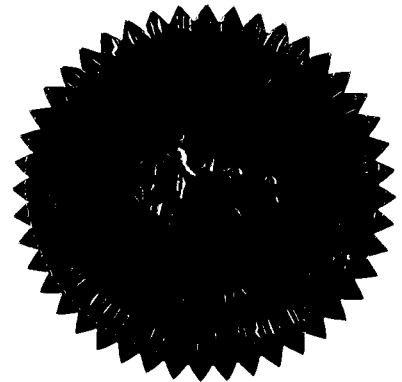


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of  
  
Petition of DIECA  
Communications, Inc. d/b/a  
Covad Communications Company  
for arbitration to establish  
interconnection agreement with  
GTE Florida Incorporated.  
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:  
DOCKET NO. 990182-TP  
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PROCEEDINGS:       **PREHEARING CONFERENCE**

BEFORE:             COMMISSIONER E. LEON JACOBS, JR.  
                      Prehearing Officer

DATE:               **Monday, April 5, 1999**

TIME:               Commenced at 11:00 a.m.  
                      Concluded at 11:50 a.m.

PLACE:              Betty Easley Conference Center  
                      Room 152  
                      4075 Esplanade Way  
                      Tallahassee, Florida

REPORTED BY:       KIMBERLY K. BERENS, CSR, RPR  
                      Hearings Reporter

1     **APPEARANCES:**

2                     **JAMES D. EARL** and **THOMAS KOUTSKY**, 700 13TH  
3     Street NW, Suite 950, Washington, D.C. 20005,  
4     appearing on behalf of **DIECA Communications, Inc.**  
5     **d/b/a Covad Communications Company.**

6                     **KIMBERLY CASWELL**, 106 East College Avenue,  
7     Suite 810, Tallahassee, Florida, appearing  
8     telephonically on behalf of **GTE Florida Incorporated.**

9                     **BETH KEATING** and **CATHY BEDELL**, Florida  
10    Public Service Commission, Division of Legal Services,  
11    2540 Shumard Oak Boulevard, Tallahassee, Florida  
12    32399-0870, appearing on behalf of the **Commission**  
13    **Staff.**

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## P R O C E E D I N G S

(Hearing convened at 11:00 a.m.)

**COMMISSIONER JACOBS:** Counsel, read the Notice. We'll call this hearing to order.

**MS. KEATING:** By Notice issued March 29, 1999, this time and place has been set for a prehearing conference in Docket No. 990182-TP for purposes as set forth in the Notice.

**COMMISSIONER JACOBS:** Take appearances.

**MR. EARL:** James D. Earl, Assistant General Counsel. And since, if this matter does go to a hearing it's likely that I will be a witness, I have with me this morning a colleague from Covad.

**MR. KOUTSKY:** My name is Thomas Koutsky, K-O-U-T-S-K-Y, Assistant General Counsel of Covad communications. And our address is 700 13th Street, Northwest, Suite 950, Washington D.C. 20005.

**COMMISSIONER JACOBS:** Ms. Caswell.

**MS. CASWELL:** This is Kim Caswell on behalf of GTEFL, One Tampa City Center, Tampa, Florida. Is Mr. Earl there in person?

**COMMISSIONER JACOBS:** Yes.

**MS. CASWELL:** Because I couldn't hear him at all.

**MR. EARL:** I'm sorry. I noticed after I

1 began to speak that my microphone was muted. I am, in  
2 fact, here.

3 **MS. CASWELL:** Okay. That's better. Thanks.

4 **MS. KEATING:** And Beth Keating and Catherine  
5 Bedell appearing for Commission Staff.

6 **COMMISSIONER JACOBS:** Great. Any  
7 preliminary matters?

8 **MS. KEATING:** Yes, Commissioner. Actually  
9 there are a couple. The first one that I think we  
10 should take up is that at the Issues Identification  
11 Meeting a dispute arose about whether Issues 5 and 6  
12 should be included for arbitration in this proceeding.  
13 The parties submitted written statements of their  
14 positions on whether these issues should be included.  
15 And Staff recommends that they be allowed five minutes  
16 a piece to present their positions to you.

17 **COMMISSIONER JACOBS:** Okay. That sounds  
18 reasonable. We will grant that. Who goes first?

19 **MS. KEATING:** I recommend that Covad go  
20 first.

21 **COMMISSIONER JACOBS:** Very well. Mr. Earl  
22 or Mr. --

23 **MR. EARL:** Thank you, Commissioner Jacobs.  
24 I think it's appropriate to begin by asking the  
25 question, why was arbitration included as a mechanism

1 within the 1996 Telecommunications Act? I think there  
2 are two reasons for that essentially.

3 One is to redress the disparity and  
4 bargaining power that Congress realized would exist  
5 between a new entrant and an established entity.

6 And secondly, in recognition of the fact  
7 that that established entity, the ILEC, had unique  
8 control of access to unbundled elements. And in many  
9 cases, and this is particularly true in the DSL world  
10 in which Covad operates, that ILEC, simultaneously  
11 competes with Covad as well as providing it essential  
12 elements with which to provide DSL service.

13 We think that this concern, or those two  
14 concerns, are indicated in several areas of the  
15 Communications Act that deal with arbitration and the  
16 mandate which the Act provides to state commissions.  
17 And specifically, I refer to 47 USC 252(b)(4)(c),  
18 which is identified in our letter, "that the State  
19 Commission shall resolve each issue set forth in the  
20 petition and the response." And later on in a  
21 following section in laying out the standards for  
22 arbitration, "in resolving by arbitration under  
23 Subsection B, any open issues." Covad sees in these  
24 statutory requirements a mandate to state commissions  
25 to resolve any open issues that are identified by the

1 petitioner.

2           We point also to the order establishing the  
3 procedure in this particular arbitration. And looking  
4 at just the first page of that order, the third  
5 paragraph cites a particular section of 252(b)(4)(c),  
6 stating that the State Commission shall resolve each  
7 issue set forth in the petition and response.

8           Moving on, Covad believes that there are  
9 good practical reasons that underpin the statutory  
10 requirements. In our experience, as a start-up  
11 provider of digital subscriber line services, we noted  
12 the interconnectedness of all things in our  
13 arbitration -- or excuse me -- in our interconnection  
14 agreements.

15           We, or other CLECs, could successfully  
16 negotiate appropriate loop rates, appropriate  
17 intervals. But if there were no penalty for violation  
18 of those requirements or an insufficient deterrent for  
19 the violation of particular terms in the  
20 interconnection agreement, then there would be no  
21 reason literally to have the long fought for and  
22 difficult negotiations that resulted in what we  
23 believe would be an appropriate access to the  
24 unbundled network elements necessary to effectuate our  
25 business.

1           Moreover, there needs to be an effective  
2 procedure to determine whether a violation of such  
3 things as loop rates and provisioning intervals and  
4 collocation requirements exists.

5           **COMMISSIONER JACOBS:** You speaking to  
6 standards that would be applied to conduct in  
7 determining whether it's a breach or not?

8           **MR. EARL:** We are talking about the terms of  
9 both the dispute resolution mechanism and the ability  
10 for parties to recover damages. In Covad's case, we  
11 collocate equipment in central offices that varies in  
12 value between half a million dollars and well over a  
13 million dollars.

14           And we believe that it's entirely  
15 appropriate in that type of commercial relationship  
16 between us as a competitive carrier and the ILEC that  
17 controls the central office, that there be some  
18 meaningful recovery allowed in the event that there is  
19 wrongful damage to our very valuable equipment that is  
20 collocated.

21           And we believe that our ability to recover  
22 direct damages, and more particularly in the case of  
23 willful misconduct or gross negligence, is very, very  
24 different from what might be found in a commercial  
25 retail tariff. An end user doesn't have a million

1 dollars worth of equipment that is immediately  
2 susceptible to wrongful misconduct or gross  
3 negligence.

4           And we believe that in order to effectively  
5 allow us to become into business and protect our  
6 interests we need both an effective dispute resolution  
7 mechanism, not one which is dictated to us, and we  
8 need to have effective recovery in the event that  
9 we -- our interests sustain injury that is recoverable  
10 from the entity on whose premises we are collocated  
11 and under an -- who alone can provide us the essential  
12 elements with which to do our business.

13           **COMMISSIONER JACOBS:** Okay. So, let me make  
14 sure I'm clear. You'd like a clause in your agreement  
15 which essentially allows you a process to recover  
16 whatever damage might occur to your equipment through,  
17 in your terms you would say, gross negligence?

18           **MR. EARL:** We believe that -- yes. There  
19 are two things. One, that we should not be limited in  
20 our ability to recover damages in a variety of ways,  
21 but specifically in case here for purposes of  
22 illustration, willful misconduct or gross negligence.

23           And secondly, our ability to resolve  
24 disputes should not be one which even colorably limits  
25 our ability to engage in litigation.



1           GTE is going to essentially be our landlord  
2 in a number of different states in our collocation  
3 arrangements, and in those circumstances we think that  
4 the particular language which we have placed before  
5 GTE in our negotiations is appropriate, in light of  
6 our interest in ensuring compliance across the country  
7 with our interconnection agreements.

8           **COMMISSIONER JACOBS:** Okay. Ms. Caswell.  
9 Hello. I'm not on. I'm sorry. Ms. Caswell.

10           **MS. CASWELL:** I think there is dispositive  
11 Commission precedence on this issue and that is that  
12 the Commission has repeatedly refused to arbitrate  
13 legal issues, such as limitations of liability and  
14 dispute resolutions.

15           For instance, in GTE's arbitration with AT&T  
16 and MCI, Commission stated that GTE was correct that  
17 the Act does not require revisions to GTE's tariff  
18 limitations of liability. And the Commission further  
19 pointed out that it would limit its consideration to  
20 the items in Sections 251 and 252 of the Act. And  
21 these provisions that Covad raises do not fall within  
22 that limitation, and as the Commission has found  
23 before, the company should not require the assistance  
24 of the Commission to establish provisions in these  
25 areas.

1           **COMMISSIONER JACOBS:** Ms. Caswell?

2           **MS. CASWELL:** Yes.

3           **COMMISSIONER JACOBS:** Would you -- in your  
4 interpretation, is this covered under your tariff or  
5 this is outside of the tariff?

6           **MS. CASWELL:** Well, the Commission has found  
7 before that the tariff's limitations of liability  
8 should apply in these situations. So I would say,  
9 yes. We're not saying that we should not be liable at  
10 all. But we're saying that we should use the measure  
11 of liability reflected in our tariff, which is what  
12 the Commission has determined would apply in earlier  
13 arbitrations.

14           **COMMISSIONER JACOBS:** Thank you.

15           **MS. CASWELL:** And I would also like to point  
16 out that these dispute resolutions and limitation of  
17 liability issues, we've worked out with all the other  
18 carriers in our interconnection contracts. And there  
19 are scores of contracts with other ILECs. And we feel  
20 that those provisions have been proven reasonable and  
21 they haven't provoked any complaints from the CLECs.

22           As I said before, the issue has to be  
23 grounded in Sections 251 and 252 of the Act and these  
24 items do not come within the Act's provisions. In  
25 fact, there was a case in Kentucky recently that went

1 up to the Federal District Court and that court  
2 decided that consistent with GTE's position here, that  
3 the Commission is not required to litigate these  
4 things that do not fall within 252. It said the court  
5 will not conclude that silence on the part of Congress  
6 implies that it is the duty of a State Commission to  
7 include such provisions in an interconnection  
8 agreement. And in that case, similar to this one,  
9 they were talking about penalty provisions such as we  
10 are here.

11 Finally, Covad has threatened to take the  
12 arbitration to the FCC if the Commission declines to  
13 arbitrate the general contract terms it seeks. The  
14 FCC has explicitly stated that it will not take an  
15 expansive view of what constitutes a state's failure  
16 to act under the Act, and that's in the FCC's order  
17 implementing the local competition provisions of the  
18 Telecom Act. Many others states have refused to  
19 arbitrate such general terms and conditions. North  
20 Carolina, for instance, is one that I know of.

21 This Commission has complied with the time  
22 lines and procedural requirements set forth in Section  
23 252. And there is no legal basis for Covad to  
24 unilaterally seek to have the FCC preempt this  
25 Commission's jurisdiction over this arbitration.

1           Now, I don't want to get into the  
2 substantive positions of the parties. Mr. Earl did  
3 that a little bit. But I would like to say that the  
4 rates that we've offered to Covad, the rates that have  
5 been arbitrated in every other case, do not include  
6 the cost of potentially unlimited liability. And if  
7 that were to be the case, then we've got to go back  
8 and do new cost studies, Commission's got to order the  
9 rates that include those costs, and that can be a  
10 very, very difficult thing to do and a thing that this  
11 Commission has never done before.

12           **COMMISSIONER JACOBS:** In your other  
13 collocation agreements, where does liability rest with  
14 regard to the physical equipment that's located --  
15 collocated?

16           **MS. CASWELL:** Well, we work out provisions  
17 on a contract by contract basis. But I think that in  
18 general we have liability limited to time mod of  
19 service, which is measure used in our retail tariff.

20           **COMMISSIONER JACOBS:** That doesn't include  
21 physical damage or lack of -- loss of operation?

22           **MS. CASWELL:** You'd have to look at each  
23 specific contract to see how that limitation -- how  
24 that liability is worked out. And that is the  
25 Commission's policy, that everybody works it out on a

1 case by case basis.

2 **COMMISSIONER JACOBS:** Okay.

3 **MS. CASWELL:** And it's the same with dispute  
4 resolutions. Some of our contracts say we've got to  
5 go to the Commission. Some of the contracts say it's  
6 strictly private arbitration. And that, again, is a  
7 matter to be worked out between the parties on a  
8 contract by contract basis.

9 So we are not saying, you know, no, we're  
10 rejecting your position, Covad. We're just saying the  
11 Commission has told parties before that we've got to  
12 work this out and that it is not an -- these are not  
13 arbitrable issues under the Act. And if they are, I  
14 would suspect that you've got to go back and redo all  
15 of the decisions you've made in previous arbitrations  
16 because you've consistently rejected these things in  
17 every past arbitration.

18 **COMMISSIONER JACOBS:** Staff.

19 **MS. KEATING:** Commissioner, Staff agrees  
20 that these issues are not appropriate for arbitration  
21 in this proceeding. The Commission has consistently  
22 rejected these types of issues and has focused instead  
23 on the more substantive requirements in Sections 251  
24 and 252. And the Commission has in the past  
25 considered arguments very similar to those raised by

1 Covad with regard to these types of issues.

2 If I could, I'd just like to read a little  
3 bit more from that order that Ms. Caswell just cited.  
4 And in that order the Commission said, "neither  
5 liability, indemnification nor liquidated damages  
6 provisions fall within that limitation," the  
7 limitation being the items enumerated in Sections 251  
8 and 252 of the Act.

9 **COMMISSIONER JACOBS:** That was -- did you --  
10 Mr. Earl you quoted me 352 or 252?

11 **MR. EARL:** 252.

12 **COMMISSIONER JACOBS:** Oh, you did. I'm  
13 sorry. Okay.

14 **MS. KEATING:** The Commission went on to say  
15 that, "while we should not be insensitive to the  
16 concerns raised by AT&T and MCI relating to the  
17 consequences of GTEFL performance failures, the  
18 company should not require the assistance of the  
19 Commission to establish contract provisions affording  
20 to each of them protections that will not cause  
21 unreasonable exposure to liability, direct or third  
22 party or hinder competitive injury." And Staff  
23 believes that that rationale is applicable to both  
24 Issues 5 and 6.

25 **COMMISSIONER JACOBS:** So, the parties are

1 free to establish those kinds of clauses?

2 **MS. KEATING:** That's correct, but it's  
3 between the parties themselves.

4 **COMMISSIONER JACOBS:** And -- now would that  
5 be on the general contract principle? Basically they  
6 go to contract law to establish those kinds of --

7 **MS. KEATING:** They would negotiate with each  
8 other to try to establish some reasonable provisions  
9 with regard to these issues.

10 **COMMISSIONER JACOBS:** Well, see, then that  
11 gets me back to the argument because essentially their  
12 argument is, if they have to go to contract law to  
13 establish those kind of provisions, then there are  
14 this scope of activity that falls within the  
15 arbitration and then there's a scope of activity that  
16 falls outside of it. And now, do -- as to that  
17 activities outside of the arbitration, do they -- does  
18 that go to court and the rest of it goes up through  
19 the process entailed in the law and in the Telecom  
20 Act, or does all of it have to go through the process  
21 envisioned in the Telecom Act?

22 **MS. KEATING:** Anything that has to do with a  
23 complaint under an agreement, if it has to do with --

24 **COMMISSIONER JACOBS:** Under the scope of  
25 activity that's under 251.

1           **MS. KEATING:** Section 251 and 252. These  
2 are areas that this Commission addresses. However,  
3 this Commission has consistently rejected arbitrating  
4 any issues as far as other contractual provisions,  
5 liquidated damages, issues of this type.

6           **COMMISSIONER JACOBS:** Right.

7           **MS. KEATING:** Now, it's my understanding  
8 that if the parties are unable to reach agreement on  
9 those types of issues, that any dispute on that would  
10 go through another process other than the Commission,  
11 but I'm unaware personally of any, you know, court  
12 cases involving those types of issues.

13           **MS. CASWELL:** Commissioner Jacobs, can I  
14 just comment that once the parties do reach agreement  
15 on these things, the contract becomes subject to  
16 enforcement by the Commission. So you don't lose --  
17 you don't totally lose jurisdiction over these things.  
18 We work them out. We put them in the contract. You  
19 approve the contract. And then, you know, if there  
20 are disputes we go through the dispute resolution  
21 mechanism. And if that mechanism includes the  
22 Commission, we go to the Commission. If it's a  
23 private dispute resolution we go to, you know, ADR.

24           **COMMISSIONER JACOBS:** What's your view on  
25 that, Mr. Earl?



1           **MR. KOUTSKY:** Actually, if I could respond.  
2 This is Tom Koutsky. It was just mentioned by  
3 Ms. Keating as to what would happen. I think the  
4 issue here is, what happens if the parties don't agree  
5 on a limitation of liability clause and they can't  
6 reach a meeting of the minds.

7           There is no such thing as a contract court  
8 which we can go to and say, I want to have a contract  
9 with GTE and I want that clause to say -- to cover  
10 liability of my equipment that's collocated. And  
11 there is no place for me to go and force somebody to  
12 make a contract. It's the Uniform Commercial Code,  
13 Title 5 or Title 2, and there is no place where I can  
14 have that contract made for me. This goes back to  
15 what Mr. Earl was talking about before.

16           **COMMISSIONER JACOBS:** And that's the point I  
17 was trying to get clarified earlier. If you agree on  
18 the general context of the agreement, and the scope of  
19 activity that comes under 251 and 252 is clear, and  
20 you form a contract, aren't you then covered by the  
21 other -- in terms of the general enforcement of that  
22 contract, aren't -- don't you have available to you  
23 the UCC and all those other provisions?

24           **MR. KOUTSKY:** If there's a contract. I  
25 think that's -- we are really two different time

1 periods we're talking about here. Once there is a  
2 contract, we abide by that contract and there may  
3 be -- this is actually what we're talking about. How  
4 do we actually enforce that contract? We will have --  
5 there are several different options available. There  
6 is private litigation, there's commercial triple A  
7 arbitration. Sometimes they talk about coming here to  
8 this proceeding. We're at the stage where we don't  
9 have an agreement yet, a meeting of the minds on this  
10 issue.

11 **MS. CASWELL:** May I respond to that briefly?

12 **COMMISSIONER JACOBS:** Sorry. Were you  
13 finished?

14 **MR. KOUTSKY:** I was just waiting for you  
15 to --

16 **COMMISSIONER JACOBS:** I was being rude.

17 **MR. KOUTSKY:** What we are really talking  
18 about is, how do we resolve a dispute over what the  
19 limitation of liability clause or the forum selection  
20 clause or the dispute resolution clause is. That is  
21 what arbitration was about. It was to provide a  
22 mechanism so that a company like Covad, who needs an  
23 agreement before we can even start doing business, to  
24 reach an agreement and close an agreement with a  
25 company like GTE in a reasonable time frame, nine

1 months, sit up by the 1996 Act. And essentially you  
2 read the Act and it says, nine months from your  
3 request for interconnection, any open issues will be  
4 resolved by a state commission and then you can have a  
5 contract. What we're saying here now is that 75% of  
6 the issues will be resolved. The other 25%, well,  
7 you'll just have to accept GTE's last offer because  
8 otherwise there is no recourse for you, there's no  
9 other place I can take that dispute to.

10 **COMMISSIONER JACOBS:** Okay. Staff.

11 **MS. CASWELL:** Can I briefly respond to that?

12 **COMMISSIONER JACOBS:** Staff had a comment  
13 first and then you may respond.

14 **MS. CASWELL:** Okay.

15 **MS. KEATING:** Well, I was just going to try  
16 to clarify. I think I may have made a misstatement or  
17 been a little unclear a minute ago. I'm not saying  
18 that the Commission won't have continuing jurisdiction  
19 over the result of this arbitration. What I'm saying  
20 is that if the parties can't reach an agreement on  
21 these types of issues then the parties don't have an  
22 agreement. How they resolve those issues is between  
23 the parties. The Commission has consistently refused  
24 to get into those issues.

25 **COMMISSIONER JACOBS:** And Ms. Caswell, your

1 point? I'm sorry. Were you finished?

2 **MS. CASWELL:** I just want to say that the  
3 Commission disagrees with Covad's fundamental premise  
4 that you need to arbitrate any open issue. This  
5 Commission, as well as Commissions around the country,  
6 have decided that that open issue has to be within the  
7 substantive terms of Sections 251 and 252.

8 So, you know, I think we should realize that  
9 their premise there is fundamentally different from  
10 this Commission's and from GTE's. And there is no  
11 right for them to have this issue arbitrated in our  
12 view and the Commission's view.

13 The Commission has, in numerous instances,  
14 directed parties to work things out between  
15 themselves, not only on these types of issues, but on  
16 other types of issues as well. And indeed, you know,  
17 we hear of instances where, you know, we need to work  
18 out a lot of things.

19 **COMMISSIONER JACOBS:** Would you agree, Ms.  
20 Caswell -- and let me just throw this out. If I buy  
21 your interpretation that these types of issues fall  
22 outside of the purview of 251 and 252, what they're  
23 saying is that that leaves them no leverage at that  
24 point. They have to accept what you offer.

25 **MS. CASWELL:** No. That's absolutely untrue.

1 Absolutely untrue. Because it's a negotiation  
2 situation just like it is with many other things we  
3 negotiated. We have come to an agreement with Covad  
4 on a number of items. That's how the negotiation  
5 process works.

6 Now, we have liability, too, in these  
7 situations. Covad is entering our central offices.  
8 There's big security issues there. We are going to  
9 want to negotiate something that is fair to us as well  
10 as to Covad. We are not saying we should have  
11 absolutely no liability. And, in fact, on the dispute  
12 resolution stuff, I think we're going to end up  
13 agreeing on that. I think there has been some  
14 movement by GTE and some compromise in that regard.  
15 So, it's absolutely not a situation of where we just  
16 dictate something and they take it.

17 **COMMISSIONER JACOBS:** Okay. For Staff, what  
18 implications are there here -- I don't know the  
19 Section number, but if I'm not mistaken somewhere in  
20 the Telecom Act it says that it constitutes  
21 uncompetitive or noncompetitive action by the ILEC if  
22 they fail to negotiate in good faith. Isn't there  
23 some language in the Act?

24 **MS. KEATING:** The duty to negotiate in good  
25 faith, yes. There are provisions -- were already met

1 in the Act.

2 **COMMISSIONER JACOBS:** Okay. I'm going to  
3 follow the recommendation of Staff and my ruling is  
4 that the -- it appears that Issue 5 has to do with  
5 what process there should be and whether or not it  
6 shall be a dispute -- informal dispute resolution or  
7 private dispute resolution. And Number 6 has to do  
8 with limitation of liability.

9 Those both appear to be the type of issues  
10 which are described to fall outside of Section 251 and  
11 252. I'm going to rule that they should not be a part  
12 of this arbitration. Other than with the caveat that,  
13 you know, the other provisions, the prevailing  
14 provisions having to do with the duty of the ILEC to  
15 negotiate in good faith, do apply, and the parties  
16 have the opportunity to arrive at some appropriate  
17 agreement on those issues. Is that clear enough to go  
18 forward at least from here?

19 **MS. KEATING:** That's fine.

20 **COMMISSIONER JACOBS:** Okay. With that then,  
21 we will go back to -- are there any other preliminary  
22 matters?

23 **MS. KEATING:** Actually, there are. The next  
24 thing I'd like to take up is, it appears to Staff that  
25 the parties' positions on Issue 2 and 4 are very close

1 to agreement and we'd just like to ask if there is any  
2 possibility that these two issues could be stipulated.

3 **MS. CASWELL:** Beth, I thought we had agreed  
4 on those issues and I think I reflected that in my  
5 prehearing statement, but I didn't see any potential  
6 stipulations reflected in Covad's prehearing. But I  
7 do think we've agreed with Covad on those issues.

8 **MR. EARL:** That's correct and that fact is  
9 reflected in, I believe, my draft prefiled testimony  
10 in identifying some of the attachments.

11 And let me confirm that Covad and GTE have,  
12 in fact, reached agreement on the provision of special  
13 access and that terminology is applicable to loops and  
14 NIDS, and we have also agreed on language that deals  
15 with GTE taking into consideration Covad's present and  
16 future collocation requirements. So language has been  
17 worked out between Covad and GTE.

18 **COMMISSIONER JACOBS:** So then we do have  
19 agreement on Issues 1 and 2?

20 **MS. KEATING:** 2 and 4.

21 **COMMISSIONER JACOBS:** 2 and 4. I'm sorry.

22 **MS. KEATING:** And can we reflect those in  
23 the Prehearing Order as stipulated?

24 **MR. EARL:** Yes. If that is the way in which  
25 the Commission reflects issues which have been agreed,

1 then yes.

2 **MS. KEATING:** You're withdrawing those  
3 issues then?

4 **MR. EARL:** Yes. Now we'd like leave to  
5 attach the language that we've agreed to but --

6 **MS. CASWELL:** Beth and Mr. Earl, how about  
7 if we agree on some language and submit it to the  
8 Commission but tentatively drop those issues out and  
9 say we stipulated them.

10 **COMMISSIONER JACOBS:** If there is a problem  
11 we can come back, but tentatively we will cite those  
12 as stipulated.

13 **MS. KEATING:** Okay.

14 **COMMISSIONER JACOBS:** Okay.

15 **MS. KEATING:** And the only other thing is  
16 that there are a couple of witnesses that were listed  
17 in Covad's prehearing statement that have not prefiled  
18 testimony.

19 **COMMISSIONER JACOBS:** Do we want to go  
20 through the whole Prehearing Order?

21 **MS. KEATING:** Yeah. That we could just take  
22 those up in the witnesses section.

23 **COMMISSIONER JACOBS:** Then we'll go through  
24 it. Okay. We will do that real quickly. All righty.  
25 Is that the last -- is that the --



1           **MS. KEATING:** That's it.

2           **COMMISSIONER JACOBS:** Okay. Good. What we  
3 will do then is we'll just go through the Prehearing  
4 Order -- draft Prehearing Order section by section and  
5 if you have any comments or revisions on each, then  
6 we'll take them up at that time.

7           Section 1. (No response.)

8           Section 2, Case Background. No  
9 modifications there?

10          Section 3. Okay.

11          Section 4, Post Hearing Procedures. No  
12 modifications?

13          Section 5, prefiled testimony process.

14          Section 6, Order Of Witnesses. This is  
15 where we had the change?

16          **MS. CASWELL:** Yeah.

17          **MS. KEATING:** I think this is -- Ms. Caswell  
18 had some points about this.

19          **COMMISSIONER JACOBS:** Okay.

20          **MS. CASWELL:** Yes. The first that I saw  
21 that Covad had three witnesses instead of one was in  
22 its prehearing statement. As Ms. Keating pointed out,  
23 I think there's -- witnesses have not prefiled any  
24 testimony and that is the mandatory procedure at this  
25 Commission as I understand it. And in fact, in

1 Section 5 it says testimony of all witnesses to be  
2 sponsored by the parties has been prefiled. That  
3 assumes that everything -- all the testimony had been  
4 filed by the time of the prehearing statement. Now we  
5 have two additional witnesses.

6 One of those witnesses, I think Terry  
7 Murray, was potentially going to testify on GTE's cost  
8 studies. Now, I might be able to agree to the fact  
9 that he can submit late filed testimony if it  
10 specifically pertains to GTE's cost studies as long as  
11 we have an opportunity to prefile rebuttal testimony  
12 in response to that.

13 Now the other witness, Chuck Haas. It says,  
14 "Chuck Haas will adopt portions of the prefiled direct  
15 testimony of James D. Earl relating to the commercial  
16 and competitive impact of the pricing of UNES."

17 **COMMISSIONER JACOBS:** What was the name of  
18 the last person?

19 **MS. CASWELL:** Terry Murray.

20 **COMMISSIONER JACOBS:** And then the second  
21 person?

22 **MS. CASWELL:** Chuck Haas, H-A-A-S. I'm just  
23 reading from the witness list.

24 **COMMISSIONER JACOBS:** Is he on here? Oh,  
25 Haas. H-A-A-S. Double "A". I thought you were

1 saying Hall. Go ahead. I'm sorry.

2 **MS. CASWELL:** Yes. As I said, we might be  
3 able to except some testimony from Terry Murray if it  
4 were filed within a reasonable time before the  
5 hearing. But as to the Chuck Haas testimony, I don't  
6 think this Commission has ever even been asked for a  
7 witness to be allowed to adopt portions of another  
8 witness' testimony.

9 Typically an adoption situation is where the  
10 witness who filed testimony cannot make it to the  
11 hearing or has some other good reason why he can't  
12 testify, and the second witness takes over the entire  
13 testimony. Furthermore, they file a Notice of  
14 Adoption of the entire testimony.

15 Now, here we have a situation where the  
16 first witness is still testifying, but they're  
17 bringing in another witness to testify allegedly to  
18 other portions of the testimony. And I looked through  
19 that testimony and I don't see any testimony on this  
20 particular issue.

21 This looks to me like a situation where they  
22 are trying to bring in an additional witness, for no  
23 other reasons than they considered it, figured this  
24 guy would be better equipped to testify to it, and  
25 this was after they saw GTE's rebuttal testimony.

1           This raises an issue of serious prejudice  
2 and that's why we can't agree to having this witness  
3 coming in at this late date. And, in fact, they're  
4 not even saying definitely that he will testify.  
5 They're saying he may testify. This procedure has  
6 never been used by the Commission and I don't think  
7 there is any good reason shown why it should be  
8 approved here.

9           **COMMISSIONER JACOBS:** Mr. Earl.

10           **MR. EARL:** When Covad undertook the  
11 arbitration, and our arbitration petition reflects  
12 this fact, we felt then as we feel now, that the  
13 issues presented to the Commission were largely legal.  
14 Particularly, the conformity of -- and in this  
15 particular case -- conformity of the rates, terms and  
16 conditions on offer by GTE with the federal pricing  
17 rules. It was not until we received prefiled  
18 testimony and the answer to the petition --  
19 circumstances which came very, very close because of  
20 the briefing schedule which had been established --  
21 that we recognized that we had a potential factual  
22 dispute over the conditions underlying the cost  
23 studies, which -- upon which GTE had based it's last  
24 offer to Covad, which itself was the arbitrated rates  
25 between GTE and AT&T.

1           **COMMISSIONER JACOBS:** So are you saying this  
2 came to light once you got their testimony?

3           **MR. EARL:** That's correct. And if I can  
4 extinguish a little bit between the two, although not  
5 perhaps in a way which is germane here. We requested  
6 the cost study information very shortly after it was  
7 on offer. There was a slight, but -- delay prior to  
8 the time that we received nondisclosure agreements in  
9 order to move forward.

10           We have now received the cost study  
11 information. It's been shipped off to our consultant.  
12 And based on what it contains, we think it appropriate  
13 to include testimony, both in terms of how our  
14 business would be effected, as well as the underlying  
15 compliance of the cost study information with the FCC  
16 rules.

17           **MS. CASWELL:** May I respond to that?

18           **COMMISSIONER JACOBS:** Briefly.

19           **MS. CASWELL:** This Commission's procedure  
20 has always been that the issue identification comes  
21 before the party's testimony. Parties need not see  
22 what another party's position is before they decide  
23 which issues they want to testify to and what  
24 witnesses they want to testify -- want to testify at  
25 the hearing. That's the way it works here. That's

1 the way it always works. That's the way that offers  
2 the least possibility of prejudice to anyone.

3 It is simply unfair to allow parties to see  
4 other party's positions and then decide, well, maybe  
5 we want another witness because we see something that  
6 somebody else may be better able to testify to. You  
7 know, that's not the way things work.

8 **COMMISSIONER JACOBS:** Okay. Staff.

9 **MS. KEATING:** Well, as far as Terry Murray,  
10 it sounds to me from listening to Covad's counsel,  
11 that the testimony he would be offering would be in  
12 the form of rebuttal. And if they determine at some  
13 point that it's necessary to file that testimony, they  
14 could seek leave to file the testimony at that time.

15 I would suggest, though, that you put some  
16 sort of limitation on how late they can file that so  
17 that GTE is not prejudiced in their ability to review  
18 the testimony and to conduct any discovery that they  
19 can on it prior to the hearing. Now --

20 **COMMISSIONER JACOBS:** Go ahead.

21 **MS. KEATING:** With regard to Chuck Haas,  
22 Ms. Caswell is right. This is a very unusual  
23 proposition for the Commission to have a witness adopt  
24 part of somebody else's testimony. We regularly have  
25 other witnesses appear at the hearing when witnesses

1 can't come, the ones that prefiled testimony.

2 **COMMISSIONER JACOBS:** Mr. Earl -- and  
3 correct me if I'm wrong. It sounds like this -- your  
4 need to have Mr. Haas testify is in response to  
5 positions taken in GTE's direct testimony.

6 **MR. EARL:** We think it would provide the  
7 Commission with a better understanding of the  
8 practical difficulties that Covad faces in terms of  
9 the -- it's ability to do business in a competitive  
10 environment.

11 **COMMISSIONER JACOBS:** So that's why you'd  
12 rather have it as direct instead of rebuttal because  
13 you want it broader than just their statements on  
14 cost; is that correct?

15 **MR. EARL:** Yes.

16 **MS. CASWELL:** Commissioner Jacobs?

17 **COMMISSIONER JACOBS:** Uh-huh.

18 **MS. CASWELL:** They knew about -- that's not  
19 a new issue. That issue is consumed within the UNE  
20 pricing issues that was identified in March 9th. They  
21 had full opportunity to file testimony on that issue  
22 in direct testimony when it was originally due.

23 **COMMISSIONER JACOBS:** Okay.

24 **MS. KEATING:** Commissioner, can I just ask a  
25 question? I'm a little confused. It was my

1 understanding they wanted to adopt Mr. -- part of  
2 Mr. Earl's testimony, but now it sounds like they  
3 actually want to file more direct for Mr. Haas, and I  
4 just wanted to see if I could get a clarification on  
5 that.

6 **MR. EARL:** We would like to have Mr. Haas  
7 explain the competitive impact on Covad of the rates  
8 on -- offered by GTE. Now, I'm not sure whether  
9 that's appropriate to -- description of our direct or  
10 rebuttal, but that's the essence of the testimony.

11 **COMMISSIONER JACOBS:** Let's do this. Sounds  
12 like you guys can work it out with Mr. Murphy. I  
13 would -- how's a week before the hearing? Is that  
14 soon enough, Ms. Caswell?

15 **MS. CASWELL:** To have Mr. Murray file  
16 testimony?

17 **COMMISSIONER JACOBS:** Yes.

18 **MS. CASWELL:** Yes, as long as we receive it  
19 a week before rather than having them mail it out and  
20 we receive it two days before the hearing. I would  
21 just ask that they overnight the testimony.

22 **COMMISSIONER JACOBS:** Is that okay?

23 **MS. KEATING:** That would be fine. But I  
24 would suggest that if you're going to set the  
25 limitations only a week before the hearing, that you



1 also extend the discovery deadline.

2           **COMMISSIONER JACOBS:** Well, let's explore  
3 earlier. How -- let me ask Covad. What's -- could  
4 you guys have him ready -- have that testimony ready  
5 10 days, 14 days before?

6           **MR. EARL:** The hearing is on the 29th. If  
7 we could do that -- have prefiled on Mr. Murray by the  
8 20th.

9           **COMMISSIONER JACOBS:** I'm sorry. I said  
10 Mr. Murphy. So it's nine days in advance. I think  
11 we'll probably still need to extend it then, and we'll  
12 do that.

13           **MS. KEATING:** Okay.

14           **MS. CASWELL:** So is that April 20th?

15           **COMMISSIONER JACOBS:** Yes.

16           **MS. CASWELL:** Okay.

17           **COMMISSIONER JACOBS:** As to Mr. Haas, what I  
18 would suggest you all do is take a look at what it is  
19 they want to say. And if you guys can agree on it,  
20 great. I do think it is -- coming in as direct, it  
21 poses some manner of unfairness to have it come in in  
22 that way.

23           I would be willing to look at it so long as  
24 we can work it out to what is fair to all parties. We  
25 can do a conference call on that, if need be. I would

1 be willing to do that over a call if you guys can't  
2 work that out, to look at whatever it is you want to  
3 file and figure out whether or not it is reasonable  
4 and trying to let it in. Is that okay?

5 But my suggestion is that there may be some  
6 avenues there where you can work out how to do that.  
7 I will prefer that you do it as rebuttal, quite  
8 frankly. I think we can work that out in the same  
9 time schedule if you can. If you can't, then we'll  
10 see where we go from there.

11 **MS. KEATING:** If I could, before we move on,  
12 Commissioner, could I just clarify how far you're  
13 going to extend the discovery deadline?

14 **COMMISSIONER JACOBS:** What is it now?

15 **MS. KEATING:** It's a week before the  
16 hearing.

17 **COMMISSIONER JACOBS:** So we're going to let  
18 them in nine days.

19 **MS. BEDELL:** The hearing is actually the  
20 28th.

21 **MS. KEATING:** Right. Right now the  
22 discovery deadline is April 21st.

23 **COMMISSIONER JACOBS:** 25th? Is that a  
24 weekend?

25 **MR. KOUTSKY:** That's a Sunday.

1           **MS. KEATING:** 26th.

2           **COMMISSIONER JACOBS:** Yes, 26th. Does that  
3 take care of the witnesses?

4           **MS. CASWELL:** Can I just get a  
5 clarification? Is the procedure now that Covad and  
6 GTE and Staff discuss this issue about Chuck Haas and  
7 see if we can reach agreement?

8           **COMMISSIONER JACOBS:** Yes.

9           **MS. CASWELL:** Okay.

10          **COMMISSIONER JACOBS:** And I'm willing to sit  
11 down, again, if you guys can't, but again, I really  
12 prefer if you would. We could perhaps do the phone  
13 thing just to make sure on the issues.

14           I will say now, though, I'm inclined -- as I  
15 indicated earlier, I'm inclined to go along with the  
16 interpretation from Staff.

17          **MS. KEATING:** Perhaps, Commissioner, if we  
18 could work after this prehearing conference, just keep  
19 this line for a little bit longer.

20          **COMMISSIONER JACOBS:** Okay. That takes care  
21 of issues. Section 7, Basic Positions. No  
22 modifications or revisions. Okay.

23           Section 8, issues and positions other than  
24 those noted already with Issues 2 and 4. Well, why  
25 don't we just go issue by issue. Issue 1. (No

1 response.)

2 Issue 3. Let me make sure I understand  
3 this. Explain to me Issue 3. What is going on there?

4 **MS. KEATING:** Perhaps Mr. Earl can explain  
5 this issue.

6 **MR. EARL:** First let me begin by noting that  
7 there are new FCC rules on collocation and we expect  
8 those to be dealt with, not in this arbitration, but  
9 pursuant to a change in law provision insofar as there  
10 are terms in the interconnection agreement that is  
11 presently under negotiation that would be effected by  
12 the FCC rules.

13 The difficulty is that the interconnection  
14 agreement presently on offer incorporates by reference  
15 federal, and in some cases, state tariffs, and a  
16 change of law provision in the interconnection  
17 agreement goes only to the provisions within the  
18 interconnection agreement and not to the tariff terms.

19 Covad's position is that if GTE or, indeed,  
20 any ILEC, wants to incorporate its federal and/or  
21 state tariffs by reference, then it's entirely  
22 appropriate for the interconnection agreement to  
23 contain a provision whereby the ILEC commits to  
24 bringing those tariffs into compliance with the state  
25 and federal rulings within a particular period of

1 time.

2 **COMMISSIONER JACOBS:** Within the new law.

3 Okay. That's an interesting issue. Okay. I

4 understand it.

5 Issue 4 is the other one that was taken out.

6 Issue 5. Did we do Issue 5? I thought it

7 was 2 and 4.

8 **MS. KEATING:** 2 and 4 are the ones that the

9 parties have agreed upon. 5 and 6 have been removed.

10 **COMMISSIONER JACOBS:** Oh, I'm sorry. That's

11 right. 5 and 6 were rejected. So that's it. That's

12 the issue. Okay. Very well.

13 Exhibit list.

14 **MS. CASWELL:** Can I ask a question here? I

15 see that there are a number of exhibits that have been

16 added and I think right in the Prehearing Order it

17 says, each exhibit intended to support a witness'

18 prefiled testimony shall be attached to the witness'

19 testimony when filed.

20 I don't recall having these attached and I

21 would just ask that we get copies of these exhibits

22 before the hearing if they are intended to be used at

23 the hearing or submitted into the record.

24 **COMMISSIONER JACOBS:** You have testimony but

25 didn't get the exhibits?

1           **MS. CASWELL:** These exhibits, to my  
2 knowledge, were not attached Mr. Earl's testimony.  
3 And as such, I think its our right to get copies of  
4 the exhibits before the hearing.

5           **MR. KOUTSKY:** Yeah, that's fine, with the  
6 exception of one exhibit here, which talks about  
7 current text of the -- of clauses of the agreements.  
8 These are publicly available documents and so we  
9 will -- so we can --

10           **COMMISSIONER JACOBS:** You can get them to  
11 them pretty quickly.

12           **MR. KOUTSKY:** Yes, presumably. Essentially  
13 these are really just decisions that have already  
14 construed GTE's cost model which we didn't know was  
15 going to be an issue in this case until GTE's reply  
16 and the federal tariffs and things like that.

17           **COMMISSIONER JACOBS:** So they can get those  
18 as quickly as possible.

19           **MS. KEATING:** Those need to be filed here,  
20 too.

21           **COMMISSIONER JACOBS:** Yeah. We need to get  
22 them filed here.

23           **MR. KOUTSKY:** We'll provide -- any  
24 particular number of copies that you need?

25           **MS. KEATING:** The same as for filing.

1           **MR. EARL:** If I could, please. There are  
2 several exhibits which were described in our  
3 prehearing statement that I don't see here, and  
4 perhaps that's with good reason because they are, in  
5 fact, the FCC pricing rules themselves and a  
6 particular statutory provision. And I take it that  
7 they're not included here simply because those would  
8 be noticed appropriately.

9           **MS. KEATING:** There were certain orders and  
10 rules that Staff believes can be included on a  
11 notice -- I mean an official recognition list.

12           **COMMISSIONER JACOBS:** Okay. And do you know  
13 if that includes all -- why don't you make sure that's  
14 all that you have and we'll continue them.

15           **MR. KOUTSKY:** We'll do that.

16           **COMMISSIONER JACOBS:** Okay. All right.  
17 Anything else on exhibits? Will that be exhibits from  
18 those new -- from the new testimony, and if so, let's  
19 make sure we get those in as quickly as possible.  
20 Okay.

21                   Stipulations now we have on Issues 2 and 4.  
22 And the motions we dealt with. Any other motions?

23           **MS. KEATING:** None that Staff is aware of.

24           **COMMISSIONER JACOBS:** Okay.

25           **MR. KOUTSKY:** Not at this time.





1 STATE OF FLORIDA)  
2 COUNTY OF LEON )

## CERTIFICATE OF REPORTER

3 I, KIMBERLY K. BERENS, CSR, RPR, Official  
4 Commission Reporter,

5 DO HEREBY CERTIFY that the Prehearing  
6 Conference in Docket No. 990182-TP was heard by the  
7 Prehearing Officer at the time and place herein  
8 stated; it is further

9 CERTIFIED that I stenographically reported  
10 the said proceedings; that the same has been  
11 transcribed by me; and that this transcript,  
12 consisting of 40 pages, constitutes a true  
13 transcription of my notes of said proceedings.

14 DATED this 12th day of April, 1999.

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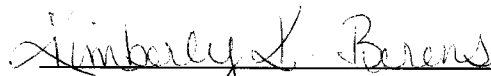
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Florida Public Service Commission  
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