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THE PUBLIC UTILITIES COMMISSION

JUN 05 2003

OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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

TC03-057

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Transcript of Proceedings
June 3, 2003

ORIGINAL

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

COMMISSION STAFF

Rolayne Ailts Wiest
John J. Smith
Karen Cremer
Kelly Frazier
Jim Mehlhaff
Greg Rislov
Harlan Best
Keith Senger
Dave Jacobson
Michele Farris
Tina Douglas
Bonnie Bjork
Heather Forney

APPEARANCES (by telephone)

THOMAS WELK, QWEST CORPORATION

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING

L I M I T E D

APPEARANCES BY TELEPHONE

Janet Brown, AT&T
Mark Ayotte, Rural Cellular Corporation and
Wireless Alliance, LLC
John Frankel, S&S Communications
Russell Blau, S&S Communications
Bill Heaston, PrairieWave Telecommunications, Inc.
Colleen Sevold, Qwest Corporation
Marv Sorensen, MidAmerican Energy Corporation
Mary Lohnes, Midcontinent Communications
Tim Goodwin, Qwest Corporation

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State
Capitol, Room 412, 500 East Capitol Avenue, Pierre,
South Dakota, on the 3rd day of June 2003, commencing
at 9 o'clock a.m.

1 CHAIRMAN SAHR: TC03-057, In The
2 Matter of the Application of Qwest Corporation to
3 Reclassify Local Exchange Services as Fully
4 Competitive. And the question we're dealing with
5 today is shall the Commission grant the motion to
6 apportion deposit.

7 I'll look at my General Counsel. Do we start
8 with Qwest?

9 MR. SMITH: Mr. Welk.

10 CHAIRMAN SAHR: Mr. Welk, we've had
11 the briefs filed by the parties. Would you like to
12 comment on those and the pending motion?

13 MR. WELK: Yes, Mr. Chairman. As I
14 understand it, there have been filings made by
15 Midco, Black Hills, and I received this morning a
16 filing from Midstate Telecom, all objecting to any
17 apportionment for a variety of reasons. These
18 reasons include such things as Qwest is the only
19 beneficiary, argument being made it's a chilling
20 effect for companies to participate in these
21 proceedings.

22 In response to those arguments, I would remind
23 the Commission and the parties that this
24 apportionment statute is unique in so far as the
25 Commission regulation and the hearing of

1 proceedings regarding various telecommunications
2 companies.

3 If you review 49-31-44 carefully, this deposit
4 requirement, putting aside the arbitration
5 proceedings, is relegated to reclassification
6 proceedings, to price hearings, and apportionment
7 proceedings.

8 We've only had a limited number of
9 reclassification proceedings in the history of the
10 Commission that I'm aware of. The only
11 apportionment docket was a Qwest docket that I'm
12 aware of that we participated in. And there have
13 been some limited price hearings, I believe, also
14 involving Qwest. None of the companies responded
15 to in any of the filings was the argument that the
16 Commission is bound by 49-31-85, that it's to be
17 fair, reasonable, and nondiscriminatory.

18 Conveniently that statute was not mentioned by
19 anyone. And the Commission needs to exercise its
20 discretion in this matter in going forward. We
21 have seen preliminarily what the positions are of
22 most of the people to the docket. Except for the
23 staff, and my preliminary review, it appears that
24 most of the other interveners have some opposition.
25 Some have varying positions, but all at least

1 intend to participate in the proceedings.

2 We would ask the Commission to utilize its
3 discretion and juxtapose its obligations under
4 49-31-85 to a portion what they feel is a fair
5 amount for each company that participates in the
6 docket. This is not a proceeding that should chill
7 any participation in future dockets because of the
8 uniqueness of the statute.

9 The Commission isn't allowed under its
10 regulatory scheme to charge people to complain or
11 bring complaints. It's a unique procedure. It's a
12 reclassification procedure.

13 All of the other parties that are
14 participating except the staff and the association
15 are direct competitors. And I didn't expect that
16 they would support the classification, but they're
17 in a unique competitive advantage to Qwest at this
18 time. And we would respectfully request the
19 Commission to apportion the deposit, however it's
20 ordered, in the amount that they deem appropriate.

21 CHAIRMAN SAHR: Thank you very much.
22 Let's do go ahead and hear from the interveners
23 now. I don't know who wants to go first. I think
24 Mr. Coit is coming to the mike here.

25 MR. COIT: Thank you, Mr. Chairman,

Commissioners, and staff. Looking at the comments that we filed -- we hand-delivered them to the Commission on Friday, and I think that we may have made an error and I don't know that they got mailed to Mr. Welk.

MR. WELK: Mr. Coit?

MR. COIT: Yes. Did you get a copy?

MR. WELK: No.

MR. COIT: I apologize for that.

I'm looking at a Certificate of Service, and I don't see your name on there, which is a mistake on our part. Just to summarize for Qwest and the Commission, our point mainly in commenting on this was to, I guess, challenge the -- what's indicated in Qwest's motion in a couple of different ways that other parties would somehow benefit from this reclassification and as a result that provides some basis for apportioning this deposit.

If you look at all of the companies other than Qwest, I believe to my knowledge -- I certainly with all the SDTA members and looking at the other companies that have filed as CLEC entities, I don't believe that any of those companies right now are above the 50,000 threshold in terms of regulation for local exchange services.

1 There's the exemption under 49-31-5.1 that
2 exempts any company serving fewer than 50,000
3 access lines from rate of return regulation on
4 local exchange services and also certain other
5 substitutes, including the tariffing statutes.

6 And also the one thing that was interesting in
7 that exemption statute to me is the fact that
8 there's a reference in that exemption statute to
9 the reclassification provisions, which would
10 indicate that companies serving fewer than 50,000
11 access lines are actually exempt from the
12 reclassification provisions.

13 If that's the case, I think it's pretty clear
14 that, you know, it doesn't appear that those
15 companies are really even subject to the
16 reclassification process. And that being the case,
17 I find it hard to believe that they should be
18 viewed as benefiting from the reclassification
19 process and that providing some basis for
20 apportioning the deposit.

21 So we're opposed to apportionment. All the
22 companies have indicated that, you know, there
23 would be a chilling effect, and we agree with that.
24 We don't believe it would be good precedent for the
25 Commission to take this sort of action.

1 We did not respond to the reference to the
2 regulation of fair and nondiscriminatory manner,
3 but I really don't believe that actually applies in
4 this sort of situation. When it comes to assessing
5 deposits I think this probably more applies to
6 applying real regulation that affects rates, terms,
7 and conditions of service and that sort of thing.
8 Thank you.

9 CHAIRMAN SAHR: Thank you.

10 MR. COIT: Any questions? Thank
11 you.

12 CHAIRMAN SAHR: At this point we'll
13 hear from some of the other interveners.
14 Mr. Koenecke.

15 MR. KOENECKE: Thank you,
16 Mr. Chairman, Commissioners, and staff. I'll be
17 brief this morning. I'll bet there's a lot of
18 people who would like to speak to this.

19 I'd just like to call attention to the brief
20 filed by Mr. Gerdes. On behalf of Midcontinent
21 Communications we'd like to state that we are
22 opposed to the motion of apportion. We don't think
23 it's appropriate at all to apportion the deposit
24 where the parties aren't all in agreement. In this
25 case they certainly are not. We think this motion

1 was filed to benefit the movement only, and it's
2 not appropriate.

3 And in regards to the chilling effect on the
4 process, that's not important only for those who
5 come before the Commission but for the Commission
6 itself and the staff to have the perspectives of
7 the various players in the industry at all times.

8 I would urge you to give due consideration
9 to that chilling effect as it applies to
10 yourselves and as it applies to those people who
11 come before you in the course of doing business.
12 Thank you.

13 CHAIRMAN SAHR: Thank you. Any
14 other interveners in the audience?

15 Ms. Rogers.

16 MS. ROGERS: Good morning,
17 Commission and staff. We oppose the motion as
18 well. And I represent Midstate Telecom, Inc. and
19 also Northern Valley Communications, LLC. I think
20 that I concur with the other responses that have
21 been given.

22 I believe another point that we discussed
23 briefly at our last meeting when we informally
24 discussed this issue was what is a fair
25 apportionment.

1 And I think it would be really difficult to
2 come up with that. The criteria for apportionment
3 that Qwest has suggested appear to me to be very
4 inexact and also subjective, and to actually come
5 up with an apportionment on those types of criteria
6 I think would be extremely difficult and
7 time-consuming for the Commission and I don't think
8 that that's where you want to spend your time,
9 quite frankly. I think that you need to get to the
10 merits of the case.

11 We oppose apportionment for the other reasons
12 that have already been stated. I don't see this
13 docket as being unique, and I don't think that
14 there's a precedent for apportionment in this type
15 of docket, and I don't think that you should
16 establish one now.

17 So we oppose the motion. Thank you.

18 CHAIRMAN SAHR: Thank you. Do we
19 have any interveners on the telephone line that
20 would like to make comment?

21 Mr. Heaston?

22 MR. HEASTON: You want to drag me
23 into this, huh?

24 CHAIRMAN SAHR: Well, you can say
25 no.

1 MR. HEASTON: I have nothing really
2 new to add except I don't -- given the fact that
3 this is solely for the benefit of Qwest and not for
4 anybody else in the -- that provides service in
5 South Dakota, that even if you were to look at
6 apportionment, that there would be no way you could
7 apportion it to anybody else but Qwest. And that
8 would be my 2 cents worth.

9 CHAIRMAN SAHR: Thank you. Do we
10 have any other intervener on the line? With that
11 in mind, staff.

12 MS. CREMER: Thank you,
13 Mr. Chairman. What we're talking about here, of
14 course, is Harlan's and my time, and we don't care
15 who pays. We just want to be paid. No, I'm just
16 kidding.

17 Traditionally in utility law the cost causer
18 pays. And I'm sure, you know, Mr. Welk can think
19 of a half a dozen examples where that's not true.

20 However, we're not talking here about an end
21 user. We're talking -- you know, in that case
22 there are all sorts of subsidiaries and I
23 understand that, but here I think in this case
24 certainly Qwest is the cost causer and they ought
25 to pay here.

1 It's critical in these matters, I believe, to
2 have the industry intervene and staff and the
3 Commission both lack any practical experience in
4 the day-to-day operations of how a
5 telecommunications company is run and that's where
6 we need the interveners and the perspective that
7 they can bring. And I believe their input is
8 crucial in order to make a well-informed decision.

9 Had a John Q in public intervened in this
10 matter, we wouldn't even be having this
11 conversation because there would be no question
12 that we would not assess them part of the deposit.
13 So I think that gets to the heart of the matter,
14 which is what the parties here are finding
15 objectional.

16 It's not the amount of money because the
17 amount of money is not going to be that great.
18 It's the principle and I think that invokes their
19 argument of the chilling effect and I think that's
20 what would happen if you started to assess
21 intervenors in these sorts of matters.

22 You know, and I think, finally, it's worth
23 noting it's not as though the intervenors are going
24 to walk away without any costs assessed to them.
25 They have the costs of their consultants and

1 attorneys, and while I'm sure all of those fees are
2 reasonable, they will add up over time.

3 So everybody will be bearing their own costs
4 here, and I do believe in order for the Commission
5 to be fair, reasonable, and nondiscriminatory that
6 only Qwest should be assessed the deposit amount.

7 CHAIRMAN SAHR: Thank you.

8 Mr. Welk, we've heard from the interveners, and
9 I'll give you a chance to respond to some of those
10 arguments.

11 MR. WELK: Essentially they haven't
12 said anything new. The only argument that was made
13 by anyone relating to 49-31-85 other than the last
14 comment by Ms. Cremer was Mr. Coit who stated he
15 didn't think that 49-31-85 applied. And he made
16 some comment that it applies to certain other type
17 of proceedings.

18 The first two words of 49-31-85 say, "Any
19 regulation of telecommunications service." And, of
20 course, nobody's going to talk about that but us
21 because we feel that we are being discriminated
22 against by bringing the proceeding.

23 And I know that the statute doesn't provide
24 the Commission any guidance as to how it may
25 apportion. I believe that's your function as the

1 Commission. We have suggested some things.
2 Obviously the interveners have disagreed with
3 those. But like most adjudicatory bodies sometimes
4 there are not factors that are provided to you in
5 exercising your discretion.

6 We ask you to look at the docket as a whole
7 and look at the participation of the parties and
8 deem what apportionment you deem is appropriate.
9 And that's all I have to say.

10 CHAIRMAN SAHR: Thank you. I guess,
11 Mr. Welk, I would have the question for you if
12 49-31-85 does apply, it does talk about it being
13 fair, reasonable, and nondiscriminatory. Certainly
14 couldn't the interveners argue that it's fair and
15 reasonable to apportion it or essentially not -- I
16 guess we'll call it apportion it -- apportion it in
17 a manner where they're suggesting Qwest as the
18 moving party and the one who benefits would be
19 responsible for the entire deposit?

20 MR. WELK: Well, obviously they'd
21 make that argument, but I think of apportion you've
22 shifted the entire cost. There should be some
23 allocation. I'm not saying the lion's share
24 shouldn't be brought to Qwest.

25 But you certainly can exercise your discretion

1 as to these other companies that are there. The
2 consumers aren't here. And who would be the
3 beneficiary -- surely Qwest will have their freedom
4 to price its products competitively, but I would
5 believe the consumers would also benefit from the
6 price flexibility.

7 And, of course, we haven't heard those
8 arguments by anyone, and there's no one here
9 representing them. And so we suggest respectfully
10 that you exercise your discretion. If you want to
11 give us the lion's share, I don't think we have any
12 disagreement with that.

13 But I think the Commission needs to come to
14 grips with what does 49-31-85 mean? The
15 legislature didn't just pass it to have it there.
16 It does mean fair and nondiscriminatory.

17 And so the Commission is going to have to
18 exercise its discretion. And I agree with
19 Ms. Cremer and others that we need to move on, but
20 I think it is an important principle for the
21 Commissioners to look at. And I think we have said
22 all we need to say about this, and the Commission
23 should make its decision.

24 CHAIRMAN SAHR: Thank you. I would
25 just note, though, that I would disagree no one is

1 here to represent the South Dakota consumers
2 because Commission staff and the Commissioners as
3 well have those interests in mind. So I would
4 slightly disagree with that, but certainly from a
5 party's standpoint you may have a point to make
6 there.

7 Do we have any questions from the
8 Commissioners or comments?

9 VICE CHAIR HANSON: Mr. Chairman,
10 being new at this I've been trying to ascertain
11 from everyone's standpoint what's fair, reasonable,
12 and nondiscriminatory, and part of that for me is
13 trying to look into the future to see who is going
14 to offer what type of objections and things of this
15 nature.

16 Mr. Welk, perhaps you can answer this. Are
17 you concerned that others may bring objections or
18 create protracted challenges to your attempts to
19 get this process completed and thereby you will
20 just go through a lengthy duration where it will
21 cost more and more money and this will be done
22 without them incurring any costs?

23 MR. WELK: Commissioner Hanson, I
24 haven't seen any of that from any of the parties or
25 counsel so far. We have, I believe, cooperated,

1 and we all understand being members of the Bar and
2 representing companies that we have an obligation
3 to bring it forward.

4 And I cannot make any representation
5 whatsoever that I have seen any dilatory or
6 protracted nature. We have some discovery that's
7 outstanding that's due this week. I'll wait to see
8 from their responses as to what I see.

9 But at this point in time I have no basis to
10 make any assertion that anybody is undertaking any
11 protractive proceedings.

12 VICE CHAIR HANSON: I wouldn't say
13 your position is without merit. I'm reaching
14 trying to figure out just exactly to what extent it
15 does have merit. My challenge is that, yes, it is
16 unique as you've brought forth.

17 And I guess both sides use similar arguments.
18 I'm just challenged from the standpoint that Qwest
19 has to bring this, and I guess it's an argument
20 that both of you are using, that you're bringing
21 this, that they don't have to, but -- it's
22 interesting how both of you use the same argument.

23 I guess I'm going to -- are you looking for a
24 motion, or did you --

25 CHAIRMAN SAHR: No. I was seeing if

1 we had anymore questions or comments.

2 VICE CHAIR HANSON: Okay. I'm
3 struggling with this from a standpoint of I haven't
4 read 49-31-85, and I plan to do that after this.
5 My position on this will not reflect how I may vote
6 on future issues of this nature.

7 CHAIRMAN SAHR: If you'd like to, I
8 have the statute open.

9 Jim, do you have any questions or comments at
10 this point?

11 COMMISSIONER BURG: Not right now.

12 CHAIRMAN SAHR: If you want to take
13 a minute and read through the statute or you
14 certainly have a chance to talk to General Counsel
15 as well. I think pretty much most of my questions
16 have been answered, and I think as Mr. Welk and as
17 staff has acknowledged, I think we pretty much have
18 heard the arguments from all sides.

19 So at this point in time I'm not going to put
20 anyone on the spot. If you'd like to discuss the
21 49-31-85 with counsel, you certainly may. If not,
22 I am prepared to make a motion, and I will go ahead
23 and move that we apportion the deposit but that the
24 apportionment will be fully applied to Qwest in the
25 amount of whatever is necessary to take care of the

1 requirements of 49-31-44, which is not to exceed
2 75,000?

3 Of course, I always get a little confused
4 because they have money on account; is that
5 correct? That's why I was trying --

6 MR. WELK: My understanding,
7 Mr. Chairman -- this is Mr. Welk. We have
8 approximately 40 some thousand dollars, and Heather
9 has got the exact amount that remains on deposit
10 from another Qwest proceeding.

11 CHAIRMAN SAHR: Thank you very much.
12 So my intent of the motion would be that you would
13 make the -- basically pay the difference between
14 what is currently on deposit and \$75,000.

15 MR. WELK: Mr. Chairman, I thought
16 we changed this agenda last time that said up to
17 75,000 and I thought we put certain amounts and I'd
18 like to put the amount that's there and then if
19 it's a draw down, I don't think it's fair to the
20 company to have 75,000 sitting there when
21 Ms. Cremer indicated that we're just going to have
22 the staff time to draw against it.

23 CHAIRMAN SAHR: Thank you. I knew I
24 was going to make a mistake somewhere along here,
25 and that was it. I just couldn't remember the

1 mistake I made last time.

2 John, how do we want to phrase that motion to
3 make sure we get it correct?

4 MR. SMITH: I think we just change
5 it to the usual language of up to 75,000 with the
6 Commission to bill the company in the event that
7 the money currently on deposit is insufficient.

8 CHAIRMAN SAHR: Will that take care
9 of it? I'm getting yeses.

10 I will go ahead and make the motion as stated
11 by General Counsel, John Smith, regarding the
12 deposit and Qwest's responsibility for it.

13 MR. WELK: Mr. Chairman, Mr. Smith's
14 voice cut out when he was mentioning --

15 CHAIRMAN SAHR: He forgot to turn on
16 his mike.

17 John, why don't you run through that so
18 interveners and Qwest could hear it.

19 MR. SMITH: The motion would just be
20 the deposit would be set at an amount not to exceed
21 \$75,000 with the staff or the Commission to bill
22 Qwest only if and to the extent that the amount
23 currently on deposit is exceeded.

24 CHAIRMAN SAHR: Thank you.

25 MR. WELK: Thank you.

1 CHAIRMAN SAHR: And I will make that
2 motion.

3 COMMISSIONER BURG: I need a
4 clarification of the motion, Mr. Chairman. You're
5 moving we grant the motion to apportion but that it
6 will all be apportioned to Qwest?

7 CHAIRMAN SAHR: Yes.

8 COMMISSIONER BURG: So you are
9 moving to grant the motion?

10 CHAIRMAN SAHR: I'm moving we
11 apportion the deposit, but I'm moving that it also
12 be apportioned completely to Qwest.

13 (Pause)

14 VICE CHAIR HANSON: Pregnant pause.

15 COMMISSIONER BURG: I will make a
16 substitute motion that we deny the motion to
17 apportion. And I would add a caveat that I would
18 not be against considering after the fact, if it
19 appears that there has been extraordinary costs
20 generated by other parties.

21 And I don't know if the law allows us that or
22 not. I'm throwing that out as an option.

23 CHAIRMAN SAHR: And I appreciate
24 that motion, the substitute motion. I think we're
25 both moving in the same direction. The question I

1 have is under 49-31-44, "The amount and division of
2 the deposit among the companies, if any, shall be
3 designated by Commission Order."

4 And what I struggle with is do we have to
5 apportion it and can apportion it within our
6 discretion, which would be 75,000, zero, zero,
7 zero, or can we simply not apportion it.

8 And I think, Jim, you and I are heading in the
9 same direction, but the question is statutorily I
10 don't want to run into a situation where we have
11 failed to do what is actually required by the
12 statute, which says we're supposed to make a
13 division. So I will --

14 COMMISSIONER BURG: Let me add then
15 that I think we are headed in the same direction.
16 That's why I hesitated on how to approach it. My
17 concern is that I'm not against leaving the door
18 open that if somebody adds extraordinary costs, we
19 could apportion part of it to them after the fact.

20 But if we apportion 100 percent of it now, we
21 don't leave that open. If we do not apportion
22 today and reconsider apportionment at a different
23 time, we could possibly do that. That's the
24 nuances that I've thought of.

25 CHAIRMAN SAHR: Okay. And I'll ask

1 that question. John, do you feel -- or Rolayne or
2 anyone else that may have an opinion on this on
3 staff -- are we dividing this, or is it just that
4 among the parties and it's 75,000, zero, zero, zero
5 or are we just simply saying that Qwest is
6 responsible for the own deposit and am I getting
7 too much worried about the semantics of the
8 statute?

9 MR. SMITH: I think at this point
10 the motion that you made would put the entire
11 burden on Qwest. I don't see anything in the
12 statute that would preclude necessarily the
13 Commission from revisiting at a subsequent time.

14 But I think if you intend to do that, you
15 should include that possibility in your order at
16 this point in time so the parties have notice of
17 what they're potentially walking into. I don't see
18 anything here that designates a specific time at
19 which this apportionment needs to occur.

20 I guess the only thing is the word "deposit"
21 implies viewing it from the vantage point of the
22 front end.

23 With respect to division, I would just point
24 out that sentence, it does include the words "if
25 any," which to me clearly indicates that the

1 statute would permit there not to be any. The word
2 "if" is --

3 COMMISSIONER BURG: Not to be any
4 apportionment?

5 MR. SMITH: Right. Otherwise, those
6 words would not have been included.

7 VICE CHAIR HANSON: Mr. Chairman,
8 would you read your motion again.

9 CHAIRMAN SAHR: I don't think I can.
10 I think it's in John Smith's head. If we can have
11 it transcribed.

12 I do want to say that I think it's important
13 that we resolve this today because I don't want the
14 parties to have uncertainty about the costs that
15 they may bear in this proceeding.

16 And it seems to me the main arguments the
17 interveners have made are that Qwest has the
18 benefit, that there's a chilling effect, and that
19 we need their input, and that's what I've heard
20 from the interveners and from staff. And to me
21 that argument isn't going to change two months,
22 three months, six months from now.

23 If we are saying in situations where one party
24 has the most -- receives the benefit where we want
25 to encourage involvement of interveners, in those

1 instances that we do not want to require deposits
2 and payments from the other parties it doesn't seem
3 to me it's going to matter how the proceeding
4 necessarily shakes out.

5 The idea is that in my mind that the company
6 that's making the motion under the circumstances
7 should bear the cost.

8 So although I certainly never like to say
9 never, I don't know if we need to leave the door
10 open when probably it sounds like under the
11 General Counsel's reading of this statute if we had
12 to, we could come back and look at this and
13 apportion it later in a different amount.

14 MR. SMITH: I don't see anything
15 that expressly precludes it. Again, the word
16 "deposit" I think is a word that -- is a word that
17 indicates that this is viewed from the front end of
18 the incurrence of costs as opposed to a back end
19 division. I guess that would be my concern.

20 And I guess the other concern I would
21 express -- and I don't see anything that expressly
22 gives an answer one way or another but just the
23 fairness issue. Is it fair to parties to walk into
24 this not knowing?

25 I believe -- and I have my rules here, but I

1 hate to take time to look. I think we have another
2 rule in the Commission's rules which permits the
3 Commission to impose costs on a party --

4 And am I wrong, Rolayne, that if a pleading or
5 other action is interposed in bad faith -- so we
6 would have that kind of thing available to us.

7 I mean, the difficult thing here is if we're
8 going to look at factors, there are a couple of
9 other rules that I might point out too to the
10 various parties here and those are 20:10:24:15 and
11 20:10:24:17, which do provide some standards for
12 apportioning the deposit.

13 The difficulty, I guess, I would see in
14 attempting to follow these particular rules at the
15 front end is that the evidence one would need in
16 order to do so is not known to us at this point in
17 time.

18 And the factors -- I'll just list them off --
19 that it says the Commission is to look at to
20 consider, that's the company's annual operating
21 income, the company's annual revenues, the
22 company's annual investments, the number of
23 South Dakota customers who annually use the
24 service, the minutes of usage, extent of the
25 company's participation, complexity of the issues

1 addressed, and any other factors which may be
2 relevant in assessing the party's involvement.

3 And I'll just read 20:10:24:17, which states,
4 "The mere filing of a written or oral protest for
5 statement of interest or the voluntary offering of
6 written or oral testimony in a proceeding is not
7 participation of such magnitude as to subject the
8 party who made the filing to the assessment."

9 And, again, those are -- I don't know that
10 they're necessarily dispositive of this, but I
11 would say this particular rule to me would indicate
12 that there might be some contemplation of an
13 apportionment being able to be made after the
14 evidence of these kinds of things is known.

15 COMMISSIONER BURG: Mr. Chairman.

16 CHAIRMAN SAHR: Yes.

17 COMMISSIONER BURG: Just an
18 additional comment. The reason I arrived at the
19 position I did is this is the first time we're
20 actually exercising this part of the law. This is
21 the first situation under it. I don't want to
22 forestall or preclude doing, you know, what is fair
23 and reasonable.

24 At this point I see only one beneficiary in
25 this. However, if we would find after the hearing

1 that there was another -- that somebody else
2 benefited and did exercise cost, I think we ought
3 to leave -- I wanted to leave the latitude that we
4 could look at that and say there is the opportunity
5 for the moving party to recover some of their costs
6 due to the cost causers -- other cost causers and
7 other beneficiaries.

8 And that's where at this point I prefer
9 denying the motion to apportion, but that would not
10 preclude them from asking for recovery if the
11 hearing actually showed that there were other
12 beneficiaries and other cost causers.

13 I think there are very small differences
14 between the direction that we're talking about, and
15 I just want to explain how I arrived at the
16 position that I chose at this point.

17 CHAIRMAN SAHR: Thank you. And back
18 to Commissioner Hanson's earlier question, would
19 you like the motion restated?

20 VICE CHAIR HANSON: If you have the
21 motion, yes.

22 CHAIRMAN SAHR: John, do you want to
23 give a stab at this. Commissioner Hanson has a
24 question about my original motion.

25 COMMISSIONER BURG: You want to know

1 what it is?

2 VICE CHAIR HANSON: I think the
3 record --

4 CHAIRMAN SAHR: Can you read that
5 back, Cheri.

6 (Reporter reads back requested portion)

7 CHAIRMAN SAHR: I'd like to offer a
8 new motion, and I don't know procedurally do we
9 need to --

10 VICE CHAIR HANSON: With three
11 people -- and you've made -- there's been an
12 attempt at a substitute motion, but there has been
13 no second so you really don't have any motion
14 before you at this time.

15 CHAIRMAN SAHR: Can I offer a
16 substitute motion?

17 VICE CHAIR HANSON: Yes,
18 Mr. Chairman, you certainly may.

19 CHAIRMAN SAHR: Thank you, Mr. Vice
20 Chairman. It dies for lack of second but not for
21 lack of support in the general concept. I think I
22 can get this right the third or fourth or fifth
23 time here.

24 What I would like to do is deny the motion to
25 apportion the deposit, and then in the interest of

1 certainty and -- I think under the applicable rules
2 we've had a lot of input on what the merits of the
3 situation are so I'd like to go ahead and make the
4 motion that the -- that Qwest --

5 MR. SMITH: Go ahead.

6 CHAIRMAN SAHR: I want to get the
7 language right on this one. John, now I want to
8 insert the language that we originally were talking
9 about.

10 MR. SMITH: In terms of just fixing
11 the dollar amount?

12 CHAIRMAN SAHR: Right. That Qwest
13 makes the deposit in an amount up to 75,000.

14 MR. SMITH: Qwest shall make a
15 deposit in an amount up to \$75,000, which shall
16 include the amount that it currently has on deposit
17 and that it -- any amounts in addition to the
18 amounts it has on deposit will only be assessed
19 against Qwest in the event that the amount of the
20 deposit is insufficient to pay the costs incurred.

21 CHAIRMAN SAHR: Thank you. That
22 will be my motion.

23 VICE CHAIR HANSON: Well done,
24 Mr. Chairman. I'll second.

25 COMMISSIONER BURG: I'll concur.

CHAIRMAN SAHR: Thank you very much.

I appreciate everyone's patience on that.

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 3rd day of
11 June 2003, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 5th day
14 of June 2003.

15
16
17
18 _____
19 Cheri McComsey Wittler,
20 Notary Public and
21 Registered Professional Reporter
22
23
24
25

1 STATE OF SOUTH DAKOTA)

2 :SS

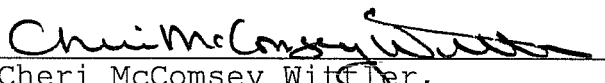
CERTIFICATE

3 COUNTY OF HUGHES)

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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 3rd day of
11 June 2003, and that the attached is a true and
12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 5th day
14 of June 2003.

15
16
17 
18 Cheri McComsey Wittler,
19 Notary Public and
20 Registered Professional Reporter
21
22
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