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THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF THE COMPLAINT
FILED BY CHARLENE LUND ON BEHALF
OF SDCASAA, PIERRE, SOUTH DAKOTA,
AGAINST MCIWORLD.COM AND
QWEST CORPORATION REGARDING
UNAUTHORIZED BILLING FOR SERVICES

CT02-013

=====

Transcript of Proceedings
June 13, 2002

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
JIM BURG, CHAIRMAN
PAM NELSON, VICE CHAIRMAN
ROBERT SAHR, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
John Smith
Karen Cremer
Kelly Frazier
Greg Rislov
Mary Healy
Harlan Best
Keith Senger
Dave Jacobson
Michele Farris
Heather Forney
Mary Giddings
Sue Cichos
Debra Elofson

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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4 IN THE MATTER OF THE COMPLAINT
5 FILED BY CHARLENE LUND ON BEHALF OF SDCASAA, PIERRE, SOUTH DAKOTA, CT02-013
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1 CHAIRMAN BURG: CT02-013, In The
2 Matter of the Complaint Filed by Charlene Lund on
3 Behalf of SDCASAA, Pierre, South Dakota Against
4 MCIWorldCom and Qwest Corporation Regarding
5 Unauthorized Billing of Services.
6 Today shall the Commission Order the
7 South Dakota CASA to obtain counsel to represent
8 itself before the Commission at the contested case
9 hearing?
10 Let's see. Who needs to go?
11 MS. HEALY: Charlene's on the phone.
12 CHAIRMAN BURG: We're requesting
13 counsel. MCI. Excuse me. Okay. I guess I wasn't
14 reading it that way.
15 MR. GERDES: Mr. Chairman, members
16 of the Commission, my name is Dave Gerdes, and I
17 represent MCIWorldCom in this matter.
18 The motion which we have filed is that given
19 the fact that South Dakota CASA is apparently a
20 nonprofit corporation, a corporation cannot
21 represent itself, and that this Commission has
22 previously set precedent that indicates that in a
23 contested case matter that a corporate entity must
24 be represented by a lawyer and thus the motion is
25 to either require the Complainant to secure counsel

1 APPEARANCES BY TELEPHONE
2 Cindy Grosvenor, TELEC Consulting
3 Wendel Aanerud, TELEC Consulting
4 Charlie Ogden, TELEC Consulting
5 Suzan Stewart, MidAmerican Energy Company
6 Karen Huisenga, MidAmerican Energy Company
7 Marv Sorenson, MidAmerican Energy Company
8 Linn Evans, Black Hills FiberCom
9 Kyle White, Black Hills FiberCom
10 Gary Witt, AT&T
11 Colleen Sevold, Qwest Corporation
12 Jeff Camron, Qwest Corporation
13 Tammy Wilka, Qwest Corporation
14 Mary Lohnes, Midcontinent Communications
15 Tom Simmons, Midcontinent Communications
16 Buster Griffing, QSI Consulting
17 Daniel Waggoner, Touch America
18 Charlene Lund, Complainant
19 -----
20 TRANSCRIPT OF PROCEEDINGS, held in the
21 above-entitled matter, at the South Dakota State
22 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
23 South Dakota, on the 13th day of June 2002, commencing
24 at 1:30 p.m.
25

1 to represent it before the Commission at the
2 hearing on this matter or if CASA fails or refuses
3 to do so, to dismiss the Complaint.
4 CHAIRMAN BURG: Does staff have a
5 position?
6 MR. FRAZIER: Yes. I would agree
7 that appearance before the Commission for a
8 corporate entity would be the practice of law or,
9 as we discovered this morning, by a parallel who is
10 basically helping or assisting an attorney who is
11 licensed in the state.
12 But either way the research that I've done on
13 this really does indicate that at a formal hearing
14 here if you're a legal entity here in the state and
15 not just an individual representing yourself, it
16 would be the practice of law, and that would be my
17 recommendation.
18 CHAIRMAN BURG: Okay. Charlene, do
19 you have a response?
20 MS. LUND: Yes. Thank you,
21 Chairman Burg. Of course, I would just really
22 oppose any requirement that a complainant need an
23 attorney to present themselves before a hearing
24 with the Commission.
25 The formal complaint brochure that was sent

1 and which outlines South Dakota Law 20:10:1 doesn't
2 indicate anywhere that the consumer complainant
3 need an attorney to appear at a hearing. You know,
4 if you allow this motion to be granted, nonprofits
5 and other business entities would be treated
6 differently than residential consumer complainants
7 who don't need a lawyer.

8 So I think that there has been a history of
9 allowing complainants to come forward without an
10 attorney.

11 CHAIRMAN BURG: Response,
12 Mr. Gerdes.

13 MR. GERDES: Well, Mr. Chairman,
14 Ms. Lund puts her finger on the answer to her own
15 contention and that is that consumer complaints
16 brought by an individual can represent themselves.
17 Any one of us can go into court and represent
18 ourselves.

19 But, legally speaking, a corporation is a
20 separate entity, and that entity must be
21 represented by an attorney. And that is supported
22 by the authority that we have mentioned in our
23 motion. First of all, the statute SDCL 16-16-1
24 I've cited five cases from other states that have
25 all held the same thing, and that is a corporate

1 entity must be represented by a lawyer because it
2 is -- the corporate entity is not an individual and
3 it represents more than an individual's rights and
4 duties under the law.

5 And then thirdly this Commission has in a
6 Docket that I cited in my motion required a
7 nonresident attorney not admitted to practice
8 law -- has held that a nonresident attorney not
9 admitted to practice law may not represent a
10 corporate entity, and that's the functional
11 equivalent of what we have here.

12 And so while I agree with Ms. Lund that a
13 consumer can represent themselves, a corporation is
14 not a consumer.

15 MS. LUND: I have a response to
16 that.

17 CHAIRMAN BURG: Okay.

18 MS. LUND: By granting this motion
19 consumers would be separated into business
20 complaints and consumer complaints and residential
21 complainants, and then they would be treated
22 differently. So I really, you know, hope that the
23 Commission considers this action because I think it
24 would be a major setback for consumers if this were
25 granted.

1 To add the requirement that business
2 complainants need an attorney would really deter
3 the complaint process, and it would prevent people
4 from coming forward with their complaints.

5 Secondly, regarding the Blendar (phonetic)
6 case that Mr. Gerdes is citing, I was the analyst
7 in that matter so I recall that very clearly where
8 the Commission required that I-Link (phonetic) had
9 to have an in-state counsel. It could not get by
10 with their out-of-state counsel in handling that
11 complaint. It was to make sure that their lawyer
12 was a state lawyer as opposed to someone from out
13 of state.

14 So really that's a whole different matter than
15 what we're talking about here.

16 COMMISSIONER SAHR: Ms. Lund, it may
17 be a little off track. I'm just curious. Did you
18 check to see if any attorney would take this pro
19 bono if necessary?

20 MS. LUND: We would not. And we
21 have several lawyers on our board of directors.
22 I'm not going to approach -- this would be
23 completely out of line to have to have a consumer
24 be represented by a lawyer in order to appear
25 before the Commission.

1 It would just be a complete setback in the
2 consumer complaint process that if you're a
3 business entity or a residential entity that a
4 lawyer would need to be appointed. That would just
5 be such a setback.

6 COMMISSIONER SAHR: Well, this
7 morning we told a business they couldn't appear
8 unless they had an attorney, and actually we were
9 temporarily wrong on that because they had
10 paralegals. We did do that this morning.

11 MS. LUND: It's not outlined in your
12 formal complaint brochure information and, you
13 know, I read through what laws were listed there
14 too and I didn't see where it was any requirement
15 in order for a consumer to come forward or a person
16 representing a consumer's business.

17 CHAIRMAN BURG: This appears to me
18 to be purely a legal position. I mean, the law is
19 pretty clear. I don't know that we have any
20 latitude to determine one way or the other on it.

21 I would ask for any recommendation from our
22 counsel, though.

23 MR. SMITH: Thank you, Mr. Chairman.
24 I, like you, no matter what we might wish the law
25 to be at least based upon the opinions of the

1 Attorney General that are outstanding at this point
 2 in time, the plain reading of the statute, I guess,
 3 and the implication actually from the statute we
 4 dealt with this morning regarding the use of
 5 paralegals clearly implies that if it weren't for
 6 that statute, even they couldn't appear on behalf
 7 of the entity. But --

8 MS. LUND: I'd like to point out to
 9 the Commission that you've had many, many
 10 businesses come forward with complaints about their
 11 phone service or whatever, formal complaints where
 12 they have not been required to have an attorney.

13 That was from my three and a half years of
 14 working at the Commission as an analyst and a
 15 complaint specialist.

16 MR. GERDES: Mr. Chairman, if I may,
 17 I think the Commission has informally permitted
 18 complaints to be made by businesses in the sense
 19 that the complaint can be made but once a
 20 proceeding gets to the formal side of it, that is,
 21 once it becomes a contested case hearing, then it
 22 requires -- we believe the law requires and clearly
 23 says that there must be a lawyer representing a
 24 corporate entity.

25 CHAIRMAN BURG: I guess the question

1 thing, though. I do encourage Ms. Lund to try to
 2 contact and see if an attorney would take it on a
 3 pro bono basis, and on a nonprofit organization I
 4 think there is a pretty good chance that might
 5 occur.

6 But short of that we're in a difficult
 7 situation where case law and statutes tie our
 8 hands.

1 that comes to me is if this is -- if this is a fact
 2 of law, why did it come to us for a decision? I
 3 mean, especially not being a lawyer.

4 COMMISSIONER SAHR: Well, Mr. Gerdes
 5 raised it as an issue as part of the case.

6 MR. GERDES: I mean, this is raised
 7 as an issue as part of the case. Our motion is
 8 either to order them to get a lawyer, and if they
 9 fail to get a lawyer, that the case be dismissed
 10 for the reasons stated.

11 CHAIRMAN BURG: Okay. Anything
 12 else?

13 I guess feeling that the law is very clear on
 14 this part, I'm going to say I'm going to grant the
 15 motion of MCI -- I'm going to move to grant the
 16 motion of MCI in this case, that either they get a
 17 lawyer or if their lawyers refuse, then we have to
 18 take up whether we would dismiss the case or not.

19 COMMISSIONER SAHR: And I will
 20 second that motion.

21 COMMISSIONER NELSON: And I'll
 22 concur.

23 CHAIRMAN BURG: Okay. The motion
 24 has been granted to MCI in CT02-013.

25 COMMISSIONER SAHR: I would say one

1 THE PUBLIC UTILITIES COMMISSION
 2 OF THE STATE OF SOUTH DAKOTA
 3 =====
 4 IN THE MATTER OF THE ANALYSIS
 5 INTO QWEST CORPORATION'S
 6 COMPLIANCE WITH SECTION 271(C) TC01-165
 7 OF THE TELECOMMUNICATIONS ACT
 8 OF 1996
 9 =====
 10 Transcript of Proceedings
 11 June 13, 2002
 12 =====
 13 BEFORE THE PUBLIC UTILITIES COMMISSION,
 14 JIM BURG, CHAIRMAN
 15 PAM NELSON, VICE CHAIRMAN
 16 ROBERT SAHR, COMMISSIONER
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 18 COMMISSION STAFF
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 Debra Elofson
 APPEARANCES
 David A. Gerdes, Midcontinent Communications
 Linden R. Evans, Black Hills FiberCom
 Todd Lundy, Qwest Corporation
 Gary Witt, AT&T
 Reported By Cheri McComsey Wittler, RPR

1 CHAIRMAN BURG: TC01-165, In The
2 Matter of the Analysis Into Qwest Corporation's
3 Compliance With Section 271(C) of the
4 Telecommunications Act of 1996.

5 Today shall the Commission grant AT&T's motion
6 to reopen the proceedings? Also shall the
7 Commission grant Touch America's position to
8 intervene? And, if so, shall Commission grant
9 Touch America's position to reopen the issues?

10 I think we will take those one at a time as
11 they are. AT&T's motion to reopen the proceedings.

12 Gary, are you taking this?

13 MR. WITT: Good afternoon, members
14 of the Commission. Yes, my name is Gary Witt, and
15 I am handling this. If I may, I'll proceed.

16 CHAIRMAN BURG: Sure.

17 MR. WITT: AT&T has in this instance
18 submitted a motion to reopen proceedings here based
19 in large part on the existence of secret unfiled
20 agreements which Qwest has entered into across its
21 14-state territory.

22 As our motion points out -- I'll try not to
23 repeat anything in our motion, but this is the
24 result of an extensive investigation which occurred
25 and is ongoing in the State of Minnesota.

1 That cite comes from the Ameritech - Michigan
2 order at paragraph 397.

3 By failing and refusing to make the terms and
4 conditions of these agreements available to other
5 carriers, Qwest has discriminated against some
6 CLECs and given preference to others. This relates
7 directly to the question of whether Qwest's local
8 markets are truly open. In other words, is a
9 discriminatory entry determination a sign of an
10 open market and whether Qwest's local markets will
11 remain open after a grant of 271 authority.

12 This is clearly germane to the examination of
13 Qwest's Section 271 application. Also by failing
14 and refusing to make these terms and conditions
15 available to other carriers, Qwest has undermined
16 the collaborative process which it asked for and
17 received here. The Eschelon agreement is a perfect
18 example of this, and there's further discussion of
19 that agreement in my motion.

20 But essentially here we have a situation in
21 which Qwest in the midst of a collaborative process
22 has engineered a separate private deal for one CLEC
23 and in that deal Qwest promised to focus on the
24 needs of this one CLEC and in exchange the CLEC
25 promised to remain silent during this collaborative

1 These agreements all relate to interconnection
2 terms and conditions, and they are all subject to
3 the filing requirements of 251 and 252 of the
4 Federal Telecommunications Act. By failing and
5 refusing to file these agreements Qwest has
6 violated federal law. Violations of federal law
7 are directly pertinent to this Commission's
8 examination of Qwest's 271 application.

9 And, in fact, to quote the FCC directly on
10 this they said, "Furthermore, we would be
11 interested in evidence that a BOC applicant has
12 engaged in discriminatory or other anti-competitive
13 conduct or failed to comply with state and federal
14 telecommunications regulations. Because the
15 success of the market opening provisions of the
16 1996 depend to a large extent on the cooperation of
17 incumbent LECs, including the BOCs, with new
18 entrance and good-faith compliance by such LECs
19 with their statutory obligations evidence that a
20 BOC has engaged in a pattern of discriminatory
21 conduct or disobeying federal and state
22 telecommunications regulations would tend to
23 undermine our confidence that a BOC's local market
24 is or will remain open to competition once the BOC
25 has received intraLATA authority."

1 process.

2 In other words, while Qwest was collaborating
3 with some CLECs publicly, it was also being, I
4 guess, more collaborative with others privately.
5 Clearly this does not promote the overall
6 collaboration which was supposed to have occurred,
7 but instead it undermines it.

8 In short, AT&T believes that the existing
9 record relating to these secret agreements at the
10 very least -- pardon me, at the very least warrants
11 consideration of those agreements in the context of
12 Qwest's 271 application.

13 However, I should also point out that the Iowa
14 board has already made tentative findings that
15 Qwest has violated state and federal law by its
16 failure to file specific agreements which the Iowa
17 board has examined. I have a citation to that
18 Docket, if you need it.

19 AT&T, therefore, urges the South Dakota
20 Commission to reopen its 271 Docket in order to
21 allow the Commission to investigate the secret
22 agreements case itself and to receive evidence on
23 those secret agreements as they relate to Qwest's
24 271 application.

25 I'd be pleased to respond to any questions you

1 may have at this point.
2 CHAIRMAN BURG: I'm going to turn
3 this discussion over to Rolayne Wiest, who was the
4 Hearing Officer. I intended to do that before we
5 started, but I'm to it at this time.

6 Rolayne.
7 MS. AILTS WIEST: I did have a
8 couple of questions of AT&T before we go on to
9 Qwest.

10 My first question to AT&T is, is AT&T aware we
11 never closed the proceedings to begin with?

12 MR. WITT: Your Honor, yes, I am.
13 And the fact of the matter is what we are kind of
14 hoping here is that -- I styled this as a motion to
15 reopen the proceedings in view of the fact that I
16 was uncertain really as to the status of the record
17 in those proceedings.

18 Mainly what we are interested in doing is
19 allowing additional evidence in. And I don't want
20 to just present that evidence and then be told, you
21 know, you're too late. I would rather ask the
22 permission of the Commission in order to proceed.

23 MS. AILTS WIEST: And then a second
24 question, is AT&T aware that the Commission asked
25 these questions of Qwest at the 271 hearing and

1 requested that all of those agreements be filed
2 with the Commission?

3 MR. WITT: Now that I was not aware
4 of.

5 MS. AILTS WIEST: Are you aware that
6 Qwest filed them today?

7 MR. WITT: No. Obviously, no, I'm
8 not aware that they filed them today. I haven't
9 been there.

10 MS. AILTS WIEST: And I believe
11 Eschelon is one of the agreements that was
12 included. I have not had an opportunity to go
13 through all of them.

14 Go ahead, Qwest.

15 MR. LUNDY: Thank you. Todd Lundy
16 appearing on behalf of Qwest.

17 I'd generally like to make three points during
18 my presentation. First I'd like to talk a little
19 bit more about this issue, what kind of agreements
20 are out there and what particular legal standard is
21 at issue when we're talking about agreements that
22 ILECs enter into with CLECs and that, quite
23 frankly, there's a large amount of ambiguity as to
24 where the line needs to be drawn between agreements
25 that must be filed and agreements that do not have

1 to be filed.
2 The second point I would like to talk about is
3 in light of this ambiguity what is Qwest doing to
4 try to remove this issue from the table while the
5 FCC is going to be looking at this very standard.
6 What is Qwest doing to resolve on a going-forward
7 basis that there isn't going to be any doubt as to
8 its compliance with any one standard under 252.

9 And, thirdly, I'd like to talk about the 271
10 implications of this issue. First, Section 252(a)
11 of the Telecom Act does require the filing of
12 "interconnection agreements." Those
13 interconnection agreements that are negotiated
14 among the parties are subject to a 90-day approval
15 standard.

16 Now the Act does not define what an
17 interconnection agreement is. It doesn't say that
18 all agreements between ILECs and CLECs must be
19 granted, simply that interconnection agreements
20 must be filed under the 90-day approval process.

21 And I would suggest that the 90-day approval
22 process is also very important in trying to
23 interpret the kinds of agreements that are
24 "interconnection agreements" and the other kind of
25 agreements that don't necessarily have to be filed

1 under 252(a).

2 Now Qwest has its view and its understanding
3 of what Section 252(a) requires and it comes from
4 the language of 252(a) itself. And we believe that
5 all the agreements that we're in full compliance to
6 the extent that we have filed agreements with the
7 Commission there within 252(a). To the extent
8 there are other agreements we have with the CLECs,
9 those are not within the filing requirements of
10 252(a). But at the very least there's tremendous
11 ambiguity as to what the standard is.

12 AT&T is basing a large part of its motion upon
13 the Minnesota proceedings. Well, the expert that
14 the Minnesota Department of Commerce retained there
15 has stated in testimony that the FCC rules really
16 do not define what is an Interconnection Agreement
17 that is within 252(a).

18 And in promulgating or proposing his standard
19 he had to look at different policies. He had to
20 create his own standard that he proposed to the
21 Commission.

22 In other words, there was no definitive
23 standard out there today that says, yes, this type
24 of agreement with a CLEC is an Interconnection
25 Agreement, this agreement is not.

1 And there are agreements out there with CLECs
 2 that ILECs have generally. For instance,
 3 settlement agreements that resolve past disputes,
 4 agreements that go to very what I would call
 5 granular or minor details of how the businesses
 6 interrelate with each other, agreements as to how
 7 to improve provisioning processes.

8 And there's testimony again in Minnesota,
 9 which AT&T is relying upon, where CLEC witnesses
 10 said, yes, there are certain agreements ILECs have
 11 with CLECs that don't fall with 252 and we don't
 12 believe that comes with the 90-day approval
 13 process, such as an agreement between service
 14 managers, how to maybe more efficiently provision a
 15 service or settlement agreement that resolves a
 16 past dispute.

17 But the point of this discussion is that
 18 before anyone could say that Qwest is in violation
 19 of Section 252(a), this Commission or another
 20 Commission would have to determine what that
 21 standard is. And so far the FCC has not told us
 22 what is that standard under 252(a).

23 Mr. Witt is correct that the Iowa board did
 24 come out with a tentative conclusion. The Arizona
 25 staff has also made recommendations to its

1 uniformity in terms of what standard eventually
 2 comes out is very important.

3 An agreement that an ILEC may enter into in
 4 South Dakota which is the same as an agreement in
 5 Minnesota, there should be the same filing
 6 requirement that applies to each of those. And
 7 that really should be a national standard, what
 8 Verizon or Bell South must file under the standard
 9 should be the same for all ILECs throughout the
 10 nation.

11 We believe that this is a federal act, it's a
 12 federal statute. The FCC is the agency that's been
 13 in power to interpret what that federal statute
 14 means. So I believe that this question as to where
 15 the line should be drawn is before the correct
 16 body.

17 The second thing that Qwest has done is it has
 18 announced new policies and commitments while the
 19 FCC is looking at this issue, again, to remove any
 20 doubt that Qwest is going to be in compliance with
 21 anyone's reasonable interpretation of what that
 22 standard is going to be.

23 And those policies have been expressed in a
 24 letter from our Steven Davis, senior vice-president
 25 for policy and law, that's been filed with the

1 Commission.

2 What's interesting about the Arizona
 3 recommendation is they applied a very broad
 4 standard, but even under that very broad standard
 5 approximately 1 out of the 4 agreements that we did
 6 submit for their review said it came within the
 7 Section 252(a) filing requirements, which means the
 8 other three-quarters in their view under, again, a
 9 very broad standard did not.

10 They also stated in their recommendation
 11 there's no evidence Qwest did not act in good faith
 12 in terms of trying to understand what the standard
 13 was and how they have filed their agreements.

14 So in light of these ambiguities what is Qwest
 15 doing on a going-forward basis to take this issue
 16 off the table. And it's done a number of things.

17 The first is Qwest filed back in October a
 18 petition for declaratory ruling with the FCC asking
 19 for a substantive ruling as to what is the
 20 guideline under 252(a), what is a "Interconnection
 21 Agreement" that is subject to the 90-day filing
 22 requirement.

23 Opening comments were filed May 29, 2002.
 24 Reply comments under a revised schedule are due, I
 25 believe, June 20, next week. And we believe that

1 state commissions including this one. And I'll
 2 read from this policy statement.

3 Mr. Davis, he has stated that "Qwest will file
 4 all contracts, agreements, or letters of
 5 understanding between Qwest Corp and CLECs that
 6 create obligations to meet the requirements of
 7 Section 251(b) or (c) on a going-forward basis. We
 8 believe that commitment" -- this is the standard he
 9 just referred to -- "goes well beyond the
 10 requirement of Section 252(a). However, we will
 11 follow it until we receive a decision from FCC on
 12 the appropriate line drawing in this area. Unless
 13 requested by this Commission, Qwest does not intend
 14 to file routine day-to-day paperwork or for
 15 specific services or settlements of past disputes
 16 that do not otherwise meet the above definition."

17 Although Mr. Davis does not mention in his
 18 letter, we are also very willing to meet with the
 19 staffs if we have agreements where there's
 20 ambiguity upon which side of the line this
 21 particular agreement may fall, we will be willing
 22 to submit the agreement to the staffs and work with
 23 them under seal, if necessary, to get some guidance
 24 as to whether a particular agreement needs to be
 25 filed with the state Commission under the 90-day

1 filing requirement.
 2 In light of that, what are the 271
 3 implications of this issue? First I'd like to
 4 address a couple of points raised by AT&T,
 5 particularly the Eschelon agreement.
 6 I believe the allegations are that Qwest
 7 entered into an agreement that it was cooperating
 8 more fully with Eschelon and in return for that
 9 Eschelon was I believe the term was silenced in the
 10 271 proceedings.
 11 Well, that agreement which has been filed with
 12 the Commission, if you read the terms of that
 13 agreement, what it says is that Qwest and Eschelon
 14 will agree to create an implementation plan, that
 15 is how two companies are to work together to
 16 provision services as well as to how to resolve
 17 disputes. And they also will work together to
 18 develop a multi-state Interconnection Agreement.
 19 In exchange for that Eschelon says they won't
 20 oppose the 271 application.
 21 Well, I suggest there's nothing wrong with
 22 that, that when Qwest is meeting and working with a
 23 CLEC and trying to develop a multi-state
 24 Interconnection Agreement, that Qwest is meeting
 25 the 251 and 252 needs of Eschelon. And if it is,

1 state Commission has not reviewed all the relevant
 2 evidence and testimony to decide what the cost
 3 should be? I would suggest not.
 4 So what are the 271 implications of this
 5 issue? Again, the policies as announced by
 6 Mr. Davis's letter has taken the issue off the
 7 table until the FCC rules on it. Again, I believe
 8 the FCC is the body to address what is the proper
 9 standard under Section 252(a). There is the
 10 assurances of 252(a) regardless of what kind of
 11 standard there is going to be.
 12 Is the unfiled agreements issue and resolution
 13 of what that standard is, is that a barrier to 271?
 14 I would suggest not. There's been about 12 or 13
 15 states that have been granted 271 authority without
 16 the FCC finally deciding this issue. Not being
 17 privy to what Verizon or SBC does, I would assume
 18 that they are working with their CLECs to settle
 19 cases or resolve provisioning issues.
 20 The FCC in its Georgia, Louisiana order
 21 suggested quite strongly that they're looking
 22 forward to Bell South cooperating on a
 23 business-to-business fashion with the CLECs to
 24 resolve provisioning problems.
 25 So 271 has been granted absent a ruling by the

1 then Eschelon has every ability to say we have no
 2 need to participate in Section 271 proceedings.
 3 And whenever Qwest -- as the testimony in
 4 Minnesota stated and was not rebutted, when Qwest
 5 works with a company like Eschelon to improve the
 6 provisioning processes and the services there, the
 7 processes for all CLECs rise to the same level.
 8 That is, a company like Qwest can't have a
 9 process for one CLEC and not for another. So if we
 10 are working with Eschelon to improve our
 11 provisioning processes, those go to the benefit of
 12 all CLECs, again a pro 271 interest.
 13 I would suggest that even if Eschelon did not
 14 participate in 271, does that in any way impinge
 15 what this Commission and other state commissions
 16 have done in 271? 271 has been a very
 17 comprehensive process, testimony, hearings,
 18 briefing, extremely comprehensive, and the
 19 suggestion that nonparticipation by one CLEC in one
 20 docket somehow impairs that process, I would
 21 respectfully disagree.
 22 AT&T may choose for many generic type dockets
 23 not to participate. Cost dockets are a good
 24 example. If AT&T doesn't participate in a cost
 25 docket in a particular state, does that mean that

1 FCC or the state commissions as to what the 252(a)
 2 standard is.
 3 Six other states have looked at the exact
 4 motion that AT&T has filed with the South Dakota
 5 Commission. The motion was filed in nine states.
 6 Six states have ruled. And it's been denied by
 7 every state that has ruled: Colorado, Montana,
 8 Nebraska, North Dakota, Wyoming, and Iowa.
 9 And Iowa is particularly significant because
 10 Mr. Witt is correct that Iowa came out with a
 11 tentative ruling. It was their judgment that there
 12 are certain agreements that were before them that
 13 did come within the 252(a) filing standard. But
 14 even though they found those agreements should be
 15 filed under 252(a), they denied AT&T's motion to
 16 reopen the 271 process.
 17 So with that, I'll conclude and take any
 18 questions you may have.
 19 MS. AILTS WIEST: Any questions from
 20 the Commission?
 21 COMMISSIONER SAHR: I have a
 22 question for Mr. Witt.
 23 MR. WITT: Yes, sir.
 24 COMMISSIONER SAHR: After you have a
 25 chance to review what Qwest has filed would AT&T be

1 satisfied if they were able to supplement -- let's
 2 say, for instance, they notice certain documents or
 3 agreements are missing that they feel are
 4 pertinent. Would that satisfy AT&T?
 5 MR. WITT: If I understand the
 6 question correctly, would a summary type of
 7 briefing or additional proceedings to allow some
 8 analysis of these agreements in the context of 271
 9 be appropriate from AT&T's perspective. And I
 10 think that's correct.
 11 Essentially what we are looking for is an
 12 opportunity to make certain that, number one, these
 13 agreements to the extent that we are able to get
 14 them into the light of day reach the light of day
 15 and, number two, that these agreements are
 16 considered in the context of 271.
 17 We believe -- as I indicated, we believe that
 18 they are extremely germane to any examination of
 19 Qwest's 271 application.
 20 COMMISSIONER SAHR: Well, here's the
 21 way I look at it is the Commission had requested
 22 that Qwest filed these agreements, and apparently
 23 they have done so today. And in my mind what we
 24 want to make sure is we have everything in front of
 25 us that should be part of the record and that's

1 pertinent to this case.
 2 I don't know if -- what I would be interested
 3 in is if you review the Qwest filing and you think
 4 that it's neglected to include certain agreements,
 5 I certainly would encourage you and any of the
 6 other parties to point that out and to, you know,
 7 file something along those lines.
 8 And I'm wondering if the idea is to get these
 9 agreements before the Commission, which I think
 10 that's why we wanted them, to find out what's here
 11 and be able to look at them and be able to give
 12 them our independent review, with AT&T if you could
 13 look at the Qwest documents -- if it's all there,
 14 do you need to reopen the record?
 15 I guess that's my question is you can brief it
 16 or you can address it, but if it's all there, do we
 17 need to reopen the record?
 18 In other words, you look at what Qwest files
 19 and the other parties do too, see if there's
 20 anything missing, add it in there, and then we go
 21 to briefing on that issue. I think that might be
 22 the most expedient way to address this issue
 23 without having to necessarily go beyond that unless
 24 after we review the documents we think there's need
 25 for additional hearing and additional testimony.

1 MR. WITT: And I believe I would
 2 concur in that. And I think that's an appropriate
 3 approach.
 4 CHAIRMAN BURG: The question I have,
 5 Mr. Witt, also is were you not aware of these
 6 agreements before the actual hearing we held?
 7 MR. WITT: Your Honor, we were
 8 certainly aware of them, but the -- I hate to say
 9 this. We simply have a resource problem here. We
 10 don't have enough people to adequately, well,
 11 shepherd it, for lack of a better word, this kind
 12 of information into the hand of the Commission.
 13 And for that I have to apologize. We don't
 14 have the same resources on a regional level that
 15 Qwest does. And we simply couldn't get that
 16 information together in a timely manner.
 17 CHAIRMAN BURG: But if we would
 18 grant your request, how do we know you're going to
 19 have resources to come take care of it then?
 20 MR. WITT: Well, that is a good
 21 question, and I would respond by saying that if you
 22 give us enough of a briefing schedule, enough time,
 23 we will be able to, number one, examine these
 24 agreements and, number two, provide some analysis
 25 of those agreements in the form of briefs.

1 CHAIRMAN BURG: Let me ask also
 2 this: The list of states that was mentioned that
 3 you filed in in the other hearings, did you
 4 actually have somebody there in the hearing in any
 5 of those?
 6 MR. WITT: I'm sorry. I don't quite
 7 understand.
 8 CHAIRMAN BURG: The list of states
 9 that we just heard that you filed this same kind of
 10 request in --
 11 MR. WITT: Yes.
 12 CHAIRMAN BURG: And then he
 13 indicated it was denied. Do you disagree with
 14 that?
 15 MR. WITT: No. I don't take issue
 16 with the fact that this motion has been denied in
 17 several states. The problem -- well, the response
 18 that I would have to that, however, is that in
 19 those states where the matter is not closed, and I
 20 think South Dakota may indeed fall into this
 21 category, where the record is either not closed or
 22 where it was viewed as convenient to leave it open
 23 to accept these documents, they've been willingly
 24 accepted into the record by different commissions
 25 and, in fact, some commissions are actively

1 pursuing separate investigations.
 2 A good example is the state of Washington and
 3 also the state of New Mexico and obviously the
 4 state of Minnesota.
 5 CHAIRMAN BURG: I guess the question
 6 I was having, though, is in any of those states
 7 that were listed where they were requested and
 8 denied, in any of those states did you have an
 9 active participant at the hearings?
 10 MR. WITT: Oh, yes.
 11 CHAIRMAN BURG: Did you not bring
 12 these into the body of the hearing --
 13 MR. WITT: Well, to the extent that
 14 we were able to do so -- let me just mention to the
 15 extent we were able to do so during, for example,
 16 the public interest portion, which I think is the
 17 place where these agreements really belong, we
 18 definitely did that.
 19 However, the agreements in many instances came
 20 to light several months after the hearings
 21 occurred. And I'm thinking specifically of Oregon
 22 and several other states as well. So to a large
 23 extent the reason that this was -- that this motion
 24 has been denied in other states has been because,
 25 well, frankly, there's been a rush to grant Qwest's

1 271 application.
 2 And if that's the context in which these other
 3 commissions have viewed this motion as interfering
 4 with their timetable or with Qwest's timetable,
 5 then I have seen commissions deny it based on that
 6 as well.
 7 CHAIRMAN BURG: Okay. Thank you.
 8 MS. CREMER: I had a question of
 9 Qwest. And I just read that Iowa order quickly,
 10 but I thought they didn't find it to be ambiguous.
 11 MR. WITT: That's correct, your
 12 Honor.
 13 COMMISSIONER SAHR: Did you switch
 14 companies?
 15 MS. CREMER: This was Karen Cremer
 16 from staff, and I was just asking Qwest I thought
 17 they fined Qwest. If they didn't fine you this
 18 time, didn't they say they would fine you next
 19 time?
 20 MR. LUNDY: A couple of answers to
 21 your questions. First, in terms of standard, I
 22 believe Iowa said the standard does not appear in
 23 the act.
 24 And then as you walk through the opinion, they
 25 do formulate their standard. In other words, they

1 did have to glean from the policies or the laws how
 2 you would interpret Section 252(a) in order to come
 3 up with the standard they came up with.
 4 And they do come up with about a four-part
 5 test, four-part standard for Section 252(a). That
 6 four-part test isn't found in any rule, statute, or
 7 opinion. We kind of disagree with that standard
 8 because of the language of 252(a) itself.
 9 But I would respectfully disagree that there's
 10 clarity in any of the existing law as to where the
 11 standard should be.
 12 MS. CREMER: But did they fine you?
 13 MR. LUNDY: They did not.
 14 MS. CREMER: Did they say they'd
 15 fine you next time if you do it again?
 16 MR. LUNDY: They stated -- first
 17 they gave us 20 days in order to request a hearing
 18 in terms of whether or not we wanted to bring
 19 additional factual issues to their attention before
 20 the order becomes final.
 21 The second thing that they did is they said
 22 under this standard that we've promulgated we
 23 request that Qwest provide these within 60 days
 24 under the standard that they talked about, and if
 25 we didn't comply with their request to provide it

1 within 60 days, then it was contemplated that fines
 2 may be appropriate.
 3 MS. CREMER: Yeah. I don't know if
 4 they contemplated it. I think they were pretty
 5 serious.
 6 COMMISSIONER NELSON: I guess I
 7 don't see it as that ambiguous either. If other
 8 companies -- if all of the provisions that are
 9 available to the one company are supposed to be
 10 available to another company and you don't ever
 11 have to file all the agreements that are out there,
 12 I mean, how does one know if you're making
 13 everything -- for everybody that everything you're
 14 offering to somebody is then available to all?
 15 So I don't find that to be ambiguous.
 16 MR. LUNDY: Your Honor, it goes to
 17 the exact subject matter of the agreement itself.
 18 For instance, some of these agreements are
 19 settlements of past disputes.
 20 If we compromise with CLECs in terms of a
 21 particular billing dispute and they say one party
 22 owes \$50 and we say it's \$20 and we compromise at
 23 35, that kind of settlement of that dispute, is
 24 that really a "Interconnection Agreement" that's a
 25 description of the terms relevance that it should

1 be made available and the rates applicable to each
2 of those.

3 Or we agree that if you have a dispute, your
4 senior vice-president can call our senior
5 vice-president to talk about that issue. Does that
6 have a close enough nexus to the term
7 interconnection or the term of a network element
8 such that it has to be filed under 252(a). It's
9 where that line is drawn where I think there is a
10 fair amount of ambiguity.

11 And certainly if we have a product out there
12 that we are offering to CLECs and we describe that
13 product and we have a rate for that product that
14 we're going to charge, yes, those are the kinds of
15 agreements or interconnection agreements that
16 definitely have to be filed under 252(a) and have
17 to be made available to other CLECs.

18 But as to some of these other agreements,
19 they're agreements but are they truly
20 interconnection agreements or terms of
21 interconnection. I don't think that line has been
22 clearly drawn quite yet.

23 MS. AILTS WIEST: Did Black Hills
24 FiberCom have any comments on the motion?

25 MR. EVANS: Our comments will be

1 very brief. First I would have a question -- this
2 is Linn Evans speaking.

3 I have a question whether or not all of the
4 agreements in this particular filing will be
5 disclosed to the parties that have intervened in
6 this matter.

7 Does the Commission give us guidance on that
8 in terms of our briefing, et cetera?

9 MS. AILTS WIEST: I believe you were
10 sent a copy of everything, but some are claimed as
11 confidential.

12 MR. EVANS: Okay. I assume those
13 are sent in the mail apparently today?

14 MS. AILTS WIEST: I believe so.

15 MR. EVANS: Thank you. We would
16 like to have time to review those prior to the
17 briefing schedule, and I believe our brief is due
18 June 21.

19 Would it be appropriate to discuss perhaps a
20 continuance or some kind of extension on the
21 briefing schedule?

22 MS. AILTS WIEST: How much?

23 MR. EVANS: Depending on what we see
24 for the filing, I would ask for maybe 10 days. And
25 perhaps Ms. Cremer could tell us what she thinks

1 she needs for briefing and maybe in her
2 circumstances it might not be any additional time.

3 MS. AILTS WIEST: First of all, does
4 Midco have any comments?

5 MR. GERDES: Yes. Excuse me.
6 Mr. Chairman, members of the Commission,
7 Dave Gerdes, representing Midcontinent
8 Communications.

9 We haven't seen the agreements, of course, and
10 would like to have an opportunity to look at them.
11 And we would like to have some additional briefing
12 time as well.

13 I don't know how big a stack the agreements
14 are, but if it's a big stack, we'd need some time
15 to look at them. Offhand, I'd say 10 days would be
16 fine to extend the briefing schedule, if that is
17 what it is.

18 I do also want to state Midcontinent's
19 position on the merits of the motion. Right now we
20 don't know what's in these agreements, but as a
21 matter of principle, Midcontinent believes that
22 Section 271 requires nondiscriminatory
23 interconnection and the ability of any carrier to
24 opt in to any other Interconnection Agreement.

25 Obviously, if we don't know about those

1 agreements, if we don't have any ability to review
2 and decide whether or not to opt into a particular
3 arrangement, then we have not been given the full
4 range of rights that we're entitled under
5 Section 271.

6 And I'm a little bit disturbed if I understood
7 Mr. Lundy correctly. If I understood him
8 correctly, it seemed to me he was saying if they're
9 negotiating a multi-state Interconnection
10 Agreement, it somehow is exempt from the filing
11 requirements under 271, and we would not agree with
12 that, if that's what he was saying.

13 That all having been said, it's our position
14 that if the Commission believes that there are some
15 special deals out there that were offered to some
16 but not all, that the matter should definitely be
17 taken up by the Commission as a matter of the
18 public interest portion of the 271 inquiry.

19 We don't know whether that is, in fact, the
20 case. We're just simply saying if the Commission
21 believes that to be the case, we would urge the
22 motion to be granted.

23 MS. AILTS WIEST: Ms. Cremer.

24 MS. CREMER: The record probably
25 doesn't need to be reopened in a technical sense in

1 that it was never closed. And they have somehow
 2 submitted -- I too haven't had time to look at it.
 3 I don't know how big it is.
 4 I've read what you have in front of you, but I
 5 haven't looked at the contracts. I have no idea.
 6 I assume Mr. Gerdes and Black Hills and AT&T will
 7 not get theirs as they were stuck in the mail until
 8 Monday.
 9 So if you're looking to extend the briefing
 10 time, I think you need to count from Monday forward
 11 as opposed to from today forward.
 12 MS. AILTS WIEST: Anything further
 13 from AT&T?
 14 MR. WITT: No, your Honor. Other
 15 than we do disagree with Mr. Lundy's
 16 characterization of the collaboration that's
 17 occurred here, and the fact is that a private
 18 agreement, irrespective of how collaborative it is,
 19 is still a private agreement.
 20 And in addition I would say that at one point
 21 Mr. Lundy indicated that settlement agreements
 22 should not be considered as part of this filing
 23 standard, but it seems to me that if a dispute is
 24 common among several carriers and it's settled with
 25 just one or two of those carriers on different

1 terms than the others, then there has been
 2 discrimination that's occurred.
 3 Whether that discrimination goes forward in
 4 time or backward in time, it still has occurred.
 5 So we would say that that's an incorrect analysis
 6 of the -- Qwest's analysis is incorrect here with
 7 respect to that.
 8 I have nothing further unless there are
 9 further questions.
 10 MS. AILTS WIEST: This would be my
 11 recommendation to the Commission. I believe that
 12 actually AT&T's motion can be denied.
 13 First of all, the proceedings are open. The
 14 Commission itself requested these documents at the
 15 hearing, and Qwest did file something today.
 16 Whether it's complete or not, I don't know. I have
 17 not had time to look at it. I just got it before
 18 lunch.
 19 But I would recommend the Commission do exten
 20 the briefing schedule because reading back through
 21 my transcript when I did ask the questions of
 22 Qwest -- and it wasn't in an order or anything but
 23 I did say the answers can be given to us in a
 24 couple of weeks and it's been considerably long
 25 since then.

1 So I believe 10 days wouldn't be unreasonable
 2 to extend the briefing schedule. So that would be
 3 my recommendation.
 4 COMMISSIONER SAHR: 10 days from
 5 today?
 6 MS. AILTS WIEST: No. From the date
 7 that they originally -- because they were due the
 8 21st.
 9 COMMISSIONER SAHR: From the 21st.
 10 Is that enough time for the -- that will take you
 11 through July 1, which is, what, a Monday --
 12 MS. CREMER: Do you have a calendar
 13 on you, Dave?
 14 MS. AILTS WIEST: Let's just make
 15 them due July 1.
 16 MS. CREMER: That's a Monday. Okay.
 17 CHAIRMAN BURG: I had one further
 18 question for Mr. Lundy. One thing that kind of
 19 bothered me as you were going through the procedure
 20 by which you determined to file or not to file, I
 21 mean, it looks to me like that puts it solely in
 22 the minds of Qwest to determine what is filed and
 23 not filed.
 24 How do we know what wasn't decided to be filed
 25 or wasn't decided to be brought to our attention so

1 we can make that determination?
 2 MR. LUNDY: The question that was
 3 asked of us a few weeks ago in terms of what
 4 documents to be filed is what agreements or terms
 5 of interconnection have you not filed. And as we
 6 say in our response, we understand that to mean --
 7 you know, we believe we filed everything we had to
 8 be filed but in the interest of disclosure we'll
 9 give you all the documents we have with CLECs
 10 certified in South Dakota that were not filed.
 11 So you have before you all the agreements with
 12 CLECs certified here that have not been filed.
 13 CHAIRMAN BURG: That's not really
 14 what I was referring to because I assumed that. I
 15 thought you were talking about going forward.
 16 MR. LUNDY: Right. On a
 17 going-forward basis where there may be ambiguity in
 18 terms of the agreements that may or not be close to
 19 the line, we would be working with the Commission
 20 staff to say we have this particular agreement,
 21 Commission, we don't think it's a 252(a) agreement
 22 but here it is, can you give us some guidance.
 23 CHAIRMAN BURG: So are you going to
 24 submit every agreement for observation by the
 25 staff?

1 MR. LUNDY: Any agreement that comes
 2 remotely close to the standards, yes.
 3 CHAIRMAN BURG: That's my problem.
 4 Your idea of remotely closely and somebody else's
 5 might be different. The thing is it's always hard
 6 to deal with what you don't know is out there. And
 7 that's why, I mean, I'm not sure this is the time
 8 or place or even in the hearing, but I think that's
 9 something that we need to work on in going forward
 10 is, yes, I think these are supposed to be offered
 11 to everybody once they come out there and the only
 12 way they're going to know is if they're filed with
 13 the Commission because that's the central place
 14 where they get that knowledge.
 15 And if you're the one who's determining
 16 whether it's filed, well, what did not get filed
 17 and somebody might have wanted to use, nobody's
 18 going to know about. And that bothers me.
 19 MR. LUNDY: I think at the beginning
 20 of this process when working with the state
 21 commissions we can say here are the sets of
 22 documents, here are sets of agreements, how would
 23 you like to treat those, and then when we get
 24 guidance on the particular state staffs as to how
 25 to do that we will know better on a going-forward

1 basis where the line can be drawn.
 2 So we'll basically be providing everything or
 3 at least a form of everything that we might have
 4 and say is this something you're interested in
 5 under the 90-day standard, yes or no, and then
 6 we'll be able to go forward and draw the lines a
 7 little better.
 8 CHAIRMAN BURG: Anyway, that's
 9 something I think we need to determine, but that
 10 was some concern I had as I heard your comments.
 11 MS. AILTS WIEST: Does the
 12 Commission have a motion?
 13 COMMISSIONER NELSON: I would move
 14 to deny the AT&T motion to reopen proceedings for
 15 the reasons that Rolayne Wiest stated earlier.
 16 CHAIRMAN BURG: I'll second.
 17 COMMISSIONER SAHR: And I will
 18 concur.
 19 Do we need to do anything on the briefing
 20 schedule?
 21 MS. AILTS WIEST: I would.
 22 CHAIRMAN BURG: Yeah. We should.
 23 MS. AILTS WIEST: Make another
 24 motion. If you would care to, my other part would
 25 be to extend the briefing schedule 10 days and have

1 the intervenor and staff brief due July 1.
 2 COMMISSIONER SAHR: I'll make the
 3 motion we extend the briefing schedule 10 days, and
 4 if there are other agreements out there the parties
 5 can ascertain that aren't filed, I would certainly
 6 encourage them to point that out on the briefing
 7 schedule.
 8 But a 10-day extension seems appropriate, and
 9 certainly if the parties haven't looked at this
 10 very much yet, if there's a lot in there that
 11 requires an additional briefing of time, then they
 12 could always ask for an additional extension as
 13 well.
 14 CHAIRMAN BURG: I'll second.
 15 COMMISSIONER NELSON: I'd concur.
 16 MS. AILTS WIEST: The second
 17 question is shall the Commission grant Touch
 18 America's petition to intervene?
 19 Touch America. Who's representing
 20 Touch America?
 21 MR. LEBRUN: Mr. Chairman, my name
 22 is Gene Lebrun. I'm with the law firm of
 23 Lynn, Jackson, Schulz & Lebrun in Rapid City, and
 24 we represent Touch America. I don't know if
 25 Daniel Waggoner was joining us by phone or not. He

1 didn't know if he was going to be able to.
 2 Dan, are you on? Apparently he is not.
 3 Touch America has filed actually two matters.
 4 One is the petition to intervene and second one is
 5 a motion to reopen some issues.
 6 We recognize that the motion to intervene has
 7 been filed after the deadline that was set by this
 8 Commission. But the Commission's own rule
 9 20:10:01:15:02 permits a late filing when the
 10 denial of the petition is shown to be detrimental
 11 to the public interest or to be likely to result in
 12 a miscarriage of justice.
 13 We would submit that the very heart of
 14 Touch America's petition goes to the public's
 15 interest and concerns relating to examining and
 16 improving Qwest's 271 application.
 17 The issue, of course, is Qwest's compliance
 18 with 271 and 272 of the Telecommunications Act of
 19 1996. Touch America has filed complaints with the
 20 FCC that raise critical questions concerning
 21 Qwest's current and future compliance with these
 22 provisions of the Telecommunications Act.
 23 Touch America's petition to intervene
 24 identifies certain activities of Qwest that this
 25 Commission should examine. We're not attempting to

1 relitigate here what's been litigated before the
 2 FCC or the district court in Colorado.
 3 Rather, Touch America wishes to bring forward
 4 to this Commission important factual information
 5 that should be considered by the Commission. The
 6 FCC has now determined that it will decide the IRU
 7 Complaint on its merits. Therefore, it is
 8 appropriate to present issues relating to it in
 9 this 271 proceeding.
 10 There are 271 application checklist matters.
 11 These are those checklist matters, and they are
 12 relevant in this state's proceedings. The facts to
 13 be considered we think are outlined clearly in our
 14 petition and I will not go through them here again.
 15 But part 2 of the petition identifies Qwest's
 16 history on anti-competitive action and unlawful
 17 behavior. Part 3 of the petition is where Qwest
 18 addresses the lift fiber IRUs, the fact that they
 19 violate nondiscriminatory safeguards. And part 3
 20 is where Touch America believes that Qwest offers
 21 lift fiber IRU as interLATA services in violation
 22 of Section 271.
 23 Therefore, we would submit that the failure to
 24 have factual issues thoroughly explored would
 25 indeed be detrimental to the public interest and

1 would result in a miscarriage of justice.
 2 Therefore, we would petition the Commission to
 3 permit Touch America to intervene at this time.
 4 MS. AILTS WIEST: Any questions?
 5 CHAIRMAN BURG: One question I have
 6 is what prevented you from intervening in a normal
 7 manner?
 8 MR. LEBRUN: Commissioner Burg, that
 9 was the first question I asked the fellow who
 10 called me a week ago to get involved in this
 11 matter. First, I really didn't understand it
 12 either, but he explained to me it is only recently
 13 the FCC has come down and said these things should
 14 be brought before the state Commission's attention.
 15 Before that they didn't feel the FCC was going
 16 to take that position, but now it's clear they
 17 have. So Touch America made a decision at that
 18 point in time to petition and intervene in, I
 19 believe, 13 states, if I'm not wrong. It wasn't
 20 until that became very clear from the FCC that they
 21 felt it became necessary to intervene but now they
 22 believe it is necessary.
 23 CHAIRMAN BURG: If we granted your
 24 intervention, could you handle it in a briefing
 25 procedure similar to what we talked about with the

1 previous issue?
 2 MR. LEBRUN: I have been assured
 3 that we would meet whatever briefing schedule --
 4 CHAIRMAN BURG: I mean, in other
 5 words you're not asking to open the formal part of
 6 the hearing or the --
 7 MR. LEBRUN: It's my understanding
 8 that the hearing has never really been closed, but
 9 I was told we would meet the briefing schedule.
 10 CHAIRMAN BURG: But, I mean, you can
 11 do it through briefs and not cross-examination.
 12 MR. LEBRUN: I believe that's
 13 correct. I'm only in this about a week now.
 14 That's my understanding.
 15 COMMISSIONER SAHR: Just so we're
 16 straight on that, you're not talking about
 17 introducing evidence? You're just talking --
 18 MR. LEBRUN: I'd have to find that
 19 out for sure, Commissioner. I'm not that familiar
 20 with what they intend to do, but I'll find that
 21 out for you and get back to you.
 22 COMMISSIONER SAHR: That's a pretty
 23 significant --
 24 MR. LEBRUN: I understand.
 25 COMMISSIONER SAHR: If you're

1 looking at filing some sort of friend of the court
 2 type of brief, that's not going to necessarily
 3 throw the proceedings out of whack. If we're
 4 looking at having to reopen the proceeding, get all
 5 the parties come back to Pierre, that starts to get
 6 a bit more burdensome.
 7 MR. LEBRUN: I understand. I will
 8 found out. I can't give you a specific answer to
 9 that because I don't know.
 10 MS. AILTS WIEST: Any other
 11 questions? Qwest.
 12 MR. LUNDY: Thank you. There are
 13 three basic reasons we would request the Commission
 14 to deny the motion of Touch America.
 15 First, it's untimely. This is an issue that
 16 Touch America raised with the FCC in its complaint
 17 back in February of this year. It also raised
 18 issues regarding this with the North Dakota
 19 Commission in 2001, the latter part of 2001.
 20 And now they're asking us today after weeks of
 21 hearings, approximately a month ago in which every
 22 issue with the exception of I believe the OSS
 23 issues have been heard. There's been full
 24 testimony. We're now in a briefing schedule trying
 25 to prepare briefs.

1 There's nothing in the record right now
 2 regarding any of the facts that Touch America's
 3 talking about. I think it would be very difficult
 4 for the parties to brief something that isn't in
 5 the record. And I think that at this late hour to
 6 reopen everything that's been done is quite
 7 untimely.

8 There's nothing in the motion to suggest why
 9 there couldn't have been intervention or testimony
 10 submitted several weeks ago. Certainly they were
 11 aware of these issues in the latter part of last
 12 year and certainly when they filed their complaint
 13 with the FCC back in February.

14 The second reason is is that this really is
 15 not the best forum to decide these issues. This is
 16 a complaint that's been filed with the FCC. They
 17 have taken it up. The FCC has invoked its own
 18 jurisdiction to decide a federal issue.

19 And I would suggest that it is before Touch
 20 America's chosen forum and I believe the correct
 21 one considering the federal issues that have been
 22 raised by the petitioner.

23 Thirdly, these are not local service issues
 24 under Section 251 or 251. My understanding is the
 25 primary issue, the primary complaint, has to do

1 with whether an IRU constituted a violation of
 2 restrictions upon interLATA services and there
 3 isn't allegations regarding any of the local
 4 services that are at issue under the 14-point
 5 checklist, the public interest issues, or the QPAP.

6 Finally we also have other states that have
 7 ruled on this in a relatively short time frame. I
 8 believe counsel is correct that this was a
 9 region-wide filing made early last week. Five
 10 states have denied the motion.

11 Washington, Iowa, Nebraska, North Dakota, and
 12 Minnesota have denied Touch America's motion, and
 13 we request that the Commission do the same here.

14 MS. AILTS WIEST: Any questions of
 15 Qwest?

16 Black Hills FiberCom, do you have any
 17 comments?

18 MR. EVANS: No, we don't have any
 19 comments on this issue. Thank you.

20 MS. AILTS WIEST: Midcontinent,
 21 Mr. Gerdes?

22 Commission staff.

23 MS. CREMER: The same concern I had
 24 with -- I can't remember if Commissioner Burg or
 25 who raised it, but if these are facts that need to

1 go into the record, that's going to be completely
 2 different than -- right now they appear to be
 3 allegations, and I don't see that anybody's made a
 4 factual determination.

5 And so I guess the way I read it was that
 6 Touch America was asking the Commission to make a
 7 factual determination, which in order to do that
 8 we're going to have to have witnesses and bring
 9 everybody back.

10 But I'll wait to have Mr. Lebrun check with
 11 his client and see what exactly it is they think
 12 they're going to put in through a brief. If that
 13 can be done, I guess staff wouldn't oppose it, as
 14 long as they can meet the briefing schedule.

15 I guess at this point I don't really have a
 16 recommendation.

17 COMMISSIONER NELSON: Well, it seems
 18 hard for me to believe they aren't going to be
 19 presenting any evidence. And so are you saying
 20 that we should defer making any decision until
 21 Mr. Lebrun finds out if he's going to present any
 22 evidence or not?

23 MS. CREMER: Yeah. I guess I was
 24 going to ask that question, and then he did just
 25 get involved last week. But that's my main concern

1 here is we haven't held the OSS hearing. It's not
 2 as though we're on fast track anyway.

3 COMMISSIONER NELSON: We could
 4 always do ad hoc to address that issue.

5 MS. CREMER: You know, people really
 6 want to litigate it, bring it back and we'll
 7 litigate it.

8 COMMISSIONER SAHR: I'm open to any
 9 suggestion. The only question I have is if we're
 10 all in agreement that we're not going to allow
 11 additional evidence, then why don't we just say
 12 they can -- and I'm just saying if. If we all are
 13 in agreement they could file a friend of the court
 14 brief, then maybe that's where we're at and we
 15 don't need to handle it today.

16 Now if we're still open to additional
 17 evidence -- and maybe we're not at that point, but
 18 if we're looking at a situation where we're going
 19 to just say that if they're going to put in
 20 evidence, that we're not going to allow it, then I
 21 think we need to dispose of this today and say they
 22 can file a friend of the court brief but we're not
 23 going to allow them to reopen the record for
 24 factual or evidentiary type issues.

25 MS. AILTS WIEST: Did you have

1 anything further, Mr. Lebrun?
 2 MR. LEBRUN: I guess I would request
 3 that you give me an opportunity to check with my
 4 client to see if there are any facts and if there
 5 are, if they would identify them for me as clearly
 6 as they can so I can tell you what they are.
 7 They may not require testimony. They may be
 8 documents. I don't know. But I would request at
 9 least that opportunity before you make the final
 10 determination of whether or not we can present
 11 anything in the way of facts and I do appreciate
 12 the opportunity to file the amicus and that type of
 13 brief as well.
 14 COMMISSIONER SAHR: Well, if we're
 15 going to wait, though, on the factual
 16 determination, I think we should probably wait
 17 on -- I don't know if we should wait on the amicus
 18 or go ahead and rule on that.
 19 Because we're abutting a briefing schedule.
 20 And I hate to have an attorney doing an amicus for
 21 nothing.
 22 MS. AILTS WIEST: Well, my
 23 recommendation is to deny the petition to
 24 intervene. I mean, their second sentence here
 25 says, "and order reopening issues to receive

1 evidence vital to finalizing the Commission's
 2 decision."
 3 Touch America, I believe, filed this last
 4 fall. These issues came up a number of months ago,
 5 and I don't see any reason why they could not have
 6 intervened sooner.
 7 I realize we allow late interventions, but I
 8 don't believe we allow interventions after the
 9 hearing during the late stages of the briefing
 10 schedule. And I don't see how they could even file
 11 a friend of the court brief or amicus brief at this
 12 point without putting any evidence because when I
 13 look through the record although AT&T brought it up
 14 in their public interest testimony -- and they
 15 never put their public interest testimony in so I
 16 don't think there's anything in there about these
 17 issues with Touch America.
 18 So I would recommend denying the intervention
 19 today.
 20 CHAIRMAN BURG: With that, I will
 21 move we deny the intervention of Touch America. I
 22 don't see how they can bring anything meaningful to
 23 it without us opening it for evidence and
 24 cross-examination and anything. So I think that's
 25 the reason I'm going to do that.

1 I'd move to deny the petition.
 2 COMMISSIONER SAHR: And I'll second.
 3 Are we also, though, on that motion -- Jim, in your
 4 motion are we saying that they cannot file a friend
 5 of the court brief?
 6 CHAIRMAN BURG: Well, we'd have to
 7 allow intervention for them to file; right?
 8 COMMISSIONER SAHR: Well, they could
 9 brief the facts before us already.
 10 COMMISSIONER NELSON: That's not the
 11 issues they're raising.
 12 COMMISSIONER SAHR: Well, I don't
 13 know what issues they intend to raise. We have to
 14 wait for the brief to actually know that.
 15 CHAIRMAN BURG: Can they do that
 16 without intervention at any time?
 17 MS. AILTS WIEST: This is a new
 18 issue. I guess we've never handled any kind of
 19 friend of the --
 20 COMMISSIONER SAHR: I guess it may
 21 not be friend of the court. It may be a late brief
 22 for intervention.
 23 MS. AILTS WIEST: Then I would say
 24 if you would take my recommendation and deny their
 25 petition to intervene, then they shouldn't be

1 allowed to do any briefing. That was my -- I mean,
 2 that was how mine was --
 3 MR. LEBRUN: Mr. Chairman, my
 4 understanding if the Commission follows basically
 5 the civil rules of procedure, we would not be able
 6 to file the friend of the court brief without
 7 permission of the Commission.
 8 CHAIRMAN BURG: Right. That's what
 9 I assumed, and I recognized that in my motion.
 10 COMMISSIONER SAHR: And I'll second
 11 the motion in that form.
 12 COMMISSIONER NELSON: And I'd
 13 concur.
 14 CHAIRMAN BURG: Okay. Was there any
 15 other questions?
 16 MS. AILTS WIEST: No. I think the
 17 next question is --
 18 CHAIRMAN BURG: Is moot; right?
 19 MS. AILTS WIEST: Yes.

1 THE PUBLIC UTILITIES COMMISSION
 2 OF THE STATE OF SOUTH DAKOTA
 3 =====
 4 IN THE MATTER OF THE FILING
 5 FOR APPROVAL OF AN AMENDMENT TC02-035
 6 TO AN INTERCONNECTION AGREEMENT
 7 BETWEEN QWEST CORPORATION AND
 8 MIDWEST WIRELESS COMMUNICATIONS,
 9 LLC AND SWITCH 2000, LLC
 10 =====
 11 Transcript of Proceedings
 12 June 13, 2002
 13 =====
 14 BEFORE THE PUBLIC UTILITIES COMMISSION,
 15 JIM BURG, CHAIRMAN
 16 PAM NELSON, VICE CHAIRMAN
 17 ROBERT SAHR, COMMISSIONER
 18
 19 COMMISSION STAFF
 20 Rolayne Ailts Wiest
 21 John Smith
 22 Karen Cremer
 23 Kelly Frazier
 24 Greg Rislov
 25 Mary Healy
 Harlan Best
 Keith Senger
 Dave Jacobson
 Michele Farris
 Heather Forney
 Mary Giddings
 Sue Cichos
 Debra Elofson

24 Reported By Cheri McComsey Wittler, RPR

1 STATE OF SOUTH DAKOTA)
 2 :SS CERTIFICATE
 3 COUNTY OF HUGHES)
 4
 5 I, CHERI MCCOMSEY WITTLER, a Registered
 6 Professional Reporter and Notary Public in and for the
 7 State of South Dakota:
 8 DO HEREBY CERTIFY that as the duly-appointed
 9 shorthand reporter, I took in shorthand the proceedings
 10 had in the above-entitled matter on the 13th day of
 11 June 2002, and that the attached is a true and
 12 correct transcription of the proceedings so taken.
 13 Dated at Pierre, South Dakota this 25th day
 14 of June 2002.
 15
 16
 17
 18 Cheri McComsey Wittler,
 19 Notary Public and
 20 Registered Professional Reporter
 21
 22
 23
 24
 25

1 CHAIRMAN BURG: TC02-035, In The
 2 Matter of the Filing For Approval of an Amendment
 3 to an Interconnection Agreement Between Qwest
 4 Corporation and Midwest Wireless Communications,
 5 LLC and Switch 2000 LLC.
 6 Today shall the Commission approve the
 7 proposed amendment.
 8 Anything from Qwest on that amendment? Kelly.
 9 MR. FRAZIER: This appears to be a
 10 standard amendment, Commissioners, and was properly
 11 filed, the proper time frame has passed, there's
 12 been no intervention, and I would recommend
 13 approval.
 14 COMMISSIONER NELSON: I would move
 15 that the Commission approve the proposed amendment
 16 in the tariff agreement requested in TC02-035.
 17 COMMISSIONER SAHR: Second.
 18 CHAIRMAN BURG: Concur.
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1 STATE OF SOUTH DAKOTA)

2 :SS

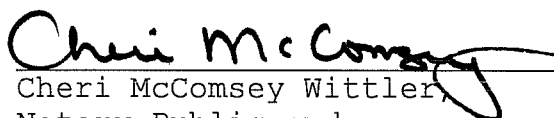
CERTIFICATE

3 COUNTY OF HUGHES)

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

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 13th day of
11 June 2002, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 25th day
14 of June 2002.

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