

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

=====

IN THE MATTER OF THE FILING FOR
APPROVAL OF A MASTER SERVICES
AGREEMENT BETWEEN QWEST CORPORATION
AND MCIMETRO ACCESS TRANSMISSION
SERVICES, LLC

TC04-144

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Transcript of Proceedings
October 26, 2004

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

ORIGINAL

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

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

APPEARANCES

Melissa Thompson
Tom Dixon
David Gerdes
Letty Friesen

Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING
L I M I T E D

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33 APPEARANCES
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35 Melissa Thompson
36 Tom Dixon
37 David Gerdes
38 Letty Friesen
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40 Reported By Cheri McComsey Wittler, RPR
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1 CHAIRMAN SAHR: Let's go to that.
2 It's item No. 3 under Telecommunications, TC04-144,
3 In the matter of the filing for approval of a
4 master service agreement between Qwest Corporation
5 and MCI metro Access Transmission Services, LLC.
6 And the question today is shall the Commission
7 grant Qwest's Motion to Dismiss? If not, shall the
8 Commission approve the agreement?
9 Qwest.
10 MS. THOMPSON: Good morning,
11 Mr. Chairman, Commissioner Burg, and Commissioner
12 Hanson. My name is Melissa Thompson, and I am here
13 this morning on behalf of Qwest Corporation. As
14 you know, Qwest Corporation has submitted an
15 agreement to you for informational purposes only,
16 which is called the QPP Master Services Agreement
17 between Qwest and MCI, and I'm going to refer to
18 that this morning. It's just simply the commercial
19 agreement.
20 As a matter of context, both Qwest and MCI
21 submitted an amendment to their ICATU that has to
22 do with the batch hot cut process and under
23 services under Section 251 contemporaneous with the
24 commercial agreement that's submitted for
25 informational purposes.

1 APPEARANCES BY TELEPHONE 2
2 TOM WELK
3 RYAN TAYLOR
4 COLLEEN SEVOLD
5 LETTY FRIESEN
6 LAUREL BURKE
7 =====
8 TRANSCRIPT OF PROCEEDINGS, held in the
9 above-entitled matter, at the South Dakota State
10 Capitol, Room 412, 500 East Capitol Avenue, Pierre,
11 South Dakota, on the 26th day of October 2004,
12 commencing at 9:30 a.m.
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1 On or about August 2, MCI submitted the
2 commercial agreement to you for review and
3 approval. Qwest has filed its Motion to Dismiss in
4 this matter because it does not believe State
5 Commissions have the authority to review and
6 approve the commercial agreement. Qwest's motion
7 rests upon a plain and straight forward reading of
8 the federal statutes and of two federal cases.
9 The federal statutes at issue are 251, 252,
10 and 271. One of the two federal court decisions
11 squarely addresses the issue of which negotiated
12 agreements must be filed with State Commissions for
13 review and approval. The commercial agreement
14 that's been filed with you for informational
15 purposes concerns mass market switching and shared
16 transport. In the interim order that is part of
17 the FCC's triennial review order proceedings, which
18 is referred to as USTA II in the proceeding, the
19 D.C. Circuit Court vacated the unbundling
20 requirements -- I should say the FCC's impairment
21 determination for mass market switching.
22 Previously in the triennial review order the FCC
23 determined unbundled share transport is not
24 required where unbundled switching is not required.
25 The Qwest MCI agreement, the commercial

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1 agreement, is the direct result of the FCC's call
 2 for carriers to negotiate agreements in the wake of
 3 the uncertainty created by the ruling in USTA II.
 4 Perhaps more than any other ILEC in the country
 5 Qwest has led the way on these negotiations. These
 6 agreements are negotiated and entered into outside
 7 the framework of Sections 251 and 252.
 8 In April 2002 Qwest filed a petition for
 9 declaratory ruling asking the FCC to tell us what
 10 kinds of negotiated agreements must be filed for
 11 State Commissions for review. The FCC issued an
 12 order in that -- in October 2002 that said, "Based
 13 on these statutory provisions, we find that an
 14 agreement that creates an ongoing obligation
 15 pertaining to resale, number portability, dialing
 16 parity, access to rights-of-way, reciprocal
 17 compensation, interconnection, unbundled network
 18 elements, or collocation, is an Interconnection
 19 Agreement that must be filed pursuant to
 20 Section 252(a)(1)."
 21 Immediately following that sentence in this
 22 order the FCC said unequivocally, "We therefore
 23 disagree with the parties that advocate the filing
 24 of all agreements between an incumbent LEC and a
 25 requesting carrier. Instead we find that only

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1 those agreements that contain an ongoing obligation
 2 relating to Section 251(b) or (c) must be filed
 3 under 251(a)(1). There is no ambiguity in the
 4 FCC's filing requirements. The language I just
 5 quoted is crystal clear.
 6 So what are the obligations under 251(b) and
 7 (c)? Under 251(b) they are resale number
 8 portability, dialing parity, access to
 9 rights-of-way and reciprocal compensation. Under
 10 (c) they are a duty to negotiate interconnection,
 11 which is defined specifically in the statute in
 12 Subsections A through D, unbundled access, resale,
 13 notice of changes, and collocation. The commercial
 14 agreement does not concern any of these services.
 15 Qwest has entered into this agreement with MCI
 16 under Section 271 of the Telecom Act. Section 271
 17 confers expressly on the FCC and not State
 18 Commissions the authority to review these
 19 negotiated agreements, including the checklist
 20 provisions of 271. One state court has explained
 21 that, "Sections 251 and 252 contemplate State
 22 Commissions may take affirmative action toward the
 23 goals of those sections. While Section 271 does
 24 not contemplate substantive conduct on the part of
 25 State Commissions, the State Commission's role is

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1 investigatory and consulting in nature, not
 2 substantive."
 3 Under the FCC's declaratory order, which is
 4 the defining ruling in this matter, because it
 5 squarely addresses the question of which negotiated
 6 agreements must be filed, Qwest agrees that this
 7 Commission has the authority to review agreements
 8 and decide which ones are subject to its filing and
 9 approval requirements.
 10 To make that determination, however, this
 11 Commission must apply the test that's set forth in
 12 the declaratory order. That test is whether a
 13 particular agreement, regardless of what it is
 14 called, whether it's called an interconnection
 15 agreement, a settlement agreement, a commercial
 16 agreement, whatever concerns obligations under
 17 251(b) and (c). If it does concern obligations
 18 under 251(b) and (c), then this Commission must
 19 review and approve or reject it. If it does not,
 20 this Commission does not have authority to do so.
 21 MCI or AT&T may argue that 252 of the Act
 22 interpreted in isolation creates a filing
 23 requirement separate from the one in 252(a)(1).
 24 However, 252(e) cannot be read in isolation.
 25 Section A of 252 refers specifically to

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1 "interconnection services or network elements
 2 pursuant to Section 251." The filing requirement
 3 of 252 applies to "any Interconnection Agreement
 4 adopted by a negotiation or arbitration," that is
 5 Interconnection Agreements adopted through
 6 negotiation as required by the duty to negotiate
 7 provision in Section 251(c)(1) and concerning
 8 obligations under 251(b) and (c).
 9 Under the 2000 South Dakota Supreme Court case
 10 of Faircloth v. Raven Industries this Commission or
 11 court must interpret a statute in a way that makes
 12 it workable and harmonious. If the Commission
 13 interprets Section 252(e) in isolation, not only is
 14 such an interpretation inharmonious with the rest
 15 of the Act but such a reading turns the FCC's 2002
 16 declaratory order on its head. If such a separate
 17 filing requirement existed, the FCC would have
 18 addressed it in the very order that Qwest requested
 19 them to issue to tell us which agreements to file.
 20 There is no mention of a separator secondary filing
 21 requirement under Section 252(e) in the declaratory
 22 order.
 23 There is no dispute in this matter that Qwest
 24 has published this commercial agreement on its
 25 website and made it publicly available. It is

1 available to any carrier who wants to opt into it
 2 in its entirety. So the Commission may wonder, I
 3 mean, it's publicly available, it's out there,
 4 Qwest has offered it, why are we pressing so hard
 5 on this filing issue?

6 The reason is Qwest thought it had firm,
 7 confirmed, established, and clearly defined
 8 standard as a result of the 2002 declaratory order.
 9 Qwest has 9 million reasons in Arizona and
 10 26 million reasons in Minnesota to want a clear
 11 filing standard. That's why it filed the petition,
 12 and that's the result it thought it earned in the
 13 2002 declaratory order.

14 You may hear from MCI and/or AT&T that this
 15 commercial agreement must be filed with you so that
 16 you can determine whether Qwest is discriminating
 17 against other carriers, whether the agreement is
 18 discriminatory. Setting aside for a moment that
 19 the agreement is publicly available and there's no
 20 dispute about that, it is within the FCC's purview
 21 to determine whether this agreement is
 22 discriminatory under Section 202 of the
 23 Communications Act of 1934.

24 The discrimination argument posed by MCI and
 25 AT&T leads to the conclusion that every negotiated

1 except to the extent a local exchange carrier is
 2 exempt from or has received a suspension or
 3 modification pursuant to 47 U.S.C. 251 the carrier
 4 shall provide interconnection network elements, and
 5 other telecommunications services to any provider
 6 of competitive telecommunications services that
 7 requests such interconnection and services to the
 8 extent required by 251(a) through (c), inclusive."

9 MCI also refers to South Dakota Administrative
 10 Rule 20:10:32:21. That says, "An agreement for
 11 interconnection network elements and other
 12 telecommunications services negotiated pursuant to
 13 49-31-81 must be submitted to the Commission for
 14 approval." Well, I have just cited to you
 15 49-31-81, which in two places limits itself to
 16 services to the extent required by 251(a) through
 17 (c).

18 The state's laws are consistent with the
 19 federal statutes, and, again, a commercial
 20 agreement is not related to services provided under
 21 Sections 251(b) and (c).

22 Finally I want to mention for the Commission's
 23 information some of the decisions that have come
 24 down in other states. MCI submitted one to you as
 25 part of the briefing round in this matter, and that

1 agreement must be filed with the State Commission.
 2 But that flies directly in the face of the
 3 declaratory order, and I say again the FCC said,
 4 "We therefore disagree with the parties that
 5 advocate the filing of all agreements between an
 6 ILEC and a requesting carrier."

7 There are many distinctions in the law between
 8 the role of the FCC and the role of State
 9 Commissions with respect to determining when and
 10 what types of agreements are discriminatory. One
 11 example -- for example -- one instance, for
 12 example, is that State Commissions do not have
 13 jurisdiction over Interstate access rates. The
 14 same is true here with respect to review and
 15 approval of the commercial agreement.

16 MCI in its briefing has cited South Dakota
 17 Codified Law. I want to point out the section
 18 cited by MCI, which is 49-31-81, refers not once
 19 but twice specifically to "interconnection and
 20 services to the extent required by 47 U.S.C. 251(b)
 21 and (c), conclusively."

22 Section 49-31-81 reads, "The Commission may
 23 implement and comply with the provisions of the
 24 Federal Telecommunications Act of 1996, including
 25 the promulgation of rules pursuant to Chapter 126

1 was from the Utah Public Service Commission. It is
 2 Qwest's position with respect to that decision that
 3 the Utah Public Service Commission pulled the
 4 sections out of 252, read them in isolation,
 5 applied them incorrectly, and more egregiously,
 6 completely ignored the express language of the
 7 declaratory order.

8 There have been three other decisions that I'm
 9 aware of that have been sort of middle ground or
 10 adverse to Qwest in other states. One of the
 11 arguments made in those decisions was that the
 12 amendment filed to you -- with you for approval,
 13 review and approval with respect to the batch hot
 14 cut process and other services under 251 is an
 15 integral part and the same agreement as the QPP
 16 commercial agreement.

17 We absolutely disagree with that position.
 18 The commercial agreement is a stand-alone agreement
 19 that has to do with mass market switching and
 20 shared transport. Those are two agreements and not
 21 one. We do not believe that is a legitimate basis
 22 for finding that the Commission has authority to
 23 review and approve the commercial agreement.

24 At the end of what may appear to you to be a
 25 complicated issue is the crystal clear language of

1 the FCC's declaratory order. In that case Qwest
 2 asks the FCC what agreements it should file with
 3 State Commissions for review and approval, and the
 4 FCC responded unequivocally, "Only those agreements
 5 that contain an ongoing application relating to
 6 Sections 251(b) or (c) must be filed."

7 Qwest respectfully asks the Commission to
 8 grant its Motion to Dismiss. Thank you for your
 9 time this morning.

10 CHAIRMAN SAHR: Thank you very much.
 11 And now we'll hear from the other parties.

12 Mr. Gerdes.

13 MR. GERDES: Mr. Chairman, members
 14 of the Commission, I'm Dave Gerdes. I'm a lawyer
 15 from Pierre, and I represent MCI. With me is
 16 Tom Dixon, who is also an MCI member from Denver.
 17 Since Tom has not appeared before this Commission
 18 before I suggested to him that I would introduce
 19 him. Tom has been a long time MCI lawyer and has
 20 represented MCI in other states and he is here for
 21 the first time so I would ask that you welcome Tom
 22 and he will present argument on behalf of MCI.

23 CHAIRMAN SAHR: Thank you very much.
 24 Good morning, Mr. Dixon, and welcome.

25 MR. DIXON: Good morning,

1 Mr. Chairman and Commissioners, and thank you for
 2 letting me appear today.

3 I would like to start off very likely just
 4 responding to Ms. Thompson's comments about the
 5 251 obligations and the "crystal clarity" of the
 6 declaratory ruling that was issued by the FCC in
 7 2002, and I think the most obvious response I have
 8 at the present is that the Commission -- the FCC
 9 has issued an order that has referred to the
 10 interim order or the interim rules that relate to
 11 what to do for the next year with regard to the 251
 12 network elements.

13 And in that particular ruling the Commission
 14 very clearly said we desire comments from the
 15 parties on whether commercial agreements need to be
 16 filed. Moreover, Commissioner Abernathy lamented
 17 the fact in that order that, in fact, the FCC has
 18 had not clarified whether commercial agreements
 19 need to be filed.

20 If the FCC's declaratory order was so crystal
 21 clear, it seems intuitive that it would not be
 22 asking for comments in a 2004 case as to whether
 23 such agreements should be filed. So I say that up
 24 front because that has occurred after the filing of
 25 our motion.

1 When I go back to look at when we filed the
 2 agreement and subsequently our response, we filed
 3 the agreement for several reasons. Ms. Thompson's
 4 alluded to a couple. Unfiled agreements, Dockets
 5 that were pending in other states where parties
 6 were challenged on whether certain Interconnection
 7 Agreements should have been filed. MCI took the
 8 position and, in fact, Interconnection Agreements
 9 in all 14 states and filed the entire package, both
 10 the commercial agreement, also known as QPP MSA, as
 11 well as the batch hot cut amendment.

12 So in part we were driven by the same issues
 13 because the reality is it's not abundantly clear
 14 who has the obligation to file the agreements. The
 15 federal law doesn't assign that responsibility to
 16 the incumbent local exchange carriers or to the
 17 competitive local exchange carriers. It says the
 18 parties will file the agreements. So MCI took at
 19 that point a very clear position that we would at
 20 least put the agreement before you because it
 21 doesn't specify that Qwest should do so or
 22 otherwise.

23 But more importantly we also felt under
 24 Section 251(a)(1) as well as 252(e) that it
 25 certainly was an Interconnection Agreement from our

1 perspective and, therefore, should be filed under
 2 those provisions as well.

3 In retrospect and given what's happened since
 4 our filing of both the agreements and the response
 5 to the Motion to Dismiss, in spite of Qwest's
 6 protestation everybody seems to be at this point
 7 endorsing what MCI is saying. We took the position
 8 that it was better to be safe and not have a
 9 problem. But we also felt very strongly that we
 10 had two agreements that are clearly interrelated,
 11 and that's so stated in our response. It's one of
 12 the last comments that was made in our response
 13 that the agreements were indeed interrelated.
 14 Well, how so?

15 There's no question that the batch hot cut
 16 amendment is a 251 agreement that's been filed.
 17 Qwest filed it separately on June 23. If you look
 18 at paragraph 222 of that agreement, it very clearly
 19 says if the batch hot cut -- I'm sorry. If the
 20 QPP MSA agreement goes down, so does the batch hot
 21 cut amendment. Likewise, if you go to the
 22 commercial agreement, paragraph 23 of the QPP MSA,
 23 you'll once again see provisions that say if one of
 24 the agreements or terms in one of the agreements
 25 are invalidated, either party has the right to

1 terminate the entire package.
 2 Now at the time we knew they were
 3 interrelated. We didn't argue heavily on that
 4 point, but we felt it was worth noting. Since that
 5 time the State of Washington on October 20 indeed
 6 relied heavily on that approach, citing to a Texas
 7 District Court case for the Western District of
 8 Texas, and that's a case known as Sage Telecom, LP,
 9 Plaintiff, v. Public Utility Commission of Texas.
 10 And that's Case No. A04CA364SS, and it is, as I
 11 said, cited in the Washington decision that came
 12 out on October 20.

13 Moreover, in every case that's been decided to
 14 date the Motion to Dismiss has been denied. It was
 15 denied in New Mexico, it's been denied in
 16 Minnesota, it's been denied in Utah, and it's been
 17 denied in Washington. Staffs in Arizona and Oregon
 18 have also filed comments recommending that those
 19 commissions deny the Motion to Dismiss, but they
 20 haven't been acted upon. In Colorado the case has
 21 been argued. The Commission intends to take up the
 22 issue tomorrow in its open meeting. So I can't
 23 report at this time what the Colorado standard is.

24 But the point is, the commissions have
 25 uniformly agreed to documents, that is both the

1 QPP MSA and the batch hot cut amendment, should
 2 have been filed, are subject to review and approval
 3 for the sole purpose of determining whether the
 4 agreements are discriminatory to other carriers who
 5 are not parties to the agreement or to determine
 6 whether the agreements are contrary to the public
 7 interest.

8 So by filing we're not suggesting the
 9 Commission should be adjusting rates, modifying
 10 terms, or in any way changing the agreements. It's
 11 effectively an up or down vote on the documents as
 12 a whole and whether those documents are
 13 nondiscriminatory and not contrary to public
 14 interest.

15 So we feel in view of what has occurred -- and
 16 I certainly recognize what the South Dakota
 17 statutes say. I recognize it had reference to 251.
 18 I'm not naive. I'm not going to quote a statute
 19 that I haven't -- I don't see what's in there.
 20 Likewise, I know the rule refers back to the
 21 statute, and we certainly put that in our response
 22 so it wasn't as if we were ignoring what the law in
 23 South Dakota says.

24 And I think at the time we wrote the response
 25 it was an issue. I mean, I really looked at that

1 and I said, you know, this could go either way
 2 given what the statute says. But as these
 3 agreements have been interpreted after our response
 4 was filed and particularly most recently, as I
 5 said, by Washington citing the Texas case I advised
 6 you of, it appears abundantly clear that even under
 7 the South Dakota statutes it does reference
 8 Section 251 that clearly these agreements are
 9 interrelated and, therefore, must be considered as
 10 a whole because you cannot opt into for all intents
 11 and purposes one portion and not opt into the other
 12 portion.

13 And while I absolutely commend Qwest for
 14 making these public and for putting them on their
 15 website and indeed allowing a number of carriers to
 16 already opt into this entire package -- I don't
 17 know if there was at least five or six that I have
 18 seen that have opted into it, which makes me feel
 19 good so I helped negotiate the agreement. It makes
 20 me sense maybe we did something right, not only MCI
 21 but the others.

22 The reality is the issue why do we want to
 23 file? One, we think it's required. Two, if it
 24 were solely filed under Section 211 of the federal
 25 law, which is what Qwest has indeed done, while the

1 FCC has the authority to determine whether the
 2 agreement's discriminatory, you do not have the
 3 opt-in rights under Section 252(i) of the Federal
 4 Act. And that's the relevant issue. Again, Qwest
 5 from a practical perspective has made that
 6 available in this situation.

7 But if, in fact, you take Qwest's approach,
 8 effectively it would be up to Qwest whether or not
 9 to make agreements available with opt-in purposes,
 10 and with the recent FCC ruling that the opt-in rule
 11 is no longer a pick-and-choose rule but is rather
 12 an all-or-nothing rule, if you take Qwest's
 13 approach that only the batch hot cut amendment is
 14 the agreement that must be filed and approved, then
 15 how would you opt in to the entire agreement?

16 Because clearly if you look at the batch hot
 17 cut, it's tied directly to the commercial
 18 agreement. So presumably "all" includes both the
 19 batch hot cut portion as well as the commercial
 20 agreement. And, indeed, that's what Qwest has
 21 allowed with all the other parties. So, once
 22 again, under the all-or-nothing interpretation it
 23 would make little sense to allow a party to enter
 24 only into the batch hot cut process, which, indeed,
 25 allows you to obtain installation of the loop, the

1 unbundled loop, and yet not have the corresponding
2 activity that's found under the Qwest master
3 agreement, mainly increased rates which come
4 directly out of that particular agreement.

5 So as a practical matter, I don't know how a
6 party could opt into just one piece of the two
7 documents. So from that perspective it seems
8 readily apparent that the -- that the agreements,
9 indeed, should have been filed, that they should be
10 reviewed for discriminatory and contrary to public
11 interest issues.

12 As I said, with the final ruling of the FCC
13 about seeking comments on commercial agreements, it
14 is not crystal clear. The declaratory ruling set
15 forth a guideline. It did not set forth a specific
16 standard. It gave examples of what not to file.
17 And I can assure you the QPP MSA does not fall
18 under those standards. That talked about you
19 didn't have to file forms, you didn't have to file
20 documents that were ordering, for example, what are
21 known as local service requests or access service
22 requests, LSR or ASR, as you may have heard of
23 them, and you didn't have to file settlement
24 agreements that were backward looking only, that
25 resolved matters in the past with no ongoing

1 obligations.

2 So the reality is there is nothing in the FCC
3 order that says this agreement is exempt from
4 filing. Rather it gives guidance, and it says you,
5 the states, will make this determination in this
6 first instance, and we believe that's where it
7 properly belongs today.

8 So on that basis we believe the Motion to
9 Dismiss should be denied and that you should
10 approve the agreements. As you'll note from our
11 application, we set forth the reasons we do not
12 believe it's discriminatory, the most obvious of
13 which it's available to others and they have
14 elected to take it. We believe it's not contrary
15 to the public interest, it's posted, and again it's
16 been taken by other parties which tends to show
17 that it's indeed fulfilling the recommendations of
18 the FCC, the parties and the commercial agreements
19 as opposed to relying on the network elements under
20 Section 251 for switching and shared transport.

21 So I thank you very much, and I'd be happy to
22 answer any questions.

23 CHAIRMAN SAHR: Thank you very much.

24 Next we'll go to AT&T.

25 MS. FRIESEN: Thank you very much.

1 This is Letty Friesen filling in for Steve Weigler.
2 And I guess the easiest way for me to do this is to
3 first concur in most -- in all of MCI's comments,
4 AT&T likewise believes that this agreement should
5 be filed. There are a couple of issues that I'd
6 like to bring up that are just slightly different
7 than what Mr. Dixon discussed with you, and that is
8 this.

9 Well, the first one has to do with Section 202
10 and Section 211 of the Act. Both of those sections
11 to the Act were in place and contemplated at a time
12 when there was no local competition. These
13 sections predate the 1996 Telecommunications Act
14 and ostensibly probably apply to jurisdictional
15 services to the FCC, that is interstate services.

16 I believe that because these two sections have
17 yet to be applied to local competition and
18 intrastate telecommunications services, we don't
19 know at this juncture what the FCC will do with
20 either of those sections. Now those are the
21 sections that Qwest relies on to suggest to you
22 that its nondiscrimination obligation is fully
23 tended to at the federal level.

24 So I would say to you that AT&T believes at
25 least at this point and until the Commission

1 determines consistent with its request for comments
2 in the interim order -- until it determines whether
3 or not these kind of commercial agreements should
4 be filed and what law requires that filing, I'd
5 suggest that Sections 202 and Section 211 requiring
6 nondiscrimination on the federal level may or may
7 not apply. So hanging our hats solely on that in
8 terms of nondiscrimination is a very uneasy path to
9 follow.

10 The other thing I'd like to point out to you
11 is that with respect to the clarity of law today, I
12 would say that in South Dakota, as in other states,
13 the obligation to provide unbundled switching and
14 common transport, which is really what this QPP
15 contract -- or this QPP product provides, continues
16 to go to unbundled network elements that are at
17 least available in this state today. They may not
18 be available once the FCC's final or permanent
19 orders come out, but they are certainly available
20 or should be available and are considered UNEs in
21 the state today and here's why.

22 The USTA II decision, that is the D.C. circuit
23 opinion, did not say that unbundled switched or
24 unbundled common transport is no longer available.
25 What it said is that states such as South Dakota

1 can't make that determination but rather the FCC
 2 needs to make that determination.
 3 What the FCC did based on that decision was
 4 put in place an interim order that required
 5 incumbent LECs like Qwest to continue providing
 6 unbundled access to switching and transport, based
 7 on existing agreements in the various states.
 8 Today AT&T has an agreement in this state that
 9 requires unbundling of switching. So I'd suggest
 10 to you that at least today unbundled switching is
 11 considered a network element until we hear
 12 otherwise. It is considered a network element for
 13 AT&T. It is considered a network element for many
 14 and any other CLEC that still has a valid contract
 15 in place today that requires unbundling of
 16 switching.
 17 That said, the obligation to file this
 18 agreement not only falls under 252(e)(1), which is
 19 what AT&T has already suggested with respect to
 20 something called the commercial agreement as
 21 opposed to the Interconnection Agreement, but
 22 because those are still elements today, it still is
 23 a requirement under 251(a)(1).
 24 Qwest still is under the obligation to file
 25 these kinds of contracts until we hear otherwise

1 for a number of reasons and under a number of
 2 statutes. The clarity that Qwest will try to
 3 present to you is about as clear as mud so AT&T
 4 suggests to you that you go with what the law
 5 actually is today, you look at what the FCC's
 6 actually questioning today, and take your cues from
 7 that.
 8 From what Qwest's interpretation of the law is
 9 or what it wants the law to be, I think we see in
 10 the Texas decision where that decision and the LEC
 11 in that decision, the incumbent, FCC tried to
 12 enforce this sort of notion that this thing didn't
 13 need to be filed, that there were no filing
 14 obligations. And there you see the District Court
 15 in Texas telling the parties to those agreements
 16 that that needs to be filed. I suggest that
 17 probably the same thing will happen in the Qwest
 18 territories if this goes to District Court.
 19 There again, because of the current
 20 uncertainty at the federal level and the state
 21 level, the best way is to make these contracts part
 22 of the filing obligation that currently exist.
 23 That's all I have for now. Thank you very
 24 much for your time.
 25 CHAIRMAN SAHR: Thank you very much.

1 Ms. Wiest.
 2 MS. WIEST: Yes. And I'm appearing
 3 on behalf of staff. First of all, staff's position
 4 is that the Commission should deny Qwest's Motion
 5 to Dismiss and the Commission should approve the
 6 agreement. I would agree with MCI that the FCC has
 7 not decided this issue. In fact, I looked up the
 8 recent interim TRO order and the notice of proposed
 9 rule making, and what the FCC stated in there
 10 specifically was that it was, Incorporating three
 11 petitions regarding incumbent LEC's obligations to
 12 file commercial agreements under Section 252 of the
 13 Act, governing acts as to network elements for
 14 which there is no Section 251(c)(3) unbundling
 15 obligation, to that end the FCC said, should we
 16 treat, properly treat, commercially negotiated
 17 agreements for access to network elements that are
 18 not required to be unbundled pursuant to Section
 19 251(c)(3) under Section 251, 211, or other
 20 provisions of law.
 21 So to the extent where they were arguing about
 22 what the Qwest declaratory rulings did or did not
 23 say, it appears that the FCC's position is that
 24 they haven't decided the issue yet.
 25 But what the FCC did say in the Qwest

1 declaratory ruling is that the State Commissions
 2 are well positioned to decide on a case-by-case
 3 basis whether a particular agreement is required to
 4 be filed. So looking at this particular agreement,
 5 I think it is very relevant to note as MCI pointed
 6 out that it is interrelated with Qwest's existing
 7 Interconnection Agreement with MCI.
 8 And I was going to point out through examples
 9 how the agreements are interrelated. I know MCI
 10 specifically mentioned the part about how the party
 11 can terminate the agreement along with the
 12 Interconnection Agreement amendment executed
 13 concurrently with the agreement. And I would point
 14 out that this concurrent amendment, as I mentioned,
 15 that has already been approved by the Commission
 16 previously.
 17 Second, I would point out under the QPP the
 18 recurring charge for the port element is to
 19 increase each year but only if Qwest meets its
 20 obligation related to the implementation of the
 21 batch hot cut process under that already approved
 22 amendment. Third, a change in the loop rate or the
 23 pricing zone designations will be offset by
 24 increase or decrease in the charges that would
 25 apply under the QPP.

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1 Now the Washington Commission pointed out all
 2 of those examples, and they did cite to the Sage
 3 case, and I would just like to quote from that
 4 case. In that case the court stated that, "If the
 5 parties were permitted to file for approval on only
 6 those portions of the integrated agreement that
 7 they deem relevant to Section 251 obligations, the
 8 disclosed terms of the filed subagreements might
 9 fundamentally misrepresent the negotiated
 10 understanding of what the parties agreed to." The
 11 court also said that, "Without access to all terms
 12 and conditions, the PUC could make no adequate
 13 determination of whether the provisions fulfilling
 14 251 duties are discriminatory or otherwise not in
 15 the public interest."
 16 And staff believes that preventing
 17 discrimination is a very important goal of the Act.
 18 When a Commission decides whether to approve a
 19 negotiated agreement one of the standards the
 20 Commission needs to apply is whether the agreement
 21 discriminates against any nonparty. Only by
 22 requiring these agreements to be filed for approval
 23 will the Commission be able to determine whether
 24 Qwest is favoring one CLEC over another.
 25 Thanks.

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1 CHAIRMAN SAHR: Thank you. Do we
 2 have anyone else who wants to appear in this
 3 matter?
 4 Seeing none, Ms. Thompson, I would give you a
 5 very short amount of time, if you wanted it, to do
 6 rebuttal, but I would encourage you to stick
 7 strictly to rebuttal type issues.
 8 MS. THOMPSON: Thank you,
 9 Mr. Chairman. It is my understanding that the
 10 batch hot cut amendment filed for your review and
 11 approval is a separate agreement from the shared
 12 transport and mass market switching agreement which
 13 we've been referring to as the commercial
 14 agreement.
 15 The declaratory order is the law, period, and
 16 it's very clear, but the only negotiated agreements
 17 that must be filed for State Commission review and
 18 approval are those that concern services provided
 19 under 251(b) and (c).
 20 The notice of proposed rule making that
 21 discusses the issue of commercial agreements is not --
 22 is an issue that Qwest expects the FCC to
 23 address specifically with respect to Sections 202
 24 and 211. Qwest does not anticipate that the FCC's
 25 going to rewrite the very law at issue in 2002 and

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1 that stands as good and clear law. What Qwest
 2 anticipates is that the FCC will clarify its ruling
 3 in 202 and 211 which do provide for the FCC purview
 4 with respect to whether or not agreements like this
 5 one are discriminatory.
 6 It is within the FCC's purview, not State
 7 Commissions, to review and approve commercial
 8 agreements like this one. Thank you.
 9 CHAIRMAN SAHR: Thank you very much.
 10 Any questions or comments from Commissioners?
 11 Commissioner Burg.
 12 COMMISSIONER BURG: I just have a
 13 couple short ones. First of all, do you agree
 14 with -- Ms. Thompson, do you agree with Mr. Dixon
 15 that you have been denied -- in every state that's
 16 decided this you've been denied dismissal?
 17 MS. THOMPSON: There have only been
 18 a few states, but, yes, the decisions have been
 19 adverse with respect Qwest's motion to dismiss.
 20 COMMISSIONER BURG: If that's the
 21 case, what is the harm you see with having the same
 22 application here in South Dakota?
 23 MS. THOMPSON: Really we're fighting
 24 this because it's a slippery slope because we
 25 thought we had a filing standard in 2002. It's

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1 been upended. Qwest anticipates appealing the
 2 decisions that are adverse to it. We believe our
 3 interpretation of the federal statutes out of the
 4 FCC's order is a plain and straight-forward
 5 interpretation, and the harm is that in Qwest's
 6 opinion it foresees a time when two parties spend
 7 hundreds of thousands of dollars and months
 8 negotiating a agreement, submit it to a State
 9 Commission, and I'm not saying to this Commission
 10 but as a principle to a State Commission in Qwest's
 11 14-state region, and that Commission sees fit to
 12 change the very terms and rates that the parties
 13 have spent months and hundreds of thousands of
 14 dollars to negotiate.
 15 That is the danger. That is the harm that
 16 Qwest sees with respect to the filing of these
 17 agreements.
 18 COMMISSIONER BURG: But the other
 19 half of the parties, in this case MCI, has the same
 20 risk as you just mentioned, but they see a value to
 21 it. Because they put as much time negotiating as
 22 you did; is that right?
 23 MS. THOMPSON: Yes. And
 24 certainly --
 25 COMMISSIONER BURG: And they want to

1 file because they see a value, there's a difference
2 here.

3 MS. THOMPSON: There is a
4 difference, and you'll note Mr. Dixon was very
5 careful to say it was submitting the agreement to
6 you for approval and not for a State Commission to
7 change the rates and terms. But I would suggest
8 that he made that comment because the risk is the
9 same for both parties, absolutely.

10 COMMISSIONER BURG: Okay. That's
11 all I have.

12 CHAIRMAN SAHR: Commissioner Hanson,
13 do you have any questions?

14 VICE CHAIR HANSON: I was a little
15 curious. Looking at precedents I look for our
16 counsel to give me some direction on this. When
17 they are appealing rulings how much can we rely
18 upon that as a foundation for making our decision?

19 MR. SMITH: The opinions of the
20 other commissions?

21 VICE CHAIR HANSON: Well --

22 MR. SMITH: The decisions of the
23 other commissions?

24 VICE CHAIR HANSON: Correct.

25 MR. SMITH: Well, it's not binding

1 authority on any court to which this would be
2 appealed.

3 VICE CHAIR HANSON: That's true.

4 MR. SMITH: But on the other hand,
5 it's authority, and particularly I would say the
6 Sage opinion, which is a Federal District Court
7 that's ruled on that. So I would assume that the
8 Federal District Court here in South Dakota might
9 be at least influenced by the thinking of the Texas
10 District Court.

11 VICE CHAIR HANSON: Question for
12 Rolayne then. As Ms. Thompson was discussing, she
13 said that we do not have certain authorities such
14 as approving commercial agreements such as this
15 particular one.

16 What are your thoughts on that? I didn't
17 catch what you might have said.

18 MS. WIEST: My position is that what
19 has happened here with the batch cut, which they
20 did put in for approval, Qwest did put in for
21 approval, it is integrally related with this
22 agreement and that the two amendments actually are
23 agreements -- agreements reference each other and
24 they're affected by each other.

25 And so the point is if they only have to file

1 the one agreement for approval and then there's
2 another agreement that affects that one, then what
3 happens to the CLEC that only is aware of the one
4 that has been approved by the Commission. And I
5 realize that Qwest has made this agreement publicly
6 available, but, again, I'm looking further down the
7 road to see what happens if the next agreement that
8 also affects the agreement that has been approved
9 by the Commission, that another CLEC doesn't know
10 about, if that discriminates against another CLEC,
11 then what happens if those aren't actually put out
12 there by Qwest.

13 VICE CHAIR HANSON: Is this a
14 Catch-22 then, considering your remarks there and
15 the potential that we may not have -- or we don't
16 have the right to approve certain issues? Let me
17 jump to, do you recall or do you have it written
18 down the very last statement you made in your
19 presentation?

20 MS. WIEST: That was on
21 discrimination and that only by requiring the
22 agreements to be filed for approval will the
23 Commission be able to determine whether Qwest is
24 favoring one CLEC or another.

25 VICE CHAIR HANSON: Okay. That

1 seems to be a rather compelling argument.
2 Ms. Thompson, do you have -- I'd be interested in
3 hearing what you have to say on that. Seems to be
4 a number of Catch-22s here.

5 MS. THOMPSON: Yes, there are, and I
6 think the way the Telecom Act has been drafted it
7 really put us in that position. But I would point
8 out to you that very early in my opening statement
9 I said that, you know, MCI and Qwest have submitted
10 the commercial agreement and entered into it under
11 Section 271 of the Act. Section 271 of the Act
12 confers on the FCC and not State Commissions the
13 authority to review and approve.

14 Section 202 of the Telecommunications Act
15 says, "It shall be unlawful for any common carrier
16 to make any unjust or unreasonable discrimination
17 in charges, practices, classifications,
18 regulations, et cetera, in connection with like
19 communication service, directly or incorrectly, by
20 any means or device."

21 That is the provision under which the FCC can
22 and does and would review and be -- and have the
23 authority to determine whether an agreement like
24 this one is discriminatory. It is the FCC's
25 purview and not the State Commission's in this

1 instance. Public interest is still protected.
2 It's just the FCC's job and not the State
3 Commission's.

4 VICE CHAIR HANSON: I don't know
5 whether I want to pursue this further in trying to
6 untie the knot, but, Mr. Dixon, would you have a
7 comment on that?

8 MR. DIXON: Commissioner Hanson,
9 yes. As we've indicated, we believe exactly what
10 you're saying. It is a Catch-22. We believe the
11 law requires you to at least look at the
12 agreements, make a determination whether they're an
13 Interconnection Agreement, and then determine
14 whether or not they're discriminatory or contrary
15 to public interest.

16 If you don't have the opportunity to see
17 them -- and although this one has been made
18 available, that's not the requirement. If you
19 accept Qwest's position, then you would not have
20 the ability to factually make that determination,
21 and that is indeed a factual determination. It is
22 not a matter of law. You have to look at the
23 document, see the facts, see what it provides, and
24 then find out how it is or is not discriminatory
25 and whether it is or is not contrary to public

1 interest.

2 So I absolutely agree. I don't know how else
3 you could do it other than to define that
4 information without ever seeing it. I don't think
5 that's going to work.

6 VICE CHAIR HANSON: Thank you.

7 MR. SMITH: May I ask a couple of
8 questions?

9 CHAIRMAN SAHR: Absolutely. Please
10 proceed.

11 MR. SMITH: Mr. Dixon, would the
12 position of MCI be different if the linkages were
13 not contained in the batch hot cut amendment?

14 MR. DIXON: I would say that at the
15 time we filed it, of course, we did not have the
16 linkages clearly defined by the State of Washington
17 and the Texas District Court, and it was our
18 opinion and continues to be our opinion that 252(e)
19 is broad enough to require the voluntary -- or the
20 filing of voluntarily negotiated Interconnection
21 Agreements.

22 We believe that is what this is. It's network
23 elements. We're not arguing and have never argued
24 that the unbundled switching or the shared
25 transport issues are now 251 by virtue of what

1 we're doing. The whole purpose of this was indeed
2 to come up with an alternative to the fact that MCI
3 in June when it signed this and throughout its
4 negotiating section said we're in a position where
5 we see the handwriting on the wall, we need
6 certainty. We're willing to forego the 251 UNEs to
7 get this other arrangement.

8 And so we felt strongly then -- and, in fact,
9 it's evident in the agreement. I'm not going to
10 talk about the negotiations, but the agreement
11 preserved the parties' positions on the obligations
12 to file all of these documents. That's why it's
13 written in there, because it becomes apparent now
14 we had a disagreement on what to do with whatever
15 we were about to participate in and what we were
16 going to put together.

17 And so we agreed to put that aside and deal
18 with it later, and that's exactly where we're at.
19 But our decision has been prior to the Texas
20 decision, prior to the Washington decision these
21 documents needed to be filed. Whether or not they
22 were interrelated, that was our position.

23 Now they are interrelated, in fact, we've
24 since heard after the fact. That's a significant
25 issue in the State of Texas and now in the State of

1 Washington, and while they're not binding
2 precedent, they're persuasive. They're something
3 you can rely on. And I think those two which focus
4 on that issue are well written. So they give you
5 not only a standard and in some respects eliminate
6 the "slippery slope" that Qwest is discussing and,
7 in fact, establish standards that give some
8 direction on how to deal with this going forward.

9 MR. SMITH: Thank you. And maybe
10 let me -- in the absence of any linkage to a
11 current 251 service, I mean, might not the whole
12 purpose of removing those elements from 251 and
13 putting them back into the strictly commercial
14 context be to permit a wider range of business to
15 business negotiation and to actually -- if not -- I
16 mean, they would still be subject to the federal
17 nondiscrimination and fairness standards, but they
18 would not be subject to the rigid term-for-term
19 opt-in standards that apply once you have a filing
20 requirement under 252(e)?

21 MR. DIXON: Yes. I agree. I think
22 that is certainly a possibility. But literally
23 that's exactly what the FCC is going to be
24 addressing. So we're talking possibilities. I'm
25 not going to predict the FCC's activity. Nor do I

1 predict how they'll come out on this. But the
2 point is a standard will be set. Whether it is the
3 "crystal clear" standard in the declaratory order,
4 that doesn't seem quite as crystal clear to me at
5 the moment. Perhaps they will make that abundantly
6 clear.

7 I still think if that was the crystal clear
8 standard, they had no reason to seek comments, and
9 they could have so stated that we've already
10 previously determined that only agreements that
11 address Sections 251(b) and (c) must be filed.
12 That would have been a very easy sentence to put in
13 decision 04-179, which is the decision Ms. Wiest
14 has cited. They didn't to that.

15 And, in fact, that's the point. Commissioner
16 Abernathy very clearly said, you know, I'm
17 disappointed we did not clarify the filing
18 requirements. And while Ms. Thompson asserts it's
19 202 and 211 at issue, that decision also does refer
20 to the filing options under 252. And so while I
21 appreciate her prediction, and it will give clarity
22 and we'll know what to do going forward, it's
23 missing today and it's in your hands and you have
24 the authority to deal with it.

25 And from the standpoint of what harm, if in

1 the end the Commission is wrong and the FCC says,
2 no, that didn't need to be filed, what happened,
3 nothing. If on the other hand, the Commission had
4 ruled it had to be filed, you have already reviewed
5 it, it didn't happen by operation of law. It
6 didn't happen because you just said, well, we don't
7 have to mess with this for now, we'll wait for
8 them. You made a concrete decision and said, no,
9 this is not discriminatory against other carriers
10 and it's not contrary to the public interest. I
11 see no harm.

12 You could argue it's against the law. I'm not
13 trying to play games, but the reality is those
14 issues from a practical perspective are not going
15 to harm anybody. Both of us want this agreement
16 approved. Both of us believe it's not
17 discriminatory and not contrary to the public
18 interest. Both of us intend to operate, and we do
19 not intend for any Commission to be modifying any
20 terms or conditions. It's up or down on the whole
21 document. You can't go in and say, well, we'll
22 agree with it if you change this rate to this or
23 that. It's up or down. And the standards don't
24 allow you to do that under the federal law.

25 MR. SMITH: Well, I think maybe,

1 Mr. Dixon -- this was for Ms. Thompson, and it's
2 really a question I had for you on the slippery
3 slope issue. If as all the other states really
4 have done, New Mexico not so clearly but all the
5 other states I have seen and in Michigan I'm not so
6 sure how they viewed the problem, but Texas, Utah,
7 and Washington have all basically grounded their
8 decisions in the fact that there were, in fact,
9 clearly 251 obligatory services included as part of
10 the agreement package.

11 Now I know you're disputing it in this case,
12 but when I look at the filed agreement that we've
13 already approved and the other agreement, there are
14 absolutely interconnection -- you know, there are
15 absolutely relationships between those two that are
16 I guess sine qua non basically. I mean, if the one
17 disappears the other one goes away too.

18 MR. DIXON: I agree.

19 MR. SMITH: You know, they're
20 absolutely -- they are absolutely in this case a
21 package agreement. And so I think from Qwest's
22 point of view to me what that says is at least as
23 far as -- I don't know that the Commission might
24 not necessarily reach the issue of whether the MSA
25 agreements standing alone would have to be filed

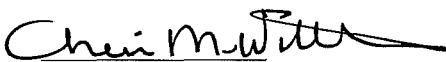
1 necessarily, but at least it could be that there is
2 another way for Qwest to achieve a set of
3 commercially agreements that would not be subject
4 to filing and that would be don't link them with
5 the ICAs.

6 MR. DIXON: And that's precisely
7 what the District Court in Texas stated in the
8 decision Ms. Wiest referred to. It isn't a
9 Catch-22 for Qwest. It isn't a slippery slope in
10 that respect. There's a way that is clear and
11 you've just identified it and it's found in the
12 Texas decision and it very clearly draws a
13 potential standard, and perhaps you will use that
14 standard and the FCC will agree later. I don't
15 know.

16 But the point is what you've said is what is
17 clear. It's not all negotiated agreements. And
18 that's a misstatement. It would best be all
19 negotiated Interconnection Agreements as opposed to
20 all negotiated agreements. Under no circumstances
21 is MCI arguing that switched access or special
22 access or agreements we entered into that deal with
23 long distance or other nonlocal services are
24 supposed to be filed under 252(e). It's
25 negotiated, voluntary, Interconnection Agreements.

1 That's what we're talking about under 252(e) and
 2 under this one.
 3 And as you point out, I'm looking at one
 4 agreement. I'm not smart enough to predict what
 5 will be done in the future by other companies and
 6 how they may do this or how Qwest may do it going
 7 forward, but this agreement and this package we
 8 believe should be filed, should be approved, is not
 9 discriminatory and not contrary to public interest.
 10 MR. SMITH: Thank you.
 11 MR. DIXON: Thank you.
 12 CHAIRMAN SAHR: Any other questions
 13 from Commissioners? I would just like to thank MCI
 14 and Qwest, and I know this process was one that
 15 took a lot of time and effort and we're happy they
 16 came up with this on their own and that's posted,
 17 that's available to people. In my mind they're
 18 definitely seems to be -- there definitely seems to
 19 be a relationship between these two agreements, and
 20 when you couple that with the uncertainty right now
 21 that we have with some of the FCC guidance, that
 22 may be clarified in a little while, you look at
 23 what other states are doing, in my mind the most
 24 prudent route to take is to require the filing and
 25 if the court cases go the other way, if we get some

1 stronger guidance from the FCC, then we could
 2 always revisit that issue.
 3 But right now especially with the connection
 4 between the agreements I think it's the appropriate
 5 thing to do to move that we deny Qwest's Motion to
 6 Dismiss and that we do approve the agreement.
 7 VICE CHAIR HANSON: Second.
 8 COMMISSIONER BURG: I'll concur.
 9 CHAIRMAN SAHR: Thank you.
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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 26th day of
 11 October 2004, and that the attached is a true and
 12 correct transcription of the proceedings so taken.
 13 Dated at Pierre, South Dakota this 16th day
 14 of November 2004.
 15
 16
 17 
 18 Cheri McComsey Wittler,
 19 Notary Public and
 20 Registered Professional Reporter
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