37:17 38:7 38:16 38:22 41:23 42:3 42:6 42:9 42:12 42:19 43:15 44:9 46:5 46:11 48:1 Lawfulness [1] 38:25 Least [2] 22:8 42:17 Left [4] 10:4 20:6 20:22 45:9 Legal [3] 3:20 3:24 39:16 Less [2] 16:5 24:8 Letter [7] 5:6 5:14 5:23 5:24 6:23 24:19 48:5 Lettering [1] 45:6 Level [2] 10:16 17:14 Lie [1] 15:20 Lies [1] 17:18 Life [1] 26:25 Likely [2] 24:10 29:15 Limit [1] 11:13 Limited [5] 30:10 34:8 37:20 49:15 49:17 Line [3] 8:1 11:5 19:11 Lines [2] 10:7 41:3 List [8] 25:22 25:23 25:24 44:12 45:24 46:2 46:4 49:15 Listed [4] 13:10 20:7 20:8 44:21 Lists [1] 44:23 Litigation [1] 17:14 Local [3] 6:19 6:19 12:16 Locked [2] 18:8 18:15 Logical [1] 9:24 Look [3] 10:20 27:11 45:9 Looking [1] 44:20 Looks</p>	<p>M Main [2] 7:18 8:23 Maine [4] 8:11 10:8 10:9 40:15 Mandated [1] 30:3 Manner [1] 35:16 Marlene [1] 2:3 Mary [2] 20:13 45:15 Matter [6] 1:4 2:7 3:2 5:9 37:14 51:10 Maureen [1] 20:17 McCarty [1] 34:24 McComsey [3] 1:23 51:5 51:18 Mean [4] 41:1 43:12 44:23 45:25 Meaning [2] 9:15 9:17 Mechanisms [1] 31:21 Meets [1] 8:21 Melissa [5] 1:21 20:18 20:19 20:20 28:1 Mention [1] 26:10 Mentioned [8] 7:11 7:18 16:17 26:9 39:15 44:24 46:17 49:18 Mentioning [1] 7:13 Met [1] 32:22 Method [1] 29:16 Michele [1] 1:17 Michigan [1] 35:7 Might [4] 6:1 6:5 27:11 41:24 Mind [2] 12:12 40:23 Mine [1] 21:10 Minnesota [5] 28:12 31:11 32:4 41:9 41:20 Mischaracterized [1] 46:16 Missed [1] 46:24 Misspoke [1] 31:2 Model [1] 22:25 Models [1] 23:9 Monitor</p>	<p>N Name [2] 3:11 28:1 Named [1] 20:12 National [1] 34:19 Nature [1] 33:9 Necessarily [2] 7:7 48:20 Necessary [9] 9:8 15:22 31:7 33:7 33:17 42:23 42:25 49:22 49:24 Need [3] 4:1 17:1 46:11 Negotiate [3] 8:7 27:2 27:7 Negotiating [2] 47:14 47:15 Negotiations [1] 30:9 Nervous [1] 19:25 Network [39] 4:5 5:2 6:4 6:7 9:14 9:16 9:18 10:3 13:17 14:16 14:22 14:23 15:8 16:6 17:16 24:21 24:21 28:19 28:25 30:11 31:6 31:8 31:23 32:6 32:11 33:18 34:15 38:11 39:17 40:1 40:25 42:21 43:16 44:12 46:19 49:7 49:10 49:13 49:16 Networks [1] 30:22 Never [2] 5:5 14:14 New [6] 7:19 9:3 15:4 32:1 38:14 40:15 Next [1] 9:24 Noncompliance [1] 21:18 Notary [2] 51:6 51:18 Note [2] 31:19 40:22 Nothing [4] 7:23 16:15 23:3 48:20 Notice [4] 16:25 17:4 17:6 18:14 Number [1] 45:7 Numbers [1] 21:7</p>	<p>O Object [1] 37:3 Obligated</p>
P Page [9] 26:12 27:14 44:2 44:3 44:25 45:9 45:14 46:15 47:1 Pages [1] 45:10 Pam [1] 1:19 Paragraph [7] 21:16 23:15 23:15 24:7 24:14 47:7 47:11 Paraphrasing [1] 9:5 Part [7] 27:6 31:14 33:5 41:11 44:17 45:11 45:14 Particular [3] 18:3 24:5 40:24 Particularly			

Word Index

<p>[1] 29:7 Parties [5] 8:17 8:19 31:21 46:3 47:14 Parties' [1] 41:13 Parts [1] 49:16 Party's [1] 40:24 Passage [1] 23:11 Paying [1] 5:13 Pedestrian [1] 14:13 People [2] 21:2 21:2 Perform [1] 33:21 Perhaps [3] 10:19 27:7 45:18 Period [1] 18:8 Permit [1] 34:3 Permits [1] 35:11 Person [1] 20:12 Perspective [3] 10:22 10:24 22:11 Persuasive [1] 15:12 Petition [3] 1:4 3:2 20:7 Petitions [3] 3:20 3:22 7:24 Phone [4] 19:22 19:22 21:12 21:13 Phones [1] 21:14 Pierre [2] 2:8 51:13 Pin [1] 21:25 Pitch [1] 14:12 Place [1] 41:25 Plain [2] 34:6 37:18 Point [9] 6:4 8:10 8:23 10:2 13:2 47:11 47:12 48:8 48:9 Position [8] 10:14 17:11 27:8 28:13 45:23 46:12 47:21 48:21 Precludes [1] 23:3 Preempted [8] 14:7 25:16 29:15 37:13 43:14 43:20 46:8 46:11 Preemption [1] 14:9 Preempts [1] 14:11 Prefiled [1] 3:25 Prerequisite [1] 33:23 Prescribed [1] 8:20 Present [1] 3:24 Presented [1] 42:24 Preserved [4] 34:8 36:3 36:18 37:20 Pressed [1] 24:20 Pretty</p>	<p>[1] 17:3 Prevent [4] 24:11 34:11 34:21 37:23 Previous [2] 24:16 24:17 Price [2] 10:4 10:5 Priced [1] 39:11 Prices [1] 17:5 Pricing [5] 8:2 9:1 10:12 11:24 39:8 Primarily [1] 41:22 Privilege [1] 3:18 Pro [1] 35:12 Problem [5] 6:7 10:21 14:8 14:17 23:22 Procedural [1] 8:15 Proceeding [4] 4:4 5:5 22:18 22:21 Proceedings [9] 1:8 2:6 8:8 23:4 39:2 40:18 41:24 51:9 51:12 Process [4] 26:8 27:7 30:3 47:23 Professional [2] 51:6 51:19 Promised [1] 40:17 Proper [1] 37:16 Properly [1] 17:18 Proposal [1] 39:4 Proposed [6] 26:22 28:19 36:23 38:8 38:9 41:13 Proposes [2] 36:14 38:12 Prove [1] 46:18 Provide [25] 4:22 4:25 5:25 7:3 9:22 10:3 13:4 13:8 13:10 21:24 26:20 28:24 29:2 31:7 31:10 32:10 32:19 35:22 38:20 40:24 42:14 42:19 42:20 49:9 49:10 Provided [6] 6:12 25:12 26:21 31:20 39:17 49:19 Provides [8] 6:4 6:13 8:14 16:11 31:4 32:17 32:23 38:11 Providing [4] 26:19 32:23 46:19 49:6 Provision [5] 5:1 5:2 5:8 25:1 47:11 Provisions [3] 27:4 29:25 48:1 Public [8] 1:1 1:10 7:18 7:20 9:4 10:8 51:6 51:18 PUC [1] 8:23 Purely [1] 22:11 Purpose [1] 12:12 Purposes [4] 13:12 22:5 22:11 49:22 Pursuant [15] 4:10 6:5 9:15 14:24 29:2 29:21 29:22 30:12 30:14 30:19 34:14 38:12 39:10 49:10 49:25 Put [2] 19:22 21:14</p>	<p>Q Qualify [1] 10:13 Question's [1] 21:5 Questions [17] 4:13 12:3 12:5 12:9 16:12 18:23 18:25 19:1 21:5 27:21 41:16 43:9 43:10 48:14 48:23 50:2 50:4 Quickly [1] 9:5 Quite [2] 13:24 21:3 Quoted [4] 23:14 23:15 24:7 42:4 Qwest [67] 1:6 1:21 3:5 3:20 3:23 4:4 4:17 4:20 4:24 5:1 5:5 5:8 5:13 5:17 5:18 5:20 5:22 5:24 6:3 6:6 6:9 6:11 7:22 8:8 10:18 11:3 11:6 11:19 13:1 13:7 13:15 13:16 14:14 16:21 16:23 16:24 19:1 19:6 19:12 20:9 20:11 21:24 22:23 24:25 25:7 26:15 26:24 26:25 28:2 28:24 29:12 30:17 36:24 37:8 38:11 39:14 41:2 41:7 41:11 42:14 42:20 46:3 46:10 46:18 47:13 47:22 49:9 Qwest's [14] 15:1 16:20 26:7 27:13 28:9 28:13 38:8 41:12 43:13 44:7 46:18 47:21 48:4 48:24</p>	<p>R Rate [12] 9:17 11:8 11:9 11:25 22:1 22:9 22:23 22:24 23:4 25:4 28:20 39:4 Rates [43] 4:10 4:19 6:9 9:17 10:10 10:11 10:13 10:16 10:23 11:1 11:9 14:21 14:23 14:25 15:3 15:8 17:5 17:11 17:19 18:14 18:15 18:16 18:18 18:19 19:2 22:4 22:14 22:19 22:22 23:1 23:23 24:1 25:2 26:1 26:2 28:23 38:10 38:13 38:14 38:18 38:25 39:12 49:11 Rather [3] 30:15 30:22 37:18 RBOC [4] 4:17 24:25 29:24 49:13 RBOCs [3] 9:20 26:18 26:23 Reach [2] 4:22 41:4 Reached [4] 9:4 14:1 14:3 28:12 Read [1] 47:7 Readily [1] 40:14 Reading [1] 31:3 Reaffirmed [2] 36:15 36:16 Realize [1] 3:17 Really [18] 5:5 6:11 6:13 7:23 9:24 11:8 11:10 13:14 13:18 15:6 21:3 21:25 23:5 23:9 23:23 25:2 26:3 44:7 Realm [2] 23:5 23:10 Reasonable [15] 4:11 4:19 10:7 10:13 10:17 10:22 11:25 17:12 17:20 19:5 22:6 22:9 22:12 24:4 26:2 Reasons [1] 49:3 Rebut [1] 48:21 Rebuttal [1] 48:18 Receive [1] 13:17</p>	<p>Received [1] 4:24 Recent [1] 9:11 Recently [1] 15:24 Recognize [1] 37:24 Recommend [1] 13:3 Record [3] 10:10 20:3 48:22 Recourse [2] 17:8 17:10 Reduce [1] 11:8 Reduction [1] 45:6 Redundant [1] 45:23 Reference [2] 32:3 49:6 Refers [3] 6:18 6:19 31:24 Reflected [1] 48:2 Reflective [1] 46:5 Refused [3] 36:1 36:6 37:1 Regard [3] 14:12 15:15 37:17 Regarding [1] 7:12 Regardless [3] 7:4 29:16 32:12 Regime [4] 24:12 34:22 37:18 37:23 Region [4] 13:4 13:7 25:8 26:25 Regional [3] 5:7 12:24 16:4 Registered [2] 51:5 51:19 Regulated [1] 38:6 Regulations [3] 35:14 36:4 38:7 Regulator [1] 34:3 Regulatory [3] 33:1 34:12 34:22 Rejected [4] 9:6 35:8 37:12 43:13 Related [2] 30:8 39:22 Relating [3] 39:17 39:25 40:13 Relief [1] 17:8 Relies [3] 5:13 5:17 40:16 Relieved [1] 7:7 Rely [1] 42:5 Remaining [1] 28:16 Remand [4] 9:12 15:25 26:16 29:8 Remove [1] 19:13 Removing [1] 26:8 Reply [8] 6:3 7:22 11:12 11:18 11:19 26:13 27:2 47:1 Report [3] 31:13 31:14 44:4 Reported [1] 1:23</p>
---	--	---	--	--

Word Index

Reporter [4] 21:4 51:6 51:9 51:19	[1] 29:7 Run [1] 29:6 Rural [1] 12:17	[5] 8:3 8:3 8:4 15:1 18:15 Shared [1] 33:12 Sharing [2] 11:5 41:3 Sharon [1] 2:3 Shock [2] 11:8 11:9 Shorthand [2] 51:9 51:9 Shrink [1] 9:13 Side [2] 31:19 45:15 Signaling [4] 7:4 7:13 13:16 32:11 Similar [2] 42:5 46:9 Similarly [3] 29:18 31:11 35:6 Simply [6] 5:22 10:24 10:25 16:10 25:23 28:14 Situation [1] 15:7 Slightly [1] 45:4 Slow [1] 21:7 Smith [1] 1:14 Solace [1] 6:13 Sole [5] 23:17 28:16 33:11 33:14 33:16 Solely [1] 32:18 Someone [2] 19:21 21:12 Sorry [5] 12:6 31:2 38:9 45:15 46:23 Sort [6] 4:8 5:3 12:15 27:8 41:23 49:8 South [18] 1:2 2:7 2:9 15:2 25:9 32:5 35:20 35:22 35:24 36:15 36:17 37:11 37:24 41:25 45:5 51:1 51:7 51:13 Special [1] 11:9 Specific [1] 7:14 Specifically [10] 6:17 8:11 8:23 13:7 16:7 30:9 35:15 35:25 36:1 44:23 Spite [1] 28:22 Spur [1] 37:3 SS [1] 51:2 STAFF [1] 1:13 Standard [14] 4:11 8:3 10:6 10:12 10:17 15:22 17:13 17:21 22:6 22:7 22:23 24:3 39:12 49:25 Standards [1] 8:20 Stands [1] 8:4 Started [1] 28:6 State [74] 1:2 2:7 4:14 7:17 8:12 8:16 8:25 12:20 14:1 14:2 14:8 14:11 15:1 15:17 23:6 23:11 24:8 25:11 25:15 29:1 29:15 29:17 30:1 30:6 32:3 32:5 32:21 32:24 33:2 33:6 33:8 33:13 33:20 34:4 34:7 34:8 34:14 35:2 35:15 35:18 35:21 36:3 36:4 36:8 36:14 36:18 36:22 37:5 37:8 37:10 37:17 37:19 37:20 37:25 38:5 38:16 38:20 38:21 39:21 40:6 40:17 40:20 41:23 42:6 42:9 42:12 42:19 43:12 43:20 43:21 46:8 46:11 51:1 51:7 Statement [3] 21:20 21:22 43:24 Statements [2] 24:17 24:17 States [13] 3:21 3:22 3:23 5:15 8:14 28:11 29:9 30:9 35:6 35:11 37:13 37:15 44:7 Stating [4] 24:8 25:11 44:13 47:6 Statute [6] 25:19 25:20 34:7 35:13 37:19 46:8 Statutes [2] 25:15 37:24 Statutory [4] 32:17 32:22 35:4 39:15 Stemming [1] 5:9 Still [2] 21:11 23:24 Stop [1] 26:19 Sub [2] 36:25 37:6 Subject [3] 16:19 17:13 26:20 Submit [2] 5:21 11:25 Submitted [1] 39:20 Subsequently [1] 5:15 Substantially [4] 24:11 34:11 34:21 37:22 Substantive [3] 8:15 33:5 33:9 Suggest [1] 22:8 Sullivan [2] 20:13 45:15 Summarized [1] 37:11 Summary [1] 11:21 Supervision [1] 38:3 Support [1] 42:18 Supports [1] 28:13 Supreme [1] 30:20 Surprised [1] 47:6 Switching [7] 7:3 7:13 13:15 16:9 16:10 16:11 32:10 System [1] 43:15
Request [2] 26:7 30:10 Requesting [7] 4:21 8:6 9:20 12:19 16:2 27:3 39:3 Require [16] 4:4 29:12 29:17 30:17 32:6 34:4 34:14 34:19 35:2 36:1 36:6 36:24 41:11 42:14 46:18 47:13 Required [12] 22:3 22:4 24:8 28:24 29:1 30:24 31:1 31:5 31:23 35:21 35:25 42:12 Requirement [4] 29:14 35:23 37:5 37:22 Requirements [9] 7:1 7:12 31:25 32:22 34:10 35:12 35:13 37:14 38:19 Requires [2] 30:10 32:20 Requiring [3] 36:8 42:20 43:15 Residing [1] 13:21 Resolution [1] 28:12 Resolve [1] 4:9 Resolved [1] 13:25 Respect [4] 17:3 31:14 33:7 48:1 Respectfully [1] 41:7 Respond [1] 26:7 Response [1] 26:16 Responsibility [1] 20:13 Responsible [1] 32:18 Restriction [1] 41:24 Rests [1] 39:6 Resulting [1] 40:11 Review [14] 5:11 6:22 6:24 9:6 9:12 15:25 26:16 29:7 29:8 34:5 34:25 36:7 37:1 38:24 Revisions [1] 30:13 Risk [1] 11:8 Rislov [9] 1:15 12:8 12:9 12:11 13:19 13:24 15:13 15:15 16:13 Rita [1] 2:2 Rolayne [6] 1:13 11:14 12:4 18:24 46:23 50:8 Rolf [4] 30:2 33:8 38:20 38:21 Room [1] 2:8 RPR [1] 1:23 Rule [1] 7:16 Ruled [8] 5:19 5:19 16:18 28:9 29:18 38:24 39:9 40:6 Rules [1] 36:10 Ruling [1] 40:9 Rulings	SAHR [10] 1:11 16:16 17:7 17:23 18:7 18:11 18:21 41:18 43:2 43:6 Sahr's [1] 18:25 Sara [1] 1:15 Satisfied [2] 9:10 35:5 Savings [2] 33:6 36:17 Scheme [5] 12:19 28:21 32:17 34:12 36:23 Second [1] 10:19 Section [124] 4:6 4:17 4:20 5:2 5:8 5:25 6:2 7:1 7:5 7:6 7:8 7:14 8:19 9:1 9:1 9:8 9:15 9:18 10:3 10:12 12:23 12:23 13:3 13:6 14:15 14:24 15:4 15:23 19:8 19:13 19:16 19:19 20:22 22:5 23:18 24:5 24:19 25:5 25:24 27:13 28:18 28:19 28:25 29:2 29:11 29:12 29:13 29:21 29:22 29:23 30:4 30:6 30:8 30:8 30:12 30:15 30:15 30:19 30:23 30:24 30:25 31:1 31:4 31:17 31:18 31:20 31:23 31:24 31:25 32:1 32:2 32:3 32:6 32:13 32:14 32:15 32:17 33:4 33:7 33:11 33:15 33:16 33:24 34:5 34:8 34:10 34:18 36:5 36:12 36:13 36:24 37:20 37:22 38:2 38:9 38:10 38:12 38:19 39:1 39:3 39:8 39:10 39:11 39:18 39:18 39:24 40:2 40:8 40:9 40:11 40:13 40:18 40:20 41:11 41:12 42:12 44:14 46:22 48:9 49:11 49:15 49:17 49:23 49:25 Sections [6] 13:22 33:2 33:4 38:14 38:15 38:17 See [2] 13:21 20:6 Seek [1] 47:17 Seeking [1] 31:9 Seeks [1] 31:10 Seminal [1] 5:10 Senger [1] 1:16 Senior [1] 3:12 Sense [3] 8:12 8:16 15:2 Separate [3] 42:19 49:12 49:24 Separately [2] 7:11 47:15 Service [10] 4:22 4:25 9:23 13:5 13:9 13:9 32:20 32:23 35:22 42:14 Services [4] 30:11 31:10 38:5 40:1 Set [8] 4:5 4:10 10:15 15:1 15:3 15:22 22:21 25:4 Sets [1] 12:16 Setting [3] 14:21 15:8 17:16 Settled [1] 15:9 Seventh [1] 34:25 Several [2] 7:17 49:20 SGAT	20 37:25 38:5 38:16 38:20 38:21 39:21 40:6 40:17 40:20 41:23 42:6 42:9 42:12 42:19 43:12 43:20 43:21 46:8 46:11 51:1 51:7 Statement [3] 21:20 21:22 43:24 Statements [2] 24:17 24:17 States [13] 3:21 3:22 3:23 5:15 8:14 28:11 29:9 30:9 35:6 35:11 37:13 37:15 44:7 Stating [4] 24:8 25:11 44:13 47:6 Statute [6] 25:19 25:20 34:7 35:13 37:19 46:8 Statutes [2] 25:15 37:24 Statutory [4] 32:17 32:22 35:4 39:15 Stemming [1] 5:9 Still [2] 21:11 23:24 Stop [1] 26:19 Sub [2] 36:25 37:6 Subject [3] 16:19 17:13 26:20 Submit [2] 5:21 11:25 Submitted [1] 39:20 Subsequently [1] 5:15 Substantially [4] 24:11 34:11 34:21 37:22 Substantive [3] 8:15 33:5 33:9 Suggest [1] 22:8 Sullivan [2] 20:13 45:15 Summarized [1] 37:11 Summary [1] 11:21 Supervision [1] 38:3 Support [1] 42:18 Supports [1] 28:13 Supreme [1] 30:20 Surprised [1] 47:6 Switching [7] 7:3 7:13 13:15 16:9 16:10 16:11 32:10 System [1] 43:15
T		
Tariff [16] 6:5 6:10 10:20 10:21 17:2 18:9 18:19 18:19 19:1 19:13 19:14 22:10 22:14 40:17 40:20 41:5 Tariffs [6] 6:8 8:2 16:19 16:24 17:4 23:19 TC005-056 [1] 1:5 TC05-056 [1] 3:1 Telecom [2] 4:11 23:12 Telecommunications [5] 4:6 14:11 31:9 37:4 38:4 Telegraphing [1] 27:8 Telephone		

Word Index

<p>[3] 2:1 32:25 34:24 TELRIC [17] 9:17 10:10 10:16 10:16 11:25 22:3 22:4 22:8 22:19 22:23 23:2 25:1 25:25 28:21 38:10 39:8 49:11 Temporary [1] 39:7 Term [1] 39:23 Terms [12] 6:9 8:5 12:11 12:14 12:21 14:13 15:19 30:7 38:18 39:16 39:25 40:12 Test [5] 33:17 33:21 33:25 35:4 42:23 Testified [1] 46:1 Testimony [1] 3:25 Therefore [2] 30:16 42:25 They've [1] 26:17 Thompson [26] 1:21 20:18 20:21 27:25 28:1 41:19 42:1 43:4 43:10 43:19 43:25 44:6 44:16 45:3 45:13 45:19 45:25 46:13 46:23 47:3 47:9 47:25 48:11 48:16 49:6 49:18 Three [3] 6:21 18:2 18:6 Thresholds [1] 16:1 Ticket [1] 16:8 Tina [1] 1:18 Today [6] 3:6 3:17 3:19 9:2 26:5 31:15 Tom [1] 2:2 Tongue [1] 19:11 Took [2] 19:6 51:9 Totally [1] 43:14 Towards [1] 33:3 Track [1] 20:14 Tracking [1] 20:12 Traditionally [2] 14:21 23:10 Transactions [1] 47:16 Transcript [2] 1:8 2:6 Transcription [1] 51:12 Transmission [1] 6:19 Transport [6] 6:20 7:4 7:12 13:13 16:8 32:10 Tremendous [1] 9:25 Triennial [14] 5:11 6:22 6:24 9:6 9:12 15:25 26:16 29:7 29:8 34:5 34:25 36:7 36:25 38:24 TRO [12] 5:14 10:19 23:15 24:7 24:18 24:18 29:8 34:13 36:2 37:12 39:9 47:21 TRRO [5] 9:13 16:7 26:22 27:4 29:9 True [2] 26:21 51:11 True-up [1] 26:21 Try [1] 6:16 Trying</p>	<p>[2] 29:5 42:5 Turn [1] 38:8 Two [10] 3:19 4:2 7:23 13:12 13:17 13:21 40:4 44:4 45:10 47:18 Typically [4] 11:13 17:15 17:24 18:2</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U. S. [1] 30:20 Unbundle [12] 4:4 6:1 14:16 24:19 35:24 36:1 36:6 36:25 37:6 42:6 43:22 49:13 Unbundled [14] 9:14 9:16 13:17 16:6 25:11 28:25 33:18 35:22 37:2 40:25 42:20 43:15 49:7 49:10 Unbundles [1] 39:10 Unbundling [34] 7:5 7:9 8:14 22:16 24:8 25:19 25:20 29:14 29:22 30:14 30:23 30:25 31:5 32:12 33:23 34:4 34:9 34:14 34:17 34:19 35:2 35:10 36:9 36:12 36:14 36:22 36:22 37:10 37:14 37:16 37:21 38:19 44:8 49:23 Uncontested [1] 21:23 Under [38] 7:5 7:6 7:8 9:8 10:12 10:25 12:19 14:15 20:21 22:19 25:4 25:20 28:25 29:1 29:11 30:5 31:23 32:11 33:11 33:15 33:17 33:24 33:24 34:4 35:18 36:4 36:14 37:9 37:10 37:17 37:18 38:15 39:3 39:17 40:7 46:22 49:12 49:23 Undermine [1] 37:3 UNE [4] 9:8 22:5 24:9 25:1 Unequivocal [1] 24:17 UNEs [6] 25:4 25:13 26:8 26:19 27:13 49:16 Unique [1] 28:5 United [2] 5:15 35:6 Unjust [1] 39:12 Unless [1] 12:4 Unlike [2] 26:18 26:22 Unlikely [1] 34:20 Unreasonable [1] 39:13 Unreasonably [1] 39:13 Unrelated [1] 49:3 Up [10] 3:7 3:19 6:11 11:19 12:16 13:20 18:25 21:7 23:25 26:21 Upheld [1] 7:16 USTA [2] 33:19 35:7 Utah [16] 21:16 23:14 24:7 28:12 31:19 32:4 41:9 41:21 43:11 43:13 43:15 43:17 44:11 44:23 45:4 45:22 Utilities [9] 1:1 1:10 7:19 7:20 9:4 10:8 29:18 33:22 42:7 Utility [1] 33:1</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>Vaguely</p>	<p>[1] 44:16 Verizon [3] 7:21 8:21 40:17 Verizon's [2] 8:2 9:7 Via [1] 32:2 VICE [10] 1:11 16:16 17:7 17:23 18:7 18:11 18:21 41:18 43:2 43:6 View [4] 17:17 43:13 43:17 43:18 Violates [1] 39:8 Violation [1] 24:13 Voices [1] 19:25</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait [2] 10:18 21:5 Walked [1] 42:7 Washington [6] 14:5 28:11 29:10 32:4 41:9 41:20 Weeks [1] 40:4 Weight [1] 49:5 Welk [1] 2:2 Whatsoever [1] 46:13 Whole [2] 49:5 49:12 Wholesale [3] 8:17 22:24 25:2 Wiest [44] 1:13 11:14 11:16 12:2 12:4 12:7 16:14 18:22 18:24 19:6 19:15 19:20 19:21 20:5 20:25 21:11 22:15 23:13 24:6 25:10 26:6 26:12 27:5 27:10 27:17 27:20 41:16 43:8 43:23 44:3 44:10 44:18 45:8 45:17 45:20 46:6 46:14 46:25 47:4 47:20 48:7 48:12 48:17 50:3 Willingness [1] 11:6 Withstanding [2] 4:15 27:1 Wittler [3] 1:23 51:5 51:18 Wondering [1] 11:11</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Years [2] 18:2 18:6</p>
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